Federal Court Cour fédérale

Date: 20240906

Docket: T-1245-21

Citation: 2024 FC 1400

Ottawa, Ontario, September 6, 2024

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

LAX KW'ALAAMS INDIAN BAND REPRESENTED BY MAYOR GARRY REECE, ON BEHALF OF ALL MEMBERS OF LAX KW'ALAAMS INDIAN BAND

Applicant

and

MINISTER OF FISHERIES AND OCEANS AND THE CANADIAN COAST GUARD

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review in respect of a decision made by the Minister of Fisheries, Oceans and the Canadian Coast Guard (the Respondent) around January 16, 2023, which endorsed a plan known as the Network Action Plan (the NAP). The NAP is a planning

document for the establishment and implementation of Marine Protected Areas (MPAs) in the Northern Shelf Bioregion of British Columbia (the NSB).

[2] The Lax Kw'alaams Indian Band (Lax Kw'alaams,) claims that the planning process identifies zones within the NSB that will permanently close or highly restrict commercial fishing. It argues that the proposed zones include fishing grounds relied upon by the Lax Kw'alaams for economic support, in addition to having cultural and social significance.

[3] Lax Kw'alaams previously sought an interlocutory injunction on this application, which Justice Favel denied on July 25, 2022 determining that the motion was premature.

[4] I dismiss this application for judicial review as being premature.

II. Facts

[5] At the hearing, the parties reviewed the facts in detail, and provided specific references to meeting minutes and affidavits, along with the cross-examination transcripts of an affiant. The parties largely relied on this evidence to dispute the issue of consultation.

[6] Given my findings on prematurity, I will not reiterate all of the specifics regarding consultation. It is necessary to point out that this evidence was presented but I have not ruled on it to determine whether the duty to consult was met.

A. *Background*

[7] Lax Kw’alaams is the third largest aboriginal community in British Columbia. It consists of over 1,000 Coast Tsimshian people and 5,300 Band members. Those living in Lax Kw’alaams are members of the Nine Allied Tsimshian Tribes.

[8] Lax Kw’alaams predominantly supports itself through commercial fishery. They acquired licences and quota in a variety of fisheries through the federal Pacific Integrated Commercial Fisheries Initiative.

[9] The fish processing plant in the Lax Kw’alaams community is the largest employer in the area. It hires up to 100 individuals depending on the supply of fish. The plant largely relies on the Band’s two commercial trawlers, which fish throughout the NSB. It is the last operating fish processing plant on the north coast of British Columbia.

[10] The waters in the NSB are considered the “breadbasket” of Lax Kw’alaams, as they support the fish plant and the Band’s fishing fleet. The NSB encompasses around 100,000 square kilometres of Canadian territorial waters on the north coast of British Columbia, extending from the Alaskan border to Bute Inlet on the mainland and Brooks Peninsula on the west coast of Vancouver Island.

B. *Trilateral Process and the NAP*

[11] Since 2014, the Government of Canada has collaborated with the Government of British Columbia and approximately seventeen First Nations to develop non-binding recommendations

for a network of MPAs in the NSB. The primary goal of this network is to protect marine biodiversity, ecological representation, and special natural features in the NSB, including underwater canyons and critical habitat.

[12] The trilateral planning process sought to build partnerships between the Crown and Indigenous governments. The parties relied on three Reconciliation Framework Agreements for Bioregional Oceans Management and Protection (RFAs) to provide the overarching governance framework. A Network Committee was established to act as the primary decision-making body on the development of the NAP.

[13] The goal of the trilateral planning process was to develop the NAP, a non-binding document that would propose a coordinated regional network of existing and recommended MPAs made up of identified zones, contributing to the network's objectives. The NAP would also summarize the approach used to develop the contemplated network and provide recommendations to support its implementation and governance.

[14] The NAP identifies 357 zones, encompassing approximately 30% of the total area of the NSB. Almost fifty percent of the proposed network, around 137 zones, falls within existing MPAs. Each zone is associated with one or more conservation priorities. For some zones, the NAP identifies activities of concern that may affect conservation priorities, like fishing or logging.

[15] As I will discuss in more detail, the NAP itself does not directly implement any new marine protections or restrictions. Rather, it consists of recommendations that decision-makers may consider in future legislative processes to create new protected areas in the NSB.

C. *Lax Kw'alaams*

[16] Since 2018, Lax Kw'alaams has participated in the trilateral planning process. Along with the related community of Metlakatla, Lax Kw'alaams signed an RFA. As a signatory, Lax Kw'alaams received access to information and had the opportunity to participate in the process, including as a member of the Network Committee and related sub-committees.

[17] By February 2019, a first draft of the NAP (Scenario 1) was released, which developed an initial MPA network in the NSB. It identified zones for possible inclusion.

[18] For the 2018 to 2019 fiscal year, Lax Kw'alaams received $20,000 to enable their review of the planning process and proposed network design.

[19] In December 2020, Lax Kw'alaams informed the Department of Fisheries and Oceans (DFO) that they no longer considered themselves partners in the planning process. However, they did not formally withdraw from the RFA and maintained full access to the shared information.

[20] During this time, Lax Kw'alaams also advised the DFO that they did not support the proposed MPAs in their traditional territories. As a result, the NAP was amended.

[21] On May 25, 2021, Lax Kw’alaams expressed concern with the trilateral planning process, and asked for formal consultation. The DFO met with Lax Kw’alaams between June and August of 2021.

[22] On August 9, 2021, Lax Kw’alaams filed an application for judicial review.

[23] On August 27, 2021, the DFO sent Lax Kw’alaams a letter expressing their willingness to consult on the NAP. The DFO explained that the draft NAP had not been endorsed, and that further analysis and engagement would occur prior to the implementation of any identified sites.

D. *Initial Consultation with Lax Kw’alaams*

[24] By September 2021, a revised draft of the NAP (Scenario 2) was released.

[25] Around October 7, 2021, the DFO advised Lax Kw’alaams that a socio-economic analysis was “still in development.”

[26] On October 29, 2021, the DFO sent Lax Kw’alaams a consultation plan (Initial Consultation Plan). The Initial Consultation Plan proposed a formal period of consultation on the NAP, which would commence when the Network Committee approved the documents for public release. It was expected that the draft NAP would be approved on December 8, 2021.

[27] On November 1, 2021, Lax Kw’alaams requested five changes to the Initial Consultation Plan, including consultation with Indigenous groups before engaging with other stakeholders and

the public. Around November 8, 2021, Lax Kw’alaams met with the DFO to discuss the proposed consultation plan.

[28] On November 19, 2021, the DFO shared a revised version of the Initial Consultation Plan, implementing three of the Band’s requests. However, the DFO did not want to change the ordering of consultation, as it determined that concurrent consultation was efficient and enabled the sharing of various perspectives.

[29] On November 25, 2021, the DFO shared “Compendium 3: Overview of Economic Implications of the Draft MPA Network for Northern Shelf Bioregion” (Compendium 3) with Lax Kw’alaams, which set out a draft socio-economic analysis.

[30] On December 2, 2021, the DFO indicated that it could not support Scenario 2, as it was concerned that it would not be possible to implement the measures described. This paused the trilateral planning process.

[31] In response, a senior working group (the SWG) was formed to revise the NAP. The SWG consisted of representatives from the Government of Canada, the Government of British Columbia, and various Indigenous groups. Lax Kw’alaams was not a part of the SWG.

[32] The DFO continued to meet with the Lax Kw’alaams to provide updates on the activities of the SWG.

[33] On February 7, 2022, Lax Kw'alaams and the DFO signed a "Capacity Building Support Contribution Agreement," pursuant to which, the DFO would contribute up to $100,000 for the 2021 to 2022 fiscal year, allowing Lax Kw'alaams to pursue its own socio-economic analysis.

[34] In the months following, the parties continued to update each other on the planning process, including the socio-economic analysis.

[35] On March 31, 2022, the DFO provided the Lax Kw'alaams with more information about the SWG while noting that documents circulated at meetings did not represent decisions or agreements and were subject to change.

E. *Revised Consultation*

[36] For the 2022 to 2023 fiscal year, the DFO provided Lax Kw'alaams with $150,000 of funding in order to enable the Band's socio-economic analysis of Scenario 2. On March 31, 2022, Lax Kw'alaams presented a report to DFO officials, which described the economic dimensions of the fishery.

[37] On April 29, 2022, the DFO shared a revised consultation plan with Lax Kw'alaams (Revised Consultation Plan). The DFO revised the consultation plan to ensure that consultation on the planning process would continue both before and after the Network Committee approved the draft NAP for consultation. The Revised Consultation Plan also updated the timelines to reflect consultations that would take place prior to the approval of the draft NAP.

[38] The DFO invited Lax Kw’alaams to provide comments on the Revised Consultation Plan by June 1, 2022, and offered to meet to discuss the plan.

[39] On May 2, 2022, Lax Kw’alaams sought an interlocutory injunction restraining the Minister from moving forward with the planning process and releasing a draft version of the NAP.

[40] On July 18, 2022, Lax Kw’alaams met to discuss revisions to Compendium 3, which changed to a socio-economic overview. The DFO asked for feedback within one week, by July 25, 2022, in order to present a revised version to the Network Committee on July 28, 2022.

F. *Interlocutory Injunction*

[41] On July 25, 2022, Justice Favel dismissed Lax Kw’alaams’ request for an injunction, determining the motion was premature. The motion was rejected on three grounds.

[42] First, Justice Favel held the impugned conduct had not yet crystallized, given the NAP was still a draft, and it was unclear how any consultations could take place without knowing what its content would ultimately contain. Second, as the formal consultation phase had not yet begun, Justice Favel found it was too early to assess the adequacy of consultation. Third, Justice Favel determined the Revised Consultation Plan already set out the consultations that Lax Kw’alaams was seeking.

[43] In considering irreparable harm, Justice Favel noted that, “the completion of either the Draft or Final NAPs does not commit Canada to an irreversible course of action. I also agree that

any potential breach of the duty to consult can eventually be repaired by future and direct consultation before any statutory or regulatory action is taken."

G. *Public Release of the NAP*

[44] On July 28, 2022, the revised NAP was publically released.

[45] Shortly thereafter, on August 3, 2022, Lax Kw'alaams provided the DFO with comments on Compendium 3. This feedback did not meet the DFO's deadline.

[46] On August 4, 2022, a meeting took place between Lax Kw'alaams and the DFO, at which time the DFO discussed revisions to the NAP, including Compendium 3. As part of the changes, all contemplated fisheries management measures were removed from the NAP, making a socio-economic analysis unnecessary.

[47] On August 18, 2022, the DFO shared a revised consultation plan, which proposed a formal period of consultation between August 17 and November 18, 2022.

[48] On September 14, 2022, the DFO sought further comments on Compendium 3.

[49] Near the end of September, as the parties were discussing consultation timelines, Lax Kw'alaams learned about the August 18 email and the draft consultation plan, as it was initially only sent to part of the consultation team. In response, Lax Kw'alaams proposed revisions to the plan and asked for funding.

[50] After a meeting between the parties on October 7, 2022, Lax Kw’alaams provided the DFO with a detailed budget estimate, seeking approximately $170,000 in funding. The DFO offered to provide $35,000, on the basis that the majority of the proposed work fell outside the scope of the consultation plan.

[51] Until mid-December, Lax Kw’alaams met with the DFO several more times to discuss the NAP.

H. *Endorsement of the NAP*

[52] Around January 5, 2023, the Deputy Minister provided a memorandum to the Minister, which recommended endorsing the NAP.

[53] On January 10, 2023, the Minister adopted the recommendation of the Deputy Minister and decided to endorse the NAP.

[54] On January 12, 2023, Lax Kw’alaams sent a detailed submission to the DFO on the finalization of the NAP, which explained several issues with the consultation process. Lax Kw’alaams asked the DFO to delay endorsing the NAP in order to allow more fulsome consultation and greater engagement and provided recommendations concerning the approach to socio-economic data.

[55] The DFO met with Lax Kw’alaams on February 2, 2023 to discuss their concerns.

[56] On February 5, 2023, the Minister publically endorsed the NAP.

[57] Around March 1, 2023, the DFO provided Lax Kw’alaams with a detailed written response in relation to their prior submission, which was discussed at a trilateral meeting on March 10, 2023.

[58] At the hearing for this application, Lax Kw’alaams alleged the DFO conducted inadequate consultation. Lax Kw’alaams seeks a declaration that the Respondent was under a duty to consult and that it breached this duty. Lax Kw’alaams also requests an order quashing the Minister’s endorsement of the NAP and setting aside any actions taken to implement the Minister’s decision.

III. Issues

[59] This matter raises the following issues:

A. Is this application for judicial review premature?

B. If this application is not premature, was it reasonable for the Minister to conclude that Lax Kw’alaams received adequate consultation in the development of the NAP before the Minister endorsed it?

IV. Relevant Provisions

[60] The following provision of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] is relevant to this proceeding:

Application for judicial review	**Demande de contrôle judiciaire**
18.1 (1) An application for judicial review may be made by	**18.1 (1)** Une demande de contrôle judiciaire peut être

the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

V. Position of the Parties

[61] Given my findings on prematurity, I will summarize the parties' arguments on this issue.

A. *Respondent*

[62] The Respondent claims that this application is premature. The Respondent refers to the Court's jurisdiction under section 18.1(1) of the *Federal Courts Act*, which allows anyone to bring an application if "directly affected by the matter in respect of which relief is sought." Although the word "matter" has a broad meaning, the Respondent argues it must affect legal rights, impose legal obligations, or cause prejudicial effects.

[63] In this case, the Respondent asserts that an interim step in an ongoing decision-making process has no substantive effect and is not subject to judicial review. The Respondent states the Minister's endorsement of the NAP is one such step. The Respondent contends that recommendations to an ultimate decision-maker, which lack any independent legal or practical effect, are not reviewable. To support this argument, the Respondent relies on *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 [*Taseko*], *Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala 2016*], leave to appeal to SCC refused, 37201 (9 February 2017); *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Trans Mountain*].

[64] The Respondent claims the NAP is not the type of "strategic, higher level decision," which could give rise to the duty to consult; it does not impose a certain course of conduct and allows for deviations from its recommendations. The NAP explicitly states that it will not fetter future decision-makers and its proposals are subject to change, including zone boundaries.

[65] The Respondent refers the Court to Justice Favel's order, dated July 25, 2022, where Justice Favel recognized that development of the NAP and its endorsement were "only a couple of steps toward any final legislative, regulatory or other action." Justice Favel acknowledged that the NAP did "not commit Canada to an irreversible course of action."

[66] Although the Respondent concedes that there is a duty to consult, the Respondent states the consultations have "not yet reached their effective end-point." The Respondent argues an evaluation should take place after consultations have finished. The Respondent contends the Court has dismissed applications seeking judicial review of consultations on a preliminary step or phase of a broader decision-making process. The Respondent cites *Gitxaala Nation v Canada (Transport, Infrastructure and Communities)*, 2012 FC 1336 [*Gitxaala 2012*] and *Conseil des innus de Ekuanitshit c Canada (Procureur général)*, 2013 FC 418 [*Conseil des innus*].

[67] Moreover, like *Trans Mountain*, the Respondent argues the NAP contains non-binding recommendations that will be considered by future decision-makers. The Respondent notes that any decisions to designate an MPA under the *Oceans Act*, SC 1996, c 31, lie with the Minister or the Governor in Council (GIC). Similarly, decisions to create a protected marine area under the *Canada Wildlife Act*, RSC 1985, c W-9, lie with the GIC on the recommendation of the Minister of Environment and Climate Change Canada. Under both laws, the regulation-making process is

involved, including Crown-Indigenous consultation and the publication of draft regulations in the *Canada Gazette*.

[68] Additionally, in order to establish or enlarge a national marine conservation area or reserve under the *Canada National Marine Conservation Areas Act*, SC 2002, c 18, any proposed amendments must be brought before Parliament with a report on the recommended area. The Respondent notes the report must include information on consultation undertaken.

[69] Finally, the Respondent states that any decisions to expand or create new MPAs in the NSB will be subject to judicial review, including on the basis that the Crown did not meet its duty to consult. The Respondent argues it would be redundant to permit legal challenges to non-binding recommendations, which would be superseded by further review and consultation.

B. *Applicant*

[70] Lax Kw'alaams argues that the NAP is consequential and the Minister has adopted a high-level strategic plan. Even if it was a proposal, Lax Kw'alaams contends that the Minister endorsed it, which turned it into a decision.

[71] Lax Kw'alaams states the NAP is a blueprint laying the foundation for establishing MPAs in northern British Columbia. Lax Kw'alaams points to the language in the NAP, which uses similar wording. Lax Kw'alaams notes that the NAP refers to facilitating cooperation and coordination, and it provides context and information, including recommendations and regulatory structures. At its core, Lax Kw'alaams claims that the NAP is a strategic, high-level

plan that the Minister accepted and leaves “little room for interpretation.” While Lax Kw’alaams acknowledges that there is the opportunity for revision, Lax Kw’alaams contends that the underlying document provides the framework by which future decisions will be made.

[72] Lax Kw’alaams claims that, if the Court were to assess consultation when an MPA was established, this would “kick the can” too far down the road. Lax Kw’alaams argues that now is the appropriate time to ensure that the plan incorporates and mitigates socio-economic impacts. If left too late, Lax Kw’alaams contends that the range of accommodations will be restrained.

[73] Moreover, Lax Kw’alaams asserts that this case can be distinguished from the authorities cited by the Respondent. Lax Kw’alaams claims that, in those decisions, the parties were contesting the content of a report, rather than challenging a ministerial decision to adopt a high-level plan.

[74] Lax Kw’alaams refers the Court to several authorities, including *Dene Tha’ First Nation v Canada (Minister of Environment),* 2006 FC 1354 [*Dene Tha’*], aff’d *Canada (Environment) v Imperial Oil Resources Ventures Ltd,* 2008 FCA 20 [*Imperial Oil*], which concerned a planning process. In that decision, the Crown gave the First Nations people a 24-hour deadline to provide feedback. The issue was not prematurity; the Court considered when the duty to consult crystallized. The *Dene Tha’* argued that the Crown breached its duty to consult during the creation of a cooperation plan for the Mackenzie Gas Pipeline. Justice Phelan found that the agreement between the parties constituted a roadmap or a blueprint from which all regulatory and environmental processes would flow. Justice Phelan found that this agreement set up the

means by which a whole process would be managed, and it affected the rights of the First Nations. The Applicant claims that the NAP is a similar blueprint.

[75] Lax Kw'alaams argues that the Court in *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204, determined that the non-binding nature of a preliminary decision did not necessarily negate the duty to consult. Lax Kw'alaams states the Court followed *Dene Tha'* and held that the duty to consult extended to strategic, high-level decisions, even if that impact was not immediate and it follows that this Court should do the same.

[76] Finally, Lax Kw'alaams points to *Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68 [*Kwikwetlem*]. In that case, there was an important preliminary decision regarding whether it was in the public interest to build a transmission line, which would lead to further regulatory decisions and a final approval. The Court found the appellants were entitled to consultation on the choice of the project. Applying the reasoning from this decision, Lax Kw'alaams argues that the Minister is the steward of the fishery, which she manages in the public interest, and consultation should have occurred on the development of the NAP. Additionally, Lax Kw'alaams states that the Minister should have assessed the adequacy of consultation before endorsing the NAP.

VI. Analysis

[77] For the reasons set out below, I find that this application is premature. The NAP itself is not justiciable, the Minister's endorsement does not carry any legal consequences, and the consultation process has not yet run its course. As noted by the Respondent, the NAP does not

create MPAs or restrict activities, and further consultation will take place between the parties when the statutory decision-makers decide to engage with the regulatory process. However, at this stage, the NAP only provides recommendations, which are subject to change, and the Minister's endorsement does not alter this impact.

A. *The NAP itself is not amenable to judicial review*

[78] First, concerning the NAP itself, the Federal Court of Appeal has consistently held that reports, which consist of non-binding recommendations to a decision-maker, are non-justiciable. This was the case in *Gitxaala 2016*, where the Court determined that a report by the Joint Review Panel, although final and conclusive, had no independent legal or practical effect. The report only provided recommendations to the GIC, meaning a decision by the GIC was the only action that carried legal consequences.

[79] Similarly, in *Trans Mountain*, the Federal Court of Appeal determined that a report by the National Energy Board, which recommended approving a proposed expansion of the Trans Mountain pipeline system, was not justiciable. Of note, on appeal, one of the parties attempted to argue that the report was a prerequisite to the GIC's decision and that, as the GIC was not an adjudicative body, judicial review was necessary in order to assess the report. At paragraph 201, the Court rejected this argument. It addressed the circumstances in which a report could be reviewed, stating:

> [i]f the decision of the Governor in Council is based upon a materially flawed report the decision may be set aside on that basis. Put another way, under the legislation the Governor in Council can act only if it has a "report" before it; a materially deficient report, such as one that falls short of legislative standards, is not such a report. In this context the Board's report may be

> reviewed to ensure that it was a "report" that the Governor in Council could rely upon. The report is not immune from review by this Court and the Supreme Court.

[80] In *Taseko*, the Federal Court of Appeal followed the reasoning in *Gitxaala 2016* and *Trans Mountain*, even though the parties tried to argue that there was a distinction based on the legislative framework. In that decision, the Court found that a final report issued by the Federal Review Panel did not affect any legal rights or carry any legal consequences. At paragraph 43, the Court noted, "[w]hether or not the Panel can be requested to review its conclusions and recommendations, the Final Report only serves to assist the Minister (or the GIC) in making their decisions."

[81] Like *Gitxaala 2016*, *Trans Mountain*, and *Taseko*, I find that the NAP is a non-binding report which presents a series of recommendations to guide the implementation of a network of MPAs in the NSB. The NAP itself does not create or establish new MPAs, and it does not impose any activity restrictions, such as closing fishing sites.

[82] The purpose of the NAP is supported by the underlying policy considerations, such as the "National Framework for Canada's Network of Marine Protected Areas," which was approved in 2011. The policy states that the primary objective of a national network of MPAs is the "long-term protection of marine biodiversity, ecosystem function and special natural features." The policy further notes that there is "a wealth of scientific evidence" that individual MPAs can provide environmental benefits and that there is "mounting evidence" that MPA networks can contribute to this aim. The document helps establish that the overall intention of the NAP is to provide a coordinated approach to creating an MPA network.

[83] Similarly, under the "Canada-British Columbia Marine Protected Area Network Strategy," the federal and provincial governments signaled their commitment to building a legacy of MPA networks. The document includes three important elements: 1) a joint federal-provincial approach to protecting marine areas; 2) a collaborative decision-making process with First Nations throughout the process; and 3) a participatory process, which will include meaningful opportunities for participation, consultation and the exchange of information with marine stakeholders, coastal communities, and the public. The policy also recognized the benefits of a systemic approach to network planning instead of designating MPAs under an "ad hoc" scheme, as the former could achieve objectives that no single MPA could.

[84] In addition, the policy provides guidance for the design of a network of marine protected areas. It aims to build collaboration and partnerships, although not intended to "fetter the statutory responsibility, authority, or interests and obligations of any governments to establish or manage such areas." The document sets out sixteen principles to guide the development of an MPA network, including environmental, economic, social, and cultural factors.

[85] The NAP builds upon this policy framework and provides operational recommendations to advance an MPA network in the NSB. It proposes the manner by which regulators and jurisdictional authorities can pursue implementation, including through federal and provincial statutory measures. As noted by the Respondent, any decisions to designate an MPA under federal legislation, such as through the *Oceans Act*, ultimately lie with the Minister or the GIC. Although the NAP may recommend the establishment or creation of new MPAs, it has no legal or practical effect on its own.

[86] Moreover, the NAP does not bind any of the decision-makers. The Deputy Minister's briefing note to the Minister, dated January 2023, stated:

> [t]he NAP is not legally binding; it is not intended to define, create, recognize, deny, or amend any of the rights of the partners; and, it will not be interpreted or implemented in a manner that fetters the decision-making authorities of any of the partners. It is recognized that implementation of the NAP will require ongoing multi-jurisdictional cooperation as MPA designation tools are pursued, site-specific management measures developed, and regulatory processes are initiated.

The NAP does not require the Minister or any other statutory decision-maker to follow the proposals laid out.

[87] Based on the policy framework, the operational recommendations, and the briefing note to the Minister, it is clear that the NAP is intended to present recommendations to decision-makers on the creation of an MPA network in the NSB. It is expected that there will be changes and further analyses, including the costs and benefits of proposed MPAs. The NAP itself states, "[a]ll zone details in the profiles are preliminary and subject to review and change during implementation of sites."

[88] Indeed, as Justice Favel determined in the injunction motion, "the completion of either the Draft or Final NAPs does not commit Canada to an irreversible course of action."

[89] On this basis, I find that the NAP is not amenable to judicial review.

B. *The Minister's endorsement does not carry any legal consequences*

[90] Additionally I find that the Minister's endorsement does not carry any legal consequences.

[91] Lax Kw'alaams has characterized the Minister's endorsement as a regulatory process and states it is a "blueprint" for the creation of MPAs. I disagree with this characterization. The NAP is the product of a trilateral partnership between the governments of Canada, British Columbia, and seventeen First Nations. This initiative involved a collaborative effort with Indigenous groups, along with other stakeholders, and sought feedback on the best approach to achieving network goals relating to biodiversity conservation and cultural priorities.

[92] The NAP refers to itself as a "blueprint for multiple marine conservation efforts to operate more cooperatively and effectively than if they were to be undertaken independently." On this basis, the NAP seeks to assist decision-makers in understanding and evaluating whether network-level goals are being met based on the proposed network of MPAs.

[93] Therefore, by endorsing the NAP, the Minister has affirmed a *recommended* approach rather than *requiring* a particular course of action. The NAP does not bind the Minister nor any other statutory decision-maker. Additionally, the Minister's endorsement is a single step in the larger process. Further measures must be completed before any regulatory or legislative action can even be taken.

[94] Given the circumstances of this application, the decisions cited by Lax Kw'alaams can be distinguished. In *Imperial Oil*, the Federal Court of Appeal recognized, at paragraph 9, that *Dene Tha'* was a case that turned "entirely on its own facts." Unlike in *Dene Tha'*, this matter does not establish a regulatory process for creating MPAs. Instead, the NAP indicates that this will depend on the circumstances, as there "is no single overarching legal tool for establishing the MPA network as a whole." The NAP considers a variety of MPA designation tools, which are Indigenous, federal, or provincial in nature. These processes will follow existing legislation.

[95] Additionally, unlike in *Kwikwetlem*, where a certificate was a legal prerequisite in order for the project to proceed, the Minister's endorsement does not represent any legal requirement or obstacle, nor does it bind the Minister. In this matter, the NAP itself will not remain static, as it is far from finalized. In other words, the Minister's endorsement is not built upon a solid foundation that is required for future action, and it does not mandate a particular course of action. It allows decision-makers to revisit concerns, including any proposals that could impact the Lax Kw'alaams's rights.

C. *The Crown has a duty to consult and further consultation will take place*

[96] Moreover, the Respondent concedes that there is a duty to consult, and the Minister's endorsement will not affect this obligation. As discussed above, the NAP and the Minister's endorsement are only steps in a larger process, which will necessarily include legislative and regulatory action. Under both federal and provincial statutes, any decisions to designate an MPA will involve the regulation-making process and require Crown and Indigenous consultation.

[97] Therefore, as noted by the Respondent, the process has not reached its conclusion. In *Gitxaala 2012*, the Court agreed that judicial intervention was premature in such circumstances. There, the applicant attempted to argue that the Joint Review Panel would not properly address its concerns. In rejecting this proposition, the Court noted it "should not act on the basis of assumptions" (*Gitxaala 2012* at para 54). Rather, the Court found it could intervene if there was unfairness, or the Crown failed in its overarching duty to consult. At paragraph 54, the Court also determined that a breach was not necessarily fatal, stating that:

> even if there was a breach of the duty to consult with Gitxaala in the context of the TRP review, there is no basis for the Court to conclude that the breach cannot be remedied by the JRP or later by the federal Crown. As the Supreme Court of Canada noted in *Haida Nation*, above, there are a variety of remedies available for a failure to consult not the least of which is the opportunity at later stages in the process to engage in meaningful dialogue and, where necessary, to accommodate First Nations concerns. The effective end-point in the process of consultation has not been reached and there is no way of knowing today how effective First Nations will be in achieving their desired outcome. Gitxaala's additional concern that the Government of Canada's commitment to a final overarching consultation is too constrained to be meaningful remains to be seen. If the process proves to be deficient or perfunctory, Gitxaala and other affected First Nations will have the opportunity to be heard again.

[98] Similarly, in *Conseil des innus*, the Court held that reviewing the federal government's consultation process was premature. In that decision, the applicants challenged an Order in Council made by the GIC, which approved the federal government's response to a report. The consultation process was expected to continue up until the issuance of permits, which could lead to actions that would impact waterways and habitat. The applicant argued that consultation and accommodation could not be left until later when the permits were issued, as it also applied to

"strategic, higher level decisions" that could impact Aboriginal claims and rights (*Conseil des innus* at para 110).

[99] Upon review, the Court noted, "[w]hile it is true that preparatory work for the Project has begun, the acts that truly put the Applicant's rights and interests at risk are those which require permits issued by TC and DFO. It is premature to evaluate the federal government's consultation process before those decisions are made" (*Conseil des innus* at para 112).

[100] I find a comparable situation arises here.

[101] The consultation process will continue as the parties contemplate the implementation of new MPAs. When further steps are taken, specifically when the regulatory and legislative process is engaged for designating MPAs, Lax Kw'alaams' rights and interests will truly be at stake.

[102] In *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*], the Supreme Court of Canada addressed the issue of whether a duty to consult arises when an agreement does not have any adverse impacts. In that decision, the government approved the building of a dam in the 1950s without consultation, and Alcan sold the excess power to BC Hydro under energy purchase agreements. In 2007, BC Hydro and Alcan entered into an agreement, which also established a committee on the operation of the dam. The issue was whether the Crown had a duty to consult on the 2007 agreement (2007 EPA).

[103] The unanimous Court found that there was no duty to consult, since the agreement itself would not have any adverse impacts on an Aboriginal claim or right. The Court provided a helpful analysis of what type of conduct would engage the duty to consult. In particular, the Court found that "mere speculative impacts" would be insufficient (*Rio Tinto* at para 46). In addition, "[t]he question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question" (*Rio Tinto* at para 49 [emphasis in original]).

[104] Upon considering these principles, the *Rio Tinto* Court rejected the arguments from the First Nations. That First Nation asserted that, even if the 2007 EPA did not have an impact on the water levels, the fisheries, or the management of the contested resource, the duty to consult could be triggered because the 2007 EPA was part of a larger hydro-electric project which continued to impact its rights. The Court found that this approach was contrary to *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, which "confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration" (*Rio Tinto* at para 53 [emphasis in original]).

[105] When applying this analysis to the present case, I find that the Minister's endorsement is not an action affecting Lax Kw'alaams' claimed rights. The Minister's decision is part of a broader process, as discussed above, and the endorsement itself does not adversely impact Lax Kw'alaams' claimed fishing rights in the NSB. At this point, based on the NAP and the endorsement, the parties have not created any MPAs, nor have they imposed any activity restrictions that could prevent Lax Kw'alaams from continuing to fish in the NSB.

[106] Finally, given this process is still at an early stage, I agree with Justice Favel that any issues can be repaired with further consultation. Prior to any legislative or regulatory enactments, the Crown must consult with Indigenous groups. Indeed, there was evidence before this Court that consultation has taken place as well as continuing following Justice Favel's decision, along with the endorsement of the NAP.

[107] Accordingly, I find that this judicial review is premature, and I dismiss the application on that basis.

VII. Costs

[108] Lax Kw'alaams and the Respondent reached an agreement regarding costs. I thank both of the parties for doing so. This agreement is based on Tariff B, column 111 midpoint. The parties agreed on the amount of $20,000.00, which will be awarded to the Respondent.

JUDGMENT in T-1245-21

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. Costs are awarded to the Respondent, payable forthwith by Lax Kw'alaams, in the lump sum amount of $20,000.00.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1245-21
STYLE OF CAUSE:	LAX KW'ALAAMS INDIAN BAND REPRESENTED BY MAYOR GARRY REECE, ON BEHALF OF ALL MEMEBERS OF LAX KW'ALAAMS INDIAN BAND v MINISTER OF FISHERIES AND OCEANS AND THE CANADIAN COAST GUARD
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 10, 2024
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	SEPTEMBER 6, 2024

APPEARANCES:

Ian M. Knapp Kathrine E. Bellet	FOR THE APPLICANT
Aileen Jones Alicia Blimkie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MacKenzie Fujisawa LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT