Federal Court  Cour fédérale

Date: 20140228

Docket: T-404-14

Citation: 2014 FC 197

Ottawa, Ontario, February 28, 2014

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

THE AHOUSAHT, EHATTESAHT, HESQUIAHT, MOWACHAHTÉMUCHALAHT AND TLA-O-QUI-AHT INDIAN BANDS AND NATIONS

Applicants

and

MINISTER OF FISHERIES AND OCEANS

Respondent

REASONS FOR ORDER AND ORDER

Introduction

[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, until their application for judicial review of the Minister of Fisheries and Oceans Canada's decision to approve

the Integrated Fisheries Management Plan for Pacific Herring including a commercial fishery on the WCVI can be heard.

[2] For the reasons that follow, I granted the request for an injunction on Friday, February 21, 2014. These are my oral reasons more fully set out in words.

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, *Ahousaht Indian Band v Canada (Attorney General)*, 2009 BCSC 1494 [*Ahousaht*], aff'd 2011 BCCA 237, 2011 CSCR 353, aff'd 2013 BCCA 300, leave to appeal to SCC refused, 34387 (January 30, 2014). While that decision was the subject of appeals, the finding that the Applicants have an Aboriginal right to fish and sell fish was undisturbed. Justice Garson specifically ordered:

> 4. The parties now have the opportunity to consult and negotiate the manner in which the plaintiffs' aboriginal rights to fish and to sell fish can be accommodated and exercised without jeopardizing Canada's legislative objectives and societal interests in regulating the fishery.
>
> (*Ahousaht* at para 909, emphasis added).

[5] Justice Garson also noted the parties have leave to return to Court to address the issue of justification and infringement of the Applicants' Aboriginal rights to fish and sell fish if, after a two year period, the parties remain unable to reconcile the various interests at stake (*Ahousaht* at para 906). The parties are currently set to return to the British Columbia Supreme Court on March 2, 2015.

[6] The Respondent Minster is responsible for the Department of Fisheries and Oceans Canada (DFO), which administers and manages the commercial roe herring fishery. The herring are harvested for their roe, which is a valuable commodity. The commercial herring fishery is divided into five different stock areas: the West Coast of Vancouver Island (WCVI), the Straight of Georgia, the Central Coast, Prince Rupert, and Haida Gwaii.

[7] One of those stock areas, the WCVI, includes portions of the traditional fishing territories of the Applicants. Roe herring fisheries in the WCVI occur soon after the license conditions are issued, and can commence within days of issuance.

[8] The WCVI area has been closed to general commercial herring fishery for nine years (since 2006) due to conservation reasons.

[9] Stock assessments on 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 past, commercial roe herring harvest rates have been set at 20% of mature herring.

[10] The commercial fishing industry has recommended a commercial roe herring fishery this season, albeit at reduced harvesting rates.

[11] DFO management considered such an option, and noted in a memorandum for the Minister dated December 9, 2013 discussed allowing "some harvest but at a more conservative 10% harvest rate until the harvest management strategy is evaluated."

[12] DFO management ultimately recommended to the Minister that the WCVI remain closed to a commercial roe herring fishery for the 2014 season in order to continue work on licence fee reform, renewing the current management framework, and working with industry to maintain necessary science activities. In the memorandum for the Minister the Department noted it may need to negotiate an agreement with the First Nations Applicants and stated "the Department would like to see more evidence of a durable and sustained recovery before re-opening."

[13] The Minister did not concur with the Department's recommendation, and the following notation was made: "The Minister agrees to an opening at a conservative 10% harvest rate for the 2014 Fishing season in the three fishing areas."

Summary of Submissions

[14] The Applicant First Nations place great significance and rely upon the duty owed by Canada to the Applicants arising out of the BC Supreme Court decision 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 as well as because of the conservation concerns of the Applicant First Nations.

[15] The Applicants submit that re-opening the commercial roe herring fishery in 2014 will cause irreparable harm because the unique opportunity to accommodate their constitutionally protected rights will be lost, and also because of any 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.

[16] The Applicants submit that the balance of convenience favours them because the status quo would be to maintain the closure of the WCVI herring fishery for conservation purposes, and because the opening is unnecessary as openings in the other management areas are able to provide sufficient herring stock in excesses of the total allowable catch currently planned for WCVI.

[17] I note the Applicants, in keeping with their conservation concerns, did not apply to fish in the proposed WCVI commercial roe herring fishery.

[18] The Respondent submits that the Applicants were adequately consulted on the decision to re-open the WCVI fishery, while stressing that the application currently before the Court is not about whether the Minister breached its duty to consult the Applicants. The Respondent concedes that this is a serious issue to be tried in the judicial review.

[19] The Respondent maintains the Applicants cannot establish irreparable harm because the issue of justification in *Ahousaht* is still before the Courts, and because, in addition to conservation and protection, the Minister's responsibilities embrace commercial and economic interests as well as Aboriginal rights.

[20] With respect to the harm that may be caused to herring stocks by opening the WCVI, the Respondent states DFO applies a "precautionary approach" with the goal of protecting vulnerable stocks. With respect to the balance of convenience, the Respondent highlights the negative financial and logistical impacts of an injunction on the WCVI herring licence holders, who have by now made business decisions and plans based on the assumption of an open fishery in that area.

[21] The intervener, the BC Seafood Alliance, provided information about the herring fishery and its financial impact, but refrained from making legal submissions. The Court thanks counsel for the Intervener for the information provided.

Analysis

[22] The test for an interlocutory injunction is a three part conjunctive test as set out in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]. It requires that the Applicants demonstrate:

1. a serious issue arises;
2. irreparable harm will occur if the injunction is not granted; and
3. the balance of convenience favours the injunction

[23] Whether the test for an interlocutory injunction has been satisfied should normally be determined with a limited review of the case on its merits (*RJR-MacDonald* at para 78). When, however, the requested relief is similar to the relief sought on the disposition of the underlying judicial review application, a more extensive review of the merits should be conducted.

[24] In this case, while I have not engaged in a complete review of the case on its merits, I have been mindful that the requested injunction is similar to the relief requested on judicial review and have considered the merits more extensively. However, I do not consider that granting of an interlocutory injunction would necessarily render the underlying judicial review moot.

Serious Issue

[25] The Applicant submits and the Respondent concedes a serious issue arises. I do find on review of the evidence in the parties' materials that a serious issue arises with respect to:

a) conservation issues concerning the WCVI herring fishery; and

b) the acknowledged Aboriginal rights of the Applicants to fish and sell fish in relation to the WCVI fish stock area.

Irreparable Harm

[26] Irreparable harm refers to the nature of the harm rather than its magnitude (*RJR-MacDonald* at para 79). On the matter of irreparable harm, I find the prospect of irreparable harm arises if the Minister is not enjoined from opening the WCVI fishery given:

a) the Respondent Fisheries and Oceans Canada recommended the WCVI fishery not be opened for 2014 for reasons of conservation. This recommendation was not accepted by the Minister.

b) the Applicants' repeated concern that the WCVI fishery has not sufficiently recovered, and the need to consider their views on conservation. The Supreme Court has repeatedly noted the importance of conservation within the *Sparrow* justification framework and questions of "whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented" are an issue to be addressed (*R v Sparrow*, [1990] 1 SCR 1075 at 1119).

c) The setting of the total allowable catch at 10% instead of 20% as a precautionary measure is, in my view, "fudging the numbers." It is not science-based, but in effect a statement "there is a conservation concern here, but if the fishery is to be opened, take less." Adoption of this approach is being used to sidestep the conservation assessment. It seems to me once the Minister and the DFO depart from science-based assessments the integrity of fisheries management system is harmed.

[27] Furthermore, irreparable harm arises in that the Applicants lose their position and opportunity to reasonably participate in negotiations for establishment of their constitutionally protected Aboriginal rights to a community-based commercial herring fishery. Once commercial fishing is allowed, the expectation of continued interests by the commercial fishery will mean the opportunity for a complete examination of "the manner in which the plaintiffs' aboriginal rights

to fish and to sell fish can be accommodated and exercised" (*Ahousaht* at para 909) will have passed.

[28] The Federal Court of Appeal stated in *Musqueam Indian Band v Canada*, 2008 FCA 214 [*Musqueam*] that inadequate consultation does not always constitute irreparable harm (at para 52). It seems to me this case can be distinguished from *Musqueam* and other cases where the failure to consult was deemed insufficient to constitute irreparable harm. This is because the Applicants have established an Aboriginal right to fish and sell fish and are therefore operating within an established rights legal framework and because they are in the process of negotiating the manner in which the Applicants' Aboriginal rights can be accommodated and exercised.

Balance of Convenience

[29] In addition to the damage each party alleges it will suffer, public interest must also be taken into account when considering the balance of convenience (*RJR-MacDonald* at para 80). The public interest is more than the public interests as between the Applicants and the Minister, or the Applicants and the commercial fishing sector. Rather, it is the public interests as a whole which flow from whether relief sought is granted or not.

[30] Public interest in the reconciliation of s. 35 Aboriginal rights with the assertion of Crown sovereignty clearly favours the Applicants. Section 35 is a constitutional declaration that Canada is a country where existing Aboriginal rights and titles are recognized and affirmed:

> Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question
>
> (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24).

[31] The public interest also lies with giving recognition to Court declarations and directions, especially when the Supreme Court of Canada has repeatedly emphasized negotiation and accommodation agreements as the better way to address the exercise of Aboriginal rights. In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 25, the Supreme Court stated:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.
>
> (See also *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at 1123)

In short, reconciliation benefits the public interest.

[32] To ignore or disregard such Court declarations and directions is not only to ignore the obligation to follow Courts' direction with respect to addressing Aboriginal rights, but also to lower the standing of the Courts in public regard by the disregard for such declarations and directions.

[33] There is an impact on the commercial fishing sector, but that arises from the Minister's decision to open the WCVI roe herring fishery. This impact can be mitigated to a degree by reallocation, as the DFO may reissue licences and move any displaced licence holders to different fishery locations where there is a satisfactory abundance of herring stock.

[34] In any event, the commercial fishing sector's preference for a WCVI roe herring fishery is the possible securing of a higher quality catch, which would be more valuable in terms of strategic marketing. This weighs much less in the balance of convenience as against the acknowledgement of the opportunity for a First Nations people to practice their recognized Aboriginal right to fish and sell fish and reclaim their heritage.

[35] Public interest also favours the upholding of the DFO conservation approach to the WCVI herring fishery lest the fishery be harmed. By observing conservation needs, the public will benefit from commercial roe herring fishery opportunities in the WCVI area in the future and the Applicants will have a future opportunity to be able to exercise their rights.

[36] Finally, an interlocutory injunction enjoining the Minister from opening the WCVI herring fishery in the circumstances of this proceeding does not seriously constrain the Minister from exercising the responsibilities and discretion for fisheries management. This is not an instance where the Minister has chosen, with the support and advice of DFO and the assessment of scientific evidence, to make a discretionary decision concerning the fishery.

[37] I have considered the impact of the lack of an undertaking as to damages. The Applicants request they not be required to provide an undertaking but say they will if it is considered necessary.

[38] Federal Court Rule 373(2) states that:

> (2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.
>
> (Emphasis added)

The lack of an undertaking is not always fatal to an applicant (*RJR-MacDonald* at para 50; *Soowahlie Indian Band v Canada (Attorney General)*, 2001 FCA 387 at para 13), but it is a relevant consideration.

[39] In *Musqueam*, the Federal Court of Appeal noted that:

> the default position under this provision [Rule 373(2)] is that a limited undertaking should not be accepted unless a the Court is presented with some evidence with respect to compelling circumstances that warrant a limited undertaking or no undertaking (at para 62, emphasis in original).

[40] In *Musqueam*, for example, the Court indicated that Public Works and Government Services might possibly lose $33 million dollars as a result of any injunction (at para 66). This is not the case at hand, where the Minister cannot be said to face the possibility of such a substantial loss.

[41] In *Taseko Mines Ltd.* v Phillips, 2011 BCSC 1675, Justice Grauer illustrates at para 70 the types of considerations warranting such discretion:

> I conclude that the circumstances of this case justify an order relieving the petitioners of the obligation to give an undertaking as to damages. Those circumstances are: my assessment of the balance of convenience as outlined above; the importance of ensuring that matters proceed on an appropriate basis between these parties for the foreseeable future; and the relative economic strength of the parties and the relative harm each is likely to suffer. I also take into account the petitioners' letter to Taseko of October 13, 2011, in which they notified Taseko of their position, and advised Taseko not commence any activities under the permits while the Tsilhqot'in National Government considered its options for response.

[42] The Applicants gave notice of their intentions to the Minister and to the commercial fishery to make this application. They refrained from participating in the WCVI commercial roe herring fishery. The Applicants do not obtain any financial gain by the continuation of the conservation closure of the 2014 WCVI roe herring fishery. All benefit by maintaining the closure for conservation purposes in order to allow the WCVI herring fishery to recover.

[43] Additional considerations are that the closure is in accord with the DFO assessment and recommendation and reallocation of licences to other herring fish stock areas is possible.

[44] I am satisfied the circumstances of this case support an order relieving the Applicants of the obligation to give an undertaking with respect to damages.

Costs

[45] Finally, on the matter of costs, the Applicants have been successful on their motion and would be entitled to costs. There costs as against the Intervener, who was an intervener for the

interlocutory application only, and who presented the Court with information in its brief presentation.

ORDER

THIS COURT ORDERS that:

1. The Minister of Fisheries and Oceans, a Regional Director-General or a Fishery Officer are prohibited from opening a commercial roe herring fishery on the West Coast of Vancouver Island pursuant to the *Fishery (General) Regulations* SOR/93-53, ss. 6(1) and (2) and the *Pacific Fishery Regulations*, SOR/93-54 pending the hearing of the Applicants' Application for Judicial Review;
2. The Applicants are not required to provide an undertaking with respect to this interlocutory injunction;
3. Costs in favour of the Applicants; and
4. No costs for or against the Intervener.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-404-14

STYLE OF CAUSE: THE AHOUSAHT, EHATTESAHT, HESQUIAHT, MOWACHAHTÉMUCHALAHT 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 21, 2014

REASONS FOR ORDER AND ORDER: MANDAMIN J.

DATED: FEBRUARY 28, 2014

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