

Date: 20080331

Docket: A-87-07

Citation: 2008 FCA 113

**CORAM: LÉTOURNEAU J.A.
EVANS J.A.
RYER J.A.**

BETWEEN:

NATIVE COUNCIL OF NOVA SCOTIA

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Halifax, Nova Scotia, on March 31, 2008.

Judgment delivered from the Bench at Halifax, Nova Scotia, on March 31, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Halifax, Nova Scotia, on March 31, 2008)

EVANS J.A.

[1] This is an appeal by the Native Council of Nova Scotia from a decision of Justice Layden-Stevenson of the Federal Court dismissing the Council's application for judicial review of a decision of the Minister of Fisheries and Oceans Canada. The Minister's decision imposed a condition in the 2004-05 fishing licence issued to the Council limiting the number of lobsters that

could be caught in two designated fishing areas by the Council's members. The Judge's decision is reported as *The Native Council of Nova Scotia v. Canada (Attorney General)*, 2007 FC 45.

[2] The Council had been created in 1974 to assist and to give voice to Mi'kmaq and other Aboriginal people living off-reserve in Nova Scotia. The Council alleges that the quota imposed by the Minister potentially restricts the Aboriginal right of its Mi'kmaq members to fish for food, social and ceremonial purposes in any inland or coastal waters of Nova Scotia. It alleges further in this litigation that the consultation which took place before the Minister imposed the quota was inadequate to discharge either the Minister's duty to consult and accommodate under section 35 of the *Constitution Act, 1982*, or the common law duty of procedural fairness.

[3] We agree with Justice Layden-Stevenson that the application for judicial review should be dismissed. In particular, we are not persuaded that the Council adduced enough evidence to the Court to establish that, when the quota was proposed, the Minister knew or ought to have known that the Council had made a credible assertion that its Mi'kmaq members had an Aboriginal right to fish in any inland or coastal waters of Nova Scotia (including the two designated areas to which the lobster quota applied) for food, social and ceremonial purposes.

[4] In our view, the existence of previous jurisprudence dealing with related, but different and more limited, Mi'kmaq fishing rights in Nova Scotia, the Council's statement of claim in other litigation against the Minister, and the "no prejudice" clauses in Fishing Agreements between the Minister and the Council, were insufficient to discharge the Council's burden of outlining to the

Minister the claims of its Mi'kmaq members "with clarity, focussing on the scope and nature of the Aboriginal right they assert": *Haida Nation v. British Columbia (Minister of Forests)*, [2004]3 S.C.R. 511, 2004 SCC 73, at para. 36.

[5] Accordingly, since the constitutional duty to consult was not triggered on the facts of this case, it is unnecessary for us to consider the hypothetical question of whether the consultation that occurred would have been sufficient to discharge the Minister's duty to consult pursuant to section 35. Nor need we decide whether the Council should have been regarded as the agent of its Mi'kmaq members in the consultative process.

[6] Finally, we agree with the Applications Judge that, substantially for the reasons which she gave, the consultation which occurred between the Minister and the Council before the Minister imposed the quota was sufficient to discharge the Minister's common law duty of fairness.

[7] For these reasons the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-87-07

**APPEAL FROM A DECISION OF THE FEDERAL COURT DATED JANUARY 16, 2007,
DOCKET NO. T-872-05**

STYLE OF CAUSE: NATIVE COUNCIL OF NOVA
SCOTIA v. ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: March 31, 2008

**REASONS FOR JUDGMENT
OF THE COURT BY:** LÉTOURNEAU J.A.
EVANS J.A.
RYER J.A.

DELIVERED FROM THE BENCH BY: EVANS J.A.

APPEARANCES:

D. Bruce Clarke FOR THE APPELLANT

Susan L. Inglis and Jonathan D. N. Tarlton FOR THE RESPONDENT

SOLICITORS OF RECORD:

Burchell Hayman Parish FOR THE APPELLANT
Halifax, Nova Scotia

John H. Sims, Q.C. FOR THE RESPONDENT
Department of Justice
Halifax, Nova Scotia