

The legal challenge to save Sandy Pond

Birds I View

Bill Montevecchi

May you grow up to righteous
May you grow up to be true
May you always know the truth
And see the light surrounding you

Bob Dylan "Forever Young"



Male American Wigeon at Burton's Pond on Memorial University campus (photo: Bill Montevecchi)

In 2009, Sandy Pond, an ancient pond situated on a hill overlooking Long Harbour, Placentia Bay, was deemed for destruction by the federal and provincial governments. Using an amendment to the conservation-intended Fisheries Act, the governments permitted Vale to use Sandy Pond as an impoundment for the toxic pollution from the nickel smelter.

Sandy Pond was treasured locally and by anglers throughout the province for its prize brook trout that fattened on the smelt that also inhabited the pond. Not unexpectedly, when Sandy Pond was given away for destruction, concerns were raised by many local residents and others who visited Sandy Pond to fish. Those concerns were swept under the economic glee that swelled through local communities.

Other apprehensions were raised by biologists, environmental scientists and groups. The Sandy Pond give-away held serious implications for the protection of aquatic ecosystems throughout Newfoundland and Labrador and across Canada. Individuals and groups came together in an effort to take a proactive approach. The result of these

meetings was the incorporation of a non-profit volunteer citizens' group – The Sandy Pond Alliance to Protect Canadian Waters.

The Sandy Pond Alliance engaged in public outreach activities to bring attention to the plight of Sandy Pond and its magnificent fish populations. Options were considered and legal advice was sought. To further proactive efforts, a legal challenge was launched to the Attorney General of Canada for violation of the conservation principles of the Fisheries Act.

The legal challenge was championed by St. John's lawyer Owen Myers. Our case built on the argument that the destruction of Sandy Pond permitted by a Schedule 2 amendment to the Fisheries Act was indeed outside the bounds of the conservation intent of the Act. As the amendment is subordinate legislation to the Fisheries Act in which it is embedded, it should not override principles of conservation to allow the destruction of aquatic ecosystems. In legal terminology, the amendment is *ultra vires* of the Act. The implication is that the destruction of Sandy Pond under this amendment is illegal.

Arguments for using Sandy Pond as a toxic tailings impoundment

Through the environmental assessment process, the proponent Vale contended that it would be much more costly and environmentally destructive to create an artificial tailings impoundment than to dump toxic residues into Sandy Pond. These weakly founded economic and environmental contentions were questioned by Nature Newfoundland and Labrador, Nature Canada, the Council of Canadians, MiningWatch Canada, the Sierra Club, fish experts, sport fishermen and environmental scientists.

Yet for arguments sake, consider carefully the implications of proponent's position. The decision to use a pristine pond rather than construct a tailings impoundment implies that natural resource development now necessitates the destruction of aquatic life-supporting ecosystems. Though such an approach is being used widely and increasingly as a corporate strategy, it is clearly unsustainable development. Like individuals, corporations have to be held accountable for the pollution and destruction that they generate in the process of profit-making. If it cuts into profit margins to be responsible, that's just the way it is (or should be).

We do not have to accept the destruction of Sandy Pond for the development to go ahead. If we do, what else will we have to give away if the provincial and federal governments continue with a third world approach to natural resource development? As things now stand with the revised Fisheries Act, we won't be asked about these concerns. Such decisions will now be in secret in federal cabinet meetings behind closed doors. We will not even have access to the rationale for the decisions. There is a better way.

In praise of environmental engineers

Green environmental technology is booming. The use of green technologies in Norway, Germany and the USA provide impressive examples of how natural resource developments can advance along with adequate environmental protection and mitigation.

We have a strong contingent of environmental engineers in our province and at our provincial university. Certainly, they could if so called upon direct their talents to further reducing and recycling the pollutant burdens to be generated by mining activities. Newfoundland and Labrador could and should be a leader in environmental engineering.

There are more environmentally benign strategies than running effluent pipes into Sandy Pond and into Placentia Bay. We have the capability. We need the commitment.

Where do we stand today?

We stand where our fathers stood before us. Our legal challenge was initiated in 2010, but legal technical wrangling by lawyers for Vale and the Mining Council of Canada has delayed it for three years. During that time, the Fisheries Act, formerly the most powerful environmental law in the country has been beaten into a developmentally oriented piece of legislation at very great expense on the environmental side of the ledger.

Sandy Pond belongs to everyone. The governments gave it away. We're taking it back. Join us (www.sandypondalliance.org).

Brown booby visit

The most shocking birds news of the past month has been the first known occurrence of a brown booby, tropical cousin of the northern gannet. What is even more shocking however is the fact that the bird was observed in July in St. Anthony and reported in the *Northern Pen* newspaper. Yet the news just surfaced among the local bird-watcher community who were both intrigued and dismayed at not having had the opportunity to see the new species for the island.

Interestingly, there was also a first record of brown booby in New Brunswick in May (possibly the same bird?), and that these tropical birds showed well north of their range during the anomalously water conditions during the summer of 2012.

Other birds in the area and around the province

Good news for harlequin ducks. On 1 March Tony Power conducted a Parks and Natural Areas vessel survey for harlequin duck in the waters off Point Lance and Cape St. Mary's. His total count was a remarkable 646 harlequins, even topping the 400 reported by Roger Tory Peterson well over 50 years.!

A couple of recent owl sightings have come to my attention. Ted Crocker saw a snowy owl in January on the barrens near Moble Big Pond, while Allan Stein observed one in February on Three Pond Barrens. Brent Kelly heard a great horned owl calling in Butterpot Park one evening while setting out nest boxes for boreal owls.

Angela McNeil got a photo of 3 mourning doves on her deck in Middle Cove.

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