Federal Court  Cour fédérale

Date: 20210607

Dockets: T-129-21
T-127-21
T-128-21
T-132-21

Citation: 2021 FC 548

BETWEEN:

MOWI CANADA WEST INC, CERMAQ CANADA LTD, GRIEG SEAFOOD B.C. LTD, AND 622335 BRITISH COLUMBIA LTD

Applicants

and

THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD

Respondent

and

ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY and WATERSHED WATCH SALMON SOCIETY

Interveners

REASONS FOR ORDER

PHELAN J.

I. Introduction

[1] This is the appeal of the Prothonotary's (Aylen) decision dismissing the Homalco and Tla'amin First Nations' [collectively the Sister Nations] motion to be added as respondents in the underlying application for judicial review [Judicial Review] or alternatively, for an order granting leave to intervene in the Judicial Review.

[2] There was a multitude of parties on this appeal with copious authorities (nine books for one party) but a straightforward attack on the Prothonotary's decision. The Minister and the Department of Fisheries and Oceans [DFO] and Canadian Coast Guard were in support of the Sister Nations' motion and appeal and the other participants opposed in varying degrees and for varying reasons.

[3] In addition to the appeal, the Court also heard a motion by the We Wai Kai Nation, Wei Wai Kum First Nation and Kwiakah First Nation [collectively the Laichkwiltach Nation] to intervene in the Sister Nations' appeal. In the course of its motion to intervene, the Laichkwiltach Nation made all the arguments it would have made if it had been granted intervener status prior to hearing the appeal. The motion to intervene was a protective step in the event the Court were to grant the appeal. In the end, this motion will be dismissed because the appeal will be dismissed.

[4] This appeal is largely determined by the Sister Nations' contention that the Minister of Fisheries and Ocean's decision [Decision], which is the subject of the Judicial Review, was an "accommodation" and as such gives it the right to be a party to the Judicial Review.

II. Background

A. *Parties/Participants*

[5] Homalco claims unceded Aboriginal rights and title interest throughout its territory as recognized by s 35(1) of the *Constitution Act, 1982*. This includes the rights of hunting, fishing, gathering and stewardship.

[6] It is a party to the Comprehensive Fisheries Agreement with DFO under which DFO issues Homalco an aboriginal communal fishing license [ACFL].

[7] The Tla'min Final Agreement between Tla'min and the Governments of Canada and British Columbia recognizes and protects Tla'amin's aboriginal rights to fish and to aquatic plants in terms of harvesting for domestic purposes and trading and bartering amongst themselves or with other aboriginal peoples [Tla'amin Fishing Rights].

[8] The Applicants are:

- Grieg Seafood B.C. Ltd [Grieg], an aquaculture producer, has fish sites in the Discovery Islands from where fresh salmon is sent to North American and Asian markets.

- 622335 BC Ltd [Saltstream], an aquaculture license holder, has a site at Doctor Bay in the Discovery Islands.
- Mowi West Inc [Mowi] is based in Campbell River, from which it and its predecessor companies operated salmon aquaculture sites for over 30 years. It has 10 sites located in the Discovery Islands and representing 30% of its business.
- Cermaq Canada Ltd [Cermaq] operates 10 aquaculture sites in the Discovery Islands.

[9] The Laichkwiltach Nation (three First Nations sharing a common history, ancestry and language) hold aboriginal title and rights throughout the Discovery Islands. All but one of the fish farms at issue in the Judicial Review fall within the Laichkwiltach Nation core title lands. They do not claim to be a party or respondent in this matter but seek only intervener status, if necessary.

B. *Context of Litigation*

[10] In 2009, the federal government, in response to a record low sockeye salmon run, established the Cohen Commission. One of the Commission's recommendations was that DFO prohibit net-pen fish farming in the Discovery Islands unless there was a minimal risk of serious harm to the health of migrating salmon.

[11] In 2020, the Minister began consultation with seven First Nations. Between October 2 and December 4, 2020, the Sister Nations participated in the consultation process. They made submissions in favour of harvesting the current stocks of farmed fish and the subsequent decommissioning of the sites.

[12] On December 17, 2020, the Minister announced her decision [Decision] to issue 18-month aquaculture licenses for the fish farms, to prohibit the issuance of licenses to restock the fish farms in the Discovery Islands area and to confirm that First Nations' monitoring would be part of the phasing out of fish farms in the area.

[13] In December 2020, the Applicants were issued finfish aquaculture licenses subject to the conditions that no new fish could be introduced into Discovery Islands' facilities and all farms had to be free of fish by June 30, 2022.

[14] By January 2021, the Applicants filed their respective Judicial Reviews seeking to quash the Decision as unreasonable and procedurally unfair.

[15] The Applicants would not consent to having the Sister Nations added as respondents in the Judicial Reviews.

[16] In March, Mowi and Saltstream filed separate interim injunctions regarding the Minister's denial of their Transfer License applications. The injunction was granted until the disposition of the Judicial Review.

[17] While none of the Applicants in the Judicial Review or in the injunction motion sought or seek declarations or other remedies regarding aboriginal rights or titles, the Sister Nations brought a motion to be added as a respondent. The critical grounds alleged is that the quashing of the Decision would nullify an accommodation made by the Crown to protect their s 35(1) rights.

C. *Prothonotary Decision*

[18] Having laid out the facts in more detail than the Court's summary above – on which there is no substantive dispute – the Prothonotary turned to the history of consultations. The outline of the Memorandum of Decision, which constituted the certified tribunal record, made reference to the consultations as follows:

> From October to December 2020, the Department undertook consultations with First Nations whose territories overlap aquaculture sites in the DI. The First Nations had a range of views regarding the ongoing licensing of these DI farms, but all expressed concern about potential impact of the farms on wild salmon stocks in their claimed territories. All of the First Nations shared in an interest in extending the consultation period and being engaged in the monitoring and/or management of the sites. Specific accommodation measures were requested to address potential infringement of Aboriginal rights to fish.
>
> …
>
> The seven First Nations had differences of views regarding the reissuance of licenses and on-going operation of farms in their territories. This ranged from tabling of a decommissioning plan for all farms and specific requests for detailed accommodation measures to interest in co-management opportunities for aquaculture operations. There were concerns raised that the policy and operational frameworks as well as the science relied on by DFO to manage the salmon farms in the DI were not consistent with the precautionary principle.
>
> First Nations also expressed concerns with the supporting science, citing that the risk assessments did not take local salmon stocks into account or evaluate sea lice, and raised issues that the CSAS process used to conduct the risk assessments does not involve a full engagement of Indigenous groups. Even after reviewing the performance data, there continued to be strong concern around sea lice management and piscine orthoreovirus (PRV) related impacts to wild salmon and potential infringement of their Aboriginal rights. [Redact] also provided information on site specific impacts of the DI farms.

> In terms of accommodations, First Nations asked for additional time for consultation, funding support for launching First Nations led monitoring and audit work focused on sea lice and PRV, requests for additional science, changes to conditions of licence, and wanting to explore the idea of ABM.

[19] The Memorandum went on to present the Minister with options and recommended that licenses be renewed until June 30, 2022. It also proposed additional measures that would help address specific issues and specific accommodation measures raised by First Nations.

[20] The Minister did not accept the recommendation and returned the Memorandum to DFO with a notation (effectively the Decision):

> Instead, I affirm the direction as discussed in the December 11, 2020 bilateral meeting with the DM:
>
> My decision is for a temporary (18 month) renewal of aquaculture licenses for facilities operating in the Discovery Islands. All farms in this area must no longer have fish in pens by June 30th, 2022.
>
> - During the period between license renewal and June 30th, 2022, no hatchery smolts will be introduced.
> - The intent of allowing time to grow out and harvest fish already in pens is to avoid culling in order to meet timelines.

[21] The Decision can be summarized as follows:

a) The Discovery Islands' aquaculture licenses would be issued for a limited 18-month period which would be the last licenses issued in the Discovery Islands.

b) No new fish of any size could be introduced to the Discovery Islands' facilities during the 18-month period.

c) All fish farms would be free of fish by June 30, 2022.

d) Fish transfer licenses will not be issued to the Applicants.

[22] The Judicial Reviews seek to quash the Decision with the usual declarations of invalidity, unreasonableness and procedural unfairness.

[23] The grounds of review range across the field of administrative law which include:

- jurisdiction/fettering and abuse of discretion;
- arbitrariness/unreasonableness;
- contrary to law/failure to consider relevant matters or erroneously so doing;
- inconsistent with policy;
- overbreadth, bad faith, substantive unfairness;
- lack of transparency, intelligibility and justification; and
- procedural unfairness;

[24] As noted by the Prothonotary, none of the grounds of relief are directed at aboriginal rights, titles and interests or at the Sister Nations specifically.

III. Analysis

[25] The parties all have slightly different issues or phrasing of the issues. Distilled to its essence, this appeal raises the following questions:

- Was the Decision an accommodation of the Sister Nations' rights, titles and interests?

- Did the Prothonotary err in refusing Sister Nations' application for joinder under Rule 104(1)(b)?

Order for joinder or relief against joinder	**Ordonnance de la Cour**
104 (1) At any time, the Court may	**104 (1)** La Cour peut, à tout moment, ordonner :
…	[…]
(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.	**b)** que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.

- Did the Prothonotary err in law in failing to consider and apply the correct test in respect of Sister Nations' motion to intervene under Rule 109?

Leave to intervene	**Autorisation d'intervenir**
109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109 (1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
Contents of notice of motion	**Avis de requête**
(2) Notice of a motion under subsection (1) shall	**(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	**a)** précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	**b)** explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
Directions	**Directives de la Cour**
(3) In granting a motion under subsection (1), the Court shall give directions regarding	**(3)** La Cour assortit l'autorisation d'intervenir de directives concernant :
(a) the service of documents; and	**a)** la signification de documents;
(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	**b)** le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

A. *Standard of Review*

[26] In *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, the Court of Appeal confirmed that appeals of a Prothonotary's decision are governed by the standard set in *Housen v Nikolaisen*, 2002 SCC 33.

[27] Therefore, the standard is correctness in respect of law or an extricable legal principle in circumstances of mixed fact and law but otherwise palpable and overriding error in respect of mixed fact and law and fact alone.

[28] As settled in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, "palpable" means an error that is obvious and significant and "overriding" means an error that determinately affects the outcome of the case. This standard is highly deferential.

[29] Some of the Applicants correctly note that Rules 104(1) and 109(1) are discretionary. As such, the exercise of discretion is mixed fact and law and therefore generally subject to the "palpable and overriding error" standard.

B. *Decision/Accommodation*

[30] The issue of whether the Decision is an accommodation of Sister Nations' rights, title and interests, as expressed in government consultations, is an aspect of the Rule 104 joinder issue. Due to the importance of this argument to Sister Nations, it is dealt with separately; however, the Prothonotary considered the matter in the context of her s 104(1) analysis.

[31] Sister Nations' position is that in finding that Sister Nations was not "directly affected" by the relief sought, the Prothonotary erred in respect of the law of consultation and to the facts in finding that the Decision was not an accommodation. The accommodation alleged is that the Minister made an express promise to the Sister Nations to shut down the salmon aquaculture operation in the Discovery Islands. The error of law in respect of consultation is not fleshed out.

[32] The Prothonotary dealt with the issue at paragraphs 39-40 of her Reasons. The Prothonotary referred to the relevant authority of *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 [*Forest Ethics*], and concluded that Sister Nations had to demonstrate that the relief sought in the Judicial Review directly affects their legal rights or will prejudicially affect them in some direct way.

[33] Paragraph 40 of her Reasons plainly and fully summarizes the Prothonotary's conclusion that none of the relief sought affects Sister Nations in a direct way.

> Turning to that issue, I am not satisfied that the relief sought by the Applicants affects the Sister Nations in a direct way. The decision to be reviewed by the Court is a denial of an aquaculture license to the Applicants on the terms sought and a pronouncement as to the future of the Applicants' operations. The decision under review limits the rights of the Applicants and, as is evident from the decision itself and the accompanying press release, cannot be properly characterized as a grant of accommodation or a promise to the Sister Nations. Unlike the case of *Ontario Federation of Anglers and Hunters v Ontario*, 2015 ONSC 7969, the decision at issue does not expressly grant a right to the Sister Nations. None of the relief sought by the Applicants would alter, affect or derogate from any duties owed by the Crown to the Sister Nations or any existing rights of the Sister Nations. Moreover, none of the Applicants have based their challenge to the decision on either the assertion or denial of Aboriginal title and rights or the Crown's duty to consult.

[34] In assessing whether there is an "accommodation", the Prothonotary is engaged in weighing evidence and assessing facts. She referred to the correct legal principles; therefore, at most, this is dealing with an issue of mixed fact and law. There is a solid factual basis for concluding that the Decision was not an accommodation of Sister Nations' concerns. Not only is the Decision silent on the issue but to the extent the Recommendations were responsive to Sister Nations' consultations, the Minister rejected the Recommendations.

[35] Sister Nations was not the only First Nation engaged in consultations – there were seven but only Sister Nations has contested the Prothonotary's determination that the Decision was not an accommodation.

[36] On this issue, I can find no palpable and overriding error on the Prothonotary's part.

C. *Rule 104(1)(a)*

[37] Sister Nations contends that the Prothonotary erred by not following *Forest Ethics*. They also argue that the Prothonotary relied on inapplicable precedents (*Kwicksutaineuk/Ah-kia-mish Tribes v Canada (Minister of Fisheries and Oceans)*, 2003 FCT 30, and *Gitxaala Nation v Prince Rupert Port Authority*, 2020 CANLII 382(FC)) and failed to apply Prothonotary Ring's decision in *Namgis First Nation v Minister of Fisheries, Oceans and the Canadian Coast Guard, Mowi Canada West Ltd and Cermaq Canada Ltd*, (July 16 2020), Vancouver T-1798-19 (FC) [*Namgis*].

Sister Nations also argue that they are a necessary party to this litigation.

[38] As suggested earlier, I find that the Prothonotary correctly identified the relevant law. Sister Nations' argument is their dissatisfaction with the manner in which the Prothonotary applied the law to the facts – a matter governed by the appellate standard with deference to the decision maker.

[39] The Prothonotary correctly observed that in respect of the "directly affected" issue, Sister Nations' rights are constitutionally protected and therefore the Decision neither purports to nor can it affect those rights.

[40] Unlike in *Forest Ethics*, where Enbridge's right to proceed with a project was affected by a decision – analogous to the Applicants' right to farm fish – in the present case aboriginal title is not in issue. Moreover, as the Prothonotary observed, Sister Nations' right to fish continues to exist regardless of the Decision.

[41] The Prothonotary is not required to follow the decision in *Namgis*. This is not an issue of judicial comity – which itself does not require that decisions of the same court level be followed. Further, in that decision, the parties' (Mowi and Cermaq) rights were created by a decision and therefore they were directly affected by the decision. The facts in *Namgis* are not the same and its applicability to the current situation is not established.

[42] The Prothonotary also concluded that Sister Nations had not established that their participation as respondents met the test in *Shubenacadie Indian Band v Canada (Attorney General)*, 2002 FCA 509 and *Laboratoires Servier v Apotex*, 2007 FC 1210. They had not pointed to a question that could not be effectively and completely settled unless Sister Nations was a party.

[43] This was a finding which was open to the Prothonotary. She also noted that the Sister Nations sought to raise issues not raised in the pleadings and to introduce evidence not relevant

to the issues raised. There are no issues as to Sister Nations' consultation or accommodation raised in the pleadings.

[44] I can find no basis for overturning the Prothonotary's conclusion that Sister Nations should not be added as a party – either as of right as an affected person – or added because its presence is necessary to ensure the matters in dispute are effectively or completely determined.

[45] As an alternative, the Sister Nations had also applied for intervener status under R 109(1), which was also denied.

D. *Intervener Status*

[46] The Sister Nations argue that the Prothonotary failed to apply the correct test on a motion for leave to intervene. They contend that the Prothonotary took an inflexible approach because she noted Sister Nations' failure to explain how their participation would assist in determining the issues before the Court. The Sister Nations contrast their treatment by the Prothonotary with that of the intervention application of the Conservation Coalition.

[47] There is no question that the Prothonotary identified the applicable law being Rule 109 and the decision in *Rothmans, Benson & Hedges Inc v Canada (Attorney General),* [1990] 1 FC 74 [*Rothmans*] as further reinforced by *Sport Maska Inc v Bauer Hockey* Corp, 2016 FCA 44 [*Sport Maska*], *Canada (Attorney General) v Pictou Landing First* Nation, 2014 FCA 21, and *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13. For purpose of this motion, the *Rothmans* factors are applicable:

(a) Is the proposed intervener directly affected by the outcome?

(b) Does there exist a justiciable issue and a veritable public interest?

(c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(d) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(e) Are the interests of justice better served by the intervention?

(f) Can the Court hear and decide the cause on its merits without the proposed intervener?

[48] The Prothonotary reasonably concluded that before looking at the factors mentioned in the above cases, an applicant would have to establish the threshold for such a motion for leave set out in Rule 109(2)(b) – description of participation - which Sister Nations did not.

[49] The Prothonotary went further and held that even if Sister Nations' oral submissions could be said to rectify the failure to comply with Rule 109(2)(b), she would still conclude that Sister Nations failed to demonstrate how their participation would assist in the issues relevant to the Judicial Review.

[50] Leave to intervene is a highly discretionary matter and as such attracts a standard of palpable and overriding error and a strong presumption of deference. The Prothonotary had before her complete basis for denying leave including the absence of being directly affected, the failure to explain not just why Sister Nations wished to intervene but also how and in what way it

would bring a further, different and valuable insight and perspective (*Sport Maska*, para 40). I can find no such error justifying this Court's intervention.

E. *Other Matters*

[51] Saltstream added a further issue claiming that Sister Nations' notice of appeal did not meet Rule 359(c) by failing to state the grounds of appeal.

[52] While the notice of appeal is not a model of clarity or conformity to the Rules, in the end it was not so defective as to merit the appeal being dismissed on this technicality. There are more substantive grounds for dismissal of the appeal.

[53] As referred to earlier, Laichkwiltach Nation sought leave to intervene but only as a protective measure if the appeal were to be granted or was granted. Given the result, there is no need to hear from Laichkwiltach Nation and its motion for leave will be dismissed.

"Michael L. Phelan"
Judge

Ottawa, Ontario
June 7, 2021

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-129-21, T-127-21, T-128-21, AND T-132-21
STYLE OF CAUSE:	MOWI CANADA WEST INC, CERMAQ CANADA LTD, GRIEG SEAFOOD B.C. LTD, AND 622335 BRITISH COLUMBIA LTD v THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD AND ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY and WATERSHED WATCH SALMON SOCIETY
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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DATED:	JUNE 7, 2021

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