Federal Court Cour fédérale

Date: 20210618

Dockets: T-1011-20
T-1012-20

Citation: 2021 FC 632

[ENGLISH TRANSLATION]

Montréal, Quebec, June 18, 2021

PRESENT: The Honourable Mr. Justice Shore

Docket: T-1011-20

BETWEEN:

JOSÉ LUIS CONESA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1012-20

BETWEEN:

NOUVELLE AUTOROUTE 30 CJV S.E.N.C.

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Is it necessary to demonstrate that a latent threat is turning into a significant environmentally destructive situation before urgent action is taken? When the variables are highly volatile and the consequences serious, is there an obligation to prevent the threat or should it be ignored knowing that it could happen today, just as well as yesterday or even tomorrow?

[2] This is an application for judicial review of a single order, for each of the applicants, dated July 31, 2020, to correct works in accordance with previously submitted plans and to protect fish habitat in connection with the Highway 30 extension along Montréal's south shore.

[3] The applicant is responsible for carrying out the project in question. The company was granted authorization under the *Fisheries Act*, RSC 1985, c F-14, s 35(2)(b) [FA or Act] to disturb fish habitat in Lake St. Louis by undertaking to construct three dykes and three islands in accordance with the documentation provided (Authorization 2012-022). The Authorization outlined monitoring requirements and the authority of the Department of Fisheries and Oceans (DFO) to require work be carried out to avoid or mitigate further adverse effects on fish and fish habitat.

[4] Since then, in November 2017, a follow-up report by the applicant revealed signs of instability that could compromise the integrity of the structures, requiring corrective work. After several exchanges between the parties to determine the remedial work being considered and the timeline, as well as following a May 2018 referral from the Society for the Protection of Parc des

Iles-de-la-Paix, DFO transferred the file to the regulatory enforcement program, which conducted a site visit in September 2018. During this visit, significant issues were noted, including scouring, poor structural conditions, discrepancy in granular material and little or no shrub vegetation, and it was concluded that remedial work as per the plans was needed as soon as possible.

[5] On October 3, 2018, DFO issued a warning of non-compliance with the authorization with regard to the stability of the structures and the growth and maintenance of vegetation, and, due to ongoing erosion, instructed the applicant to perform remedial work to restore the structures in accordance with the original plans. In the alternative, the notice advised that failure to comply with the prescribed conditions is an offence under the subsection 40(3) of the FA and that this warning would not preclude prosecution under the Act.

[6] Two months later, the completed inspection report was provided at the request of the applicant. Since a response was not received following this correspondence, a follow-up letter was sent in February 2018 reiterating, as stated in the warning, the consequences of failing to comply with the conditions of the authorization and the importance of compliance. Over the next few months, inconsistent timelines were submitted to provide comments and to initiate potential corrective work. The applicant finally provided an inspection report and proposal for maintenance work in July 2019 and, following negotiations, its request for review of the remedial work was approved on September 27, 2019. Likewise, the applicant agreed to begin the remedial work by the end of 2019 and finish it by late June 2020.

[7] In the meantime, DFO continued its monitoring and inspections as advised to ensure compliance until the work was completed, and the parties exchanged various documents. According to this preparatory documentation, further deterioration during the winter months was noted, requiring additional remediation.

[8] After remedial work began in July 2020, a site visit found that some maintenance work may have still not been completed in accordance with the plans. As a result, DFO reiterated that remedial work must be completed in accordance with the plans as per the Authorization, citing condition 1.1.5 requiring compliance with the submitted documentation. A follow-up was then done with the applicant, and DFO indicated that a second visit would take place at the beginning of the following week, and that it would be difficult to provide advance notice of this visit, given the schedule of the inspection officers and the fact that they could not determine the exact time of their inspection; nevertheless, the inspection follow-up reports would be provided. In response, the applicant tentatively indicated that the work complied with the specifications that had been submitted and agreed upon.

[9] The inspection report, which was issued following the two inspections in July, showed that the work had not been done in accordance with the plans and documents submitted, as evidenced by the significant amount of granular material coming from the structures and their considerable weaknesses; the risk of scouring is high, especially during the winter and spring periods, which in turn represents an increased risk equivalent to the harmful alteration, disruption or destruction of fish habitat.

[10] Due to the urgency of the situation, on July 31, 2020, a DFO fishery officer ordered the applicant to correct these structures as per the plans. The order was issued pursuant to subsection 38(7.1) of the Act on the grounds that the dykes and islands were continuing to be subject to erosion and premature degradation which, depending on conditions, could occur in the near future and cause damage to fish habitat.

[11] This judicial review focuses on compliance with procedural fairness and the reasonableness of the officer's decision in light of legal and factual constraints. Apart from the procedural fairness argument, the standard of review applicable by this Court is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23 and 77 [*Vavilov*]).

[12] The applicants argue that the officer breached procedural fairness by failing to provide notice of the order and an opportunity to make submissions prior to making the decision. They also claim that the decision was unreasonable because it was made without regard to emergency criteria and that it had no factual basis.

[13] An administrative decision affecting the rights, privileges or interests of a party requires the observance of procedural fairness. Its content is determined on a contextual scale, defined by the non-exhaustive factors developed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21–27, 43 [*Baker*], endorsed by *Vavilov*, above, at para 77.

[14] Even in the absence of prior information and notwithstanding any conditions of the authorization, an officer may order corrective measures to prevent, counteract, mitigate or remedy any adverse effects that result from the unauthorized harmful alteration, disruption or destruction of fish habitat, or a serious and imminent danger of such an occurrence. The officer must be satisfied on reasonable grounds that immediate action is necessary.

[15] In this case, the order was issued after a warning, investigation reports and nearly two and a half years of discussions concerning the extensive scouring of the structures, their instability and the current and projected consequences thereof, contrary to the authorization. The process appears highly discretionary.

[16] Similarly, the legislative scheme grants broad discretionary power to DFO to intervene for the "conservation and protection of fish and fish habitat" (FA, subsection 2.1(b); House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Fisheries and Forestry,* 30th Parl, 2nd Sess, Issue No 29 (June 8, 1977) at p 12 (Roméo LeBlanc)). Parliament prohibits *a priori* by section 35 of the FA any activity that has the effect of harming fish habitat, subject to the exceptions set out in that Act. Ministerial authority to intervene in an emergency is essential in this regard; it is not restricted by regulation, where it is permitted (see ibid, s 38(9)(c)–(d); compare *Authorizations Concerning Fish and Fish Habitat Protection Regulations*, SOR/2019-286; and see, for example, Authorization 2012-022, condition 1.4, last sentence).

[17] In this context, parties subject to an order must seek judicial review. They also incur costs for corrective measures, in addition to those that are incidental to the project, and are liable for

an offence under the Act. In contrast, “Canada’s fisheries are a ‘common property resource,’ belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister’s duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest” (*Comeau's Sea Foods Ltd. v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 37). This power requires balancing the conservation and protection of various competing rights and interests, with the public interest being paramount.

[18] There is a legitimate expectation that DFO will be able to exercise its emergency discretion independently when circumstances require, as supported by guidance regarding the urgency of the measures ordered. Otherwise, the Act is devoid of content. The applicant, for its part, was expecting to continue with the pattern of the previous interactions, i.e., to extend the discussions over time.

[19] That said, the officer chose to issue the order for corrective measures, which requires that the officer be satisfied on reasonable grounds that immediate action is necessary.

[20] Given the urgency and the role of DFO, balancing the above, the present context gives rise to a lesser duty of procedural fairness. The party affected by a decision must, however, know what it is facing and be given an opportunity to respond, regardless of any deference that may be afforded to the choice of procedure (*Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 at para 56).

[21] The order in this case is rooted in the offsetting work under Authorization 2012-022, based on the plans provided by the applicant itself as part of the Highway 30 extension project, and stems from the findings of the 2018 visit that determined that the structures were unstable and not in compliance with the documentation enjoining the authorization. According to the terms of the order, it also considers the applicant’s commitment to remedial work, the related documentation and the two inspections of that work in July 2020 that showed the increasing severity of the previously reported problems, with equivalent material impacts on the environment.

[22] Moreover, the order follows a warning that has not been judicially reviewed, several informal reminders—the most recent in July 2020—and numerous exchanges of documents, case studies and respective submissions focusing on scouring and the increasing instability of structures that do not comply with the documentation as per the authorization, requiring remedial work as soon as possible to ensure compliance.

[23] The accounts of the interactions between the parties cannot be taken in isolation in this respect, as they all relate to the same issue identified in 2017, with the same solution identified in 2018—this solution becoming larger in scope, owing to the passage of time and the severity of the situation—with which any non-compliance carries consequences under the FA.

[24] The crux of the issue is the current and increased instability of the structures in contravention of the plans, which is a condition of Authorization 2012-022, which outlines activities that are detrimental to fish habitat. Non-compliance with the authorization is not only

potentially detrimental to fish habitat but defies the content and intent of the legislative scheme under the heading “Fish and Fish Habitat Protection and Pollution Prevention”.

[25] DFO was not compelled to further delay carrying out its duty of care subject to further feedback from the claimant, given the previous exchanges, the history of non-compliance, the harm to fish habitat and the fact that the required remedial work in this regard is to be done without delay, since the warning pursuant to the FA in 2018 (*British Columbia Hydro and Power Authority v Canada (Attorney General)* (1998), 149 FTR 161 at para 74 [predating *Baker* and distinguishable on the facts]).

[26] To require a higher duty of procedural fairness than is legislated by the Act in the circumstances prior to the exercise of its ministerial authority, in light of the risk and urgency justifying the corrective measures, would have the effect of compromising fish habitat and the public interest. Taken together, given the seriousness of the circumstances in which this exercise is taking place and the history preceding it in this case, the Court is satisfied that the determinative issue has been disclosed to the applicant and that it has been given an opportunity to respond.

[27] The Court is also of the view that the order is justified under the circumstances within the legal and factual constraints.

[28] In the words of the Act as they relate to this case, the officer must be satisfied on reasonable grounds that immediate action is necessary to take the ordered corrective measures to

prevent the occurrence or to counteract, mitigate or remedy any adverse effects that result or might reasonably be expected to result from the unauthorized disruption of fish habitat. Therefore, "not only is the appreciation of the circumstances left to the inspector, but he also has to decide which of the measures . . . he will take . . . . It is not [however] an absolute discretion for it is very clearly limited to the specific situations described in subs. 38(4) of the Act and when immediate action is necessary" *(St. Brieux (Town) v Canada (Fisheries and Oceans)*, 2010 FC 427 at paras 54–55 [emphasis added]).

[29] In this case, the reasons for the order as well as the evidence on the record—both from the applicant and from DFO—mention the increasing instability of the structures due to their scouring, requiring work. Accordingly, the evidence indicates that the significant release of material from the structures into Lake St. Louis due to scouring as a result of non-compliance with the plans under the Authorization is highly likely to result in significant harm to fish habitat. This damage increased over time and with the addition of large volumes of stone during the remedial work—which was still non-compliant—and was even more serious during the winter and spring periods according to the July 2020 inspection report. Immediate remedial work was therefore required.

[30] When the order was issued, the officer confirmed that he had also considered these observations and analyzed them, indicating the non-compliance with the authorization, which was obviously disrupting the environment, as well as the history of the structures. The situation has evolved significantly since the structures were first reported to be unstable, and their fragility is closely linked to unstable and changing factors. Previously, over an eight-month period in

2015, scouring was also noted on some of the structures, which became significant after one month, and severe within a year. For these reasons, the officer had grounds to believe that the latent risks associated with past and future scouring of structures, prone to cause harm to fish habitat, are evident.

[31] The officer was fully entitled to intervene to prevent adverse effects that might reasonably be expected to result from the unauthorized disruption of fish habitat, as established by the evidence of the risks involved. Moreover, based on the record before it, it was reasonable to believe that the time element of this intervention required immediate action, in accordance with the reasons set out above and its duty of care.

[32] Finally, the Court accepts and endorses what was articulated in *Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116:

> The Minister is presumed to act in the public interest, and significant weight should be given to these public interest considerations and to the statutory duties carried out by the Minister. As a statutory authority responsible for the administration and enforcement of the *Fisheries Act*, the Minister benefits from a presumption that actions taken pursuant to the legislation are bona fide and in the public interest. In other words, there is a public interest in allowing the Minister and DFO to accomplish their roles under the *Fisheries Act*.

[33] In light of the above, the Court finds that DFO complied with procedural fairness and that the order is justified and justifiable and has the characteristics of a reasonable decision. <u>The latent threat is apparent in this case. The statutory scheme supports the enforcement of the order to achieve its objective as defined by this Court, all in the interest of ensuring the stability of the Îles-de-la-Paix dykes and islands.</u>

[34] The application for judicial review is dismissed. No costs are awarded, given the public interest associated with the entire matter, that is to say a more than $1.5 billion project covering an area of approximately twenty hectares (including bridges), which according to the record is greater in scope than the work done on the Champlain Bridge.

JUDGMENT in T-1011-20 and T-1012-20

THE COURT'S JUDGMENT is that the application for judicial review be dismissed without costs, given the background of the case, the scope of the project and the public interest in the entire matter. The style of cause has been amended to reflect the correct respondent, the Attorney General of Canada.

"Michel M.J. Shore"

Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1011-20
STYLE OF CAUSE:	JOSÉ LUIS CONESA v THE ATTORNEY GENERAL OF CANADA
DOCKET:	T-1012-20
STYLE OF CAUSE:	NOUVELLE AUTOROUTE 30 CJV S.E.N.C. v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 14, 2021
JUDGMENT AND REASONS:	SHORE J.
DATED:	JUNE 18, 2021

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