Federal Court  Cour fédérale

Date: 20150227

Docket: T-70-15

Citation: 2015 FC 253

Vancouver, British Columbia, February 27, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THE AHOUSAHT, EHATTESAHT, HESQUIAHT, MOWACHAHT/MUCHALAHT, AND TLA-O-QUI-AHT INDIAN BANDS AND NATIONS

Applicants

And

MINISTER OF FISHERIES AND OCEANS

Respondent

ORDER AND REASONS

[1] The Applicant First Nations bring a motion for an interlocutory injunction, prohibiting the opening of a commercial roe herring fishery on the West Coast of Vancouver Island [WCVI], until their application for judicial review of the Minister of Fisheries and Oceans Canada's [the Minister] decision to approve the Integrated Fisheries Management Plan for Pacific Herring [IFMP].

[2] For the reasons that follow, the application for an injunction is dismissed.

I. Background

[3] The Applicants are five Nuu-chah-nulth First Nations located on the West Coast of Vancouver Island: Ahousaht, Ehattesaht, Hesquiaht, Mowachaht/Muchalaht and Tla-o-qui-aht.

[4] The Applicants' Aboriginal right to fish and sell fish was recognized and affirmed by the decision of the British Columbia Supreme Court [BCSC] in *Ahousaht Indian Band v Canada (Attorney General)*, 2009 BCSC 1494 [*Ahousaht*], aff'd 2011 BCCA 237, aff'd 2013 BCCA 300, leave to appeal to SCC refused, 34387 (January 30, 2014).

[5] The BCSC directed that Canada and the Applicants consult and negotiate how the Aboriginal Rights can be accommodated, and gave either party liberty to return to court to have the matter of justification tried, if negotiations are not successful. The negotiations have, to date, failed and the Applicants' Aboriginal Rights, including with respect to herring, are being contested. The parties are set to return to the BCSC next month.

[6] The WCVI commercial roe herring fishery has been closed to commercial harvest since 2006, due to low abundance and related conservation concerns about the WCVI herring stocks. In 2014, Department of Fisheries and Oceans [DFO] staff recommended to the Respondent Minister that she maintain the closure for 2014, noting that the Department would like to see "more evidence of a durable and sustained recovery before re-opening".

[7] Notwithstanding DFO's advice, the Minister directed that the commercial fishery be opened. However, Justice Mandamin of this Court granted the Applicants an interlocutory injunction, to prevent the opening of the WCVI fishery in 2014, for reasons that included the Applicants' conservation concerns with regard to herring stocks and Canada's alleged unfulfilled obligations to negotiate accommodation of the Applicants' Aboriginal Rights.

[8] Once again, the Applicants oppose opening the WCVI to commercial roe harvesting for 2015. They assert that the WCVI stock should not be opened to a commercial roe herring fishery until their Aboriginal Rights are accommodated and conservation concerns are addressed.

[9] Stock assessments on the WCVI have shown that the herring returns are forecast to exceed the cut-off-point used by DFO to consider if there should be a commercial roe herring harvest in the WCVI area. The affidavit of Nathan Taylor sets out the science relied upon by DFO. In summary, there is approximately a 1% probability that the stock will be below the "cut-off" level of 14,436 tonnes in 2015. Projections are that the stock will be 31,505 tonnes, which is 17,079 tonnes above the cut-off; expressed as a ratio, the stock will be 2.18 times the cut-off amount. That evidence was not refuted by the Applicants' evidence or by Dr. Hall in his reply evidence.

[10] On November 24, 2014, DFO sought a decision from the Minister of the herring harvest level for the 2015 fishing season. Based upon the latest scientific information, consultation and its management objectives, DFO recommended to the Minister that the herring fishery be opened

in all five major areas of the Pacific Region. This included three areas that have recently been closed, one of which is the WCVI.

[11] In contrast to the situation one year ago, when Justice Mandamin issued an injunction with respect to the roe herring fishery in the WCVI area:

> a) both of the options offered to the Minister by DFO this year involve opening of the fishery:
>
> i. option 1, which in the three previously closed areas, including the WCVI area, would be at a 15% harvest rate for a total harvest quantity of 13,393 short tons; or
>
> ii. option 2, a more conservative option, in which the three-previously-closed areas would be at a 10% harvest rate for a total harvest quantity of 8,729 short tons.

[12] The Minister chose the recommended second, more cautious level of harvest, provided in option 2 by DFO.

[13] While the Applicants and the Respondent have not reached an agreement on the form of accommodation of the Applicants' Aboriginal fishing rights, there is clear evidence of ongoing consultations and negotiation between the Respondent's representatives and the Applicants' to reach a settled accommodation.

[14] The Applicants argue that the decision to reopen the roe herring fishery in the WCVI area raises conservation concerns for the First Nations Applicants, that it is too early to re-open the WCVI roe herring stock, and that given the roe herring openings in the Strait of Georgia and Prince Rupert District, there is no need to re-open the WCVI area.

[15] As argued before Justice Mandamin a year ago, the First Nations Applicants rely upon the duty owed by Canada to the Applicants arising out of the BCSC and BCCA decisions, in *Ahousaht*. The Applicants submit there is a serious issue to be tried as to whether the opening of the WCVI to commercial herring fishing is a breach of Canada's duties to negotiate with the First Nations, and raises serious conservation concerns of the First Nations Applicants.

[16] The Applicants also submit that re-opening the commercial roe herring fishery in 2015 will cause irreparable harm, because the unique opportunity to accommodate their constitutionally protected rights will be lost, and because of the adverse impact on the rebuilding of the WCVI herring stocks that may result from this opening will harm and further delay the implementation of their recognized Aboriginal Rights for a community-based roe herring fishery and right to sell fish.

[17] However, as pointed out by the Respondent, it is also important to the public interest of Canadians that Canada's fisheries, as a significant and important resource belonging to all the people of Canada, are properly managed, conserved and developed for the benefit of all Canadians. The Minister's fisheries power includes not only conservation and protection, but also embraces commercial and economic interests, Aboriginal Rights and interests, and the public interest in sport and recreation.

II. The test for an Interlocutory Injunction

[18] The well-established test for an interlocutory injunction is set out in the Supreme Court of Canada case of *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at para 43. The party seeking an interlocutory injunction must prove:

i) There is a serious issue to be tried;
ii) Irreparable harm would result if an injunction is not granted; and
iii) The balance of convenience, considering all the circumstances, favours granting the order.

[19] The test is conjunctive, and all three criteria must be satisfied to obtain interlocutory injunctive relief.

A. *Serious Issue to be Tried*

[20] The parties are agreed that there is a serious issue to be tried. The regulation of Canada's fisheries and the Crown's duty to consult and to accommodate First Nations' rights to fish and sell fish raise serious issues (*Ahousaht*, at paras 26-28).

B. *Irreparable Harm*

[21] If an interlocutory injunction is not granted, the Applicants allege that:

a. There could be harm to the herring stock and that the decision to open the fishery therefore does harm them; and
b. A unique opportunity to accommodate their established Aboriginal fishing rights after a lengthy closure of the fishery will be lost.

[22] The Applicants must prove that the alleged irreparable harm is real and substantial, and the evidence required to prove irreparable harm must be clear, not speculative. It is not sufficient to speculate that irreparable harm is "likely" to be suffered (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7).

[23] The requirement for proof of non-speculative harm applies even where an applicant alleges that the impugned conduct is based on allegations of unconstitutionality (*International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 26).

[24] While the Applicants' argue that re-opening the WCVI area to roe herring fishery "raises conservations concerns" and "puts the implementation of their established Aboriginal Rights at risk", with respect, these concerns are, at best, speculative, and based on the scientific evidence before me, as well as the evidence of on-going, good faith negotiations by the Respondent to consult with and accommodate the First Nations Applicants' fishing rights in the WCVI area, I do not find that the Applicants have made out a case of irreparable harm. While there may be disagreement about management decisions concerning the roe herring fishery in the WCVI area, an agreement has not yet been reached on an accommodated settlement, that is no basis for a finding of irreparable harm.

[25] Moreover, I also agree with the Respondent that there is no reason to assume that the Applicants' rights cannot or will not be reasonably and fairly accommodated simply because other commercial interests participate in a limited commercial fishery in the WCVI area.

C. *Balance of Convenience*

[26] Given my decision on lack of irreparable harm, the Applicants' application for an interlocutory injunction must fail.

[27] However, when I consider the balance of convenience, as it affects the stake-holders in this matter, I also conclude that the balance tips in favour of the Respondent. As pointed out by the Respondent, the process by which the Applicants' rights as declared in the *Ahousaht* proceeding are being further defined and accommodated continues through the ongoing negotiations between DFO and the Applicants and through the pending judicial process in the BCSC.

[28] While there is no question that this process of accommodation is complicated, its ultimate goal is reconciliation of the Applicants' rights with those of society at large. As was recognized by the Supreme Court of Canada in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186:

> …Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, supra, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

[29] Further, as provided in the evidence before me, if an injunction issued to enjoin the Minister from opening the WCVI, the 15 gillnet licence holders and 7 seine licence holders who have in good faith selected the WCVI to fish will be adversely impacted.

[30] Moreover, the window of time in which the 2015 fishery will occur is very tight – early March only. There is a real risk that fishing opportunities may be lost altogether if DFO is unable to re-issue licence conditions in time.

[31] This potential loss should be weighed against the fact that the four of the five Applicants who have access to commercial licenses for roe herring will not lose any opportunity to fish arising from the closure, as these licenses will be fished this year in the Strait of Georgia.

[32] Moreover, I must recognize, as Justice Garson did in the BCSC in the *Ahousaht* case, Canada's approach to fisheries management should be afforded considerable deference. Without having to decide the issue of whether an absence of an undertaking as to damages should negatively impact the Applicants' position, I nevertheless find that the balance of convenience favours the Minister, for the reasons given above.

III. Interveners

[33] The B.C. Seafood Alliance and B.C. Wildlife Federation seek to intervene pursuant to Rule 109 of the *Federal Courts Rules*. The Interveners seek to make submissions on the nature and scope of industry's interest in and participation in the roe herring industry and the impact of the injunctive relief sought by the First Nations Applicants in this proceeding.

[34] However, the Interveners seek to introduce an issue or issues not before the Court, thereby trying to introduce a new matter in this proceeding. The motion is brought on the eve of this interlocutory injunction hearing, and given the representations of both the Applicants and the

Respondent, I fail to see how the Interveners' assistance is needed for me to decide the application (*Ontario Federation of Anglers and Hunters v Alderville Indian Band*), 2014 FCA 145 at para 35).

[35] The motion to intervene is dismissed.

ORDER

THIS COURT ORDERS that

1. The application for an interlocutory injunction is dismissed with costs to the Respondent;

2. The motion to intervene by the B.C. Seafood Alliance and B.C Wildlife Federation is also dismissed, no costs.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-70-15
STYLE OF CAUSE:	THE AHOUSAHT, EHATTESAHT, HESQUIAHT, MOWACHAHT/MUCHALAHT, AND TLA-O-QUI-AHT INDIAN BANDS AND NATIONS v MINISTER OF FISHERIES AND OCEANS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 26, 2015
ORDER AND REASONS:	MANSON J.
DATED:	FEBRUARY 27, 2015

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