Federal Court Cour fédérale

Date: 20210830

Docket: T-129-21

Citation: 2021 FC 900

Ottawa, Ontario, August 30, 2021

PRESENT: Mr. Justice Sébastien Grammond

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

Respondents

and

ALEXANDRA MORTON, DAVID SUZIKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY AND WATERSHED WATCH SALMON SOCIETY

Interveners

ORDER AND REASONS

[1] Homalco First Nations and Tla'amin Nation [the Sister Nations] move for an adjournment of the hearing of this application for judicial review. The Sister Nations are not currently parties to the application. They were denied leave to be added as parties. They are appealing that decision to the Federal Court of Appeal. They would like this Court to wait for the outcome of their appeal before hearing the underlying application.

[2] I am dismissing the Sister Nations' motion. I am not persuaded that they will suffer injustice if the hearing proceeds as scheduled, and the Applicants have a strong interest in a timely decision on the merits of the application.

I. Background

[3] The underlying application for judicial review is directed at a decision made by the Minister of Fisheries and Oceans to discontinue all fish farming operations in a specific part of the Salish Sea by June 30, 2022. Four fish farm operators argue that that decision is unreasonable.

[4] The Sister Nations moved to be added as parties pursuant to rule 104 of the *Federal Courts Rules*, SOR/98-106. They alleged that the Minister's decision constitutes an accommodation of their Aboriginal and treaty rights protected by section 35 of the *Constitution Act, 1982*. Hence, overturning the decision would affect their rights.

[5] In a decision made on March 18, 2021, my colleague Prothonotary Mandy Aylen (now Justice Aylen) denied their motion, because the record did not show that the decision was an accommodation or that it affected the rights of the Sister Nations.

[6] In the alternative, the Sister Nations sought intervener status pursuant to rule 109, but failed to explain the grounds for such a request. After giving them an opportunity to explain these grounds, Justice Aylen also denied this request.

[7] The Sister Nations appealed Justice Aylen's order. On June 7, 2021, my colleague Justice Michael Phelan dismissed their appeal: *Mowi Canada West Inc v Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 548. The Sister Nations have appealed this decision to the Federal Court of Appeal.

[8] Meanwhile, the hearing of the application was set for five days beginning on October 18, 2021.

[9] On August 3, 2021, the Sister Nations brought the present motion for the adjournment of the hearing set for October 18. They allege that they will suffer prejudice if the application is heard before the appeal of Justice Phelan's order; that no prejudice will result to the Applicants from a short delay; and that the case has exceptional importance.

[10] On August 18, 2021, Justice Aylen made a further order granting intervener status to the First Nations Fisheries Council of British Columbia, the British Columbia Assembly of First

Nations, the Union of British Columbia Indian Chiefs and the First Nations Summit. At that time, the Applicants had already filed their responding submissions on this motion. The Sister Nations emphasized this new order in their reply, arguing that Justice Aylen contradicted a key finding underlying her March 18 order. As a result, I directed the Applicants to provide further submissions as to the impacts of this order on the motion to adjourn.

II. Analysis

[11] Rule 36(1) provides that the Court may adjourn a hearing "on such terms as the Court considers just." There are no rigid rules regarding the circumstances in which it is appropriate to adjourn a hearing. In this regard, we are guided by rule 3, which states that the Rules are aimed at securing "the just, most expeditious and least expensive determination of every proceeding on its merits." We are also guided by decisions made in the context of motions for stay of proceedings: see, for example, *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 [*Mylan*]; *Jensen v Samsung Electronics Co, Ltd*, 2019 FC 373.

[12] Thus, as I alluded to in *McCulloch v Canada (Attorney General)*, 2020 FC 565, we must balance the need to offer a timely remedy to aggrieved parties, while ensuring the fairness of the process for all. The public interest in the timely resolution of matters and the need to avoid squandering the Court's time and resources are also relevant considerations. While concepts used in the context of interlocutory injunctions, such as irreparable harm, are not determinative, they remain a useful component of the analysis.

[13] Two additional considerations are relevant to the exercise of my discretion. First, the principle of judicial comity invites me to follow decisions made by my colleagues, unless there is a serious reason to doubt their accuracy. Moreover, I should refrain from speculating as to the outcome of the appeal before the Federal Court of Appeal. Second, my role is not to rule on the merits of the case. I shall thus state my reasons in a manner that avoids pronouncing on the issues in the underlying application for judicial review.

[14] The Sister Nations' main ground for their motion is the injustice that would result if their appeal is allowed after the application is heard and determined in their absence. They rely on rule 103(1) to illustrate the prejudice they would suffer. It is important, however, to quote rule 103 in full:

103 (1) No proceeding shall be defeated by reason of the misjoinder or nonjoinder of a person or party.	**103 (1)** La jonction erronée ou le défaut de jonction d'une personne ou d'une partie n'invalide pas l'instance.
(2) In a proceeding in which a proper person or party has not been joined, the Court shall determine the issues in dispute so far as they affect the rights and interests of the persons who are parties to the proceeding**.**	**(2)** La Cour statue sur les questions en litige qui visent les droits et intérêts des personnes qui sont parties à l'instance même si une personne qui aurait dû être jointe comme partie à l'instance ne l'a pas été.

[15] The Sister Nations focus on the first paragraph of rule 103. They assert that they will be deprived of a meaningful remedy if the present application is heard in their absence. A subsequent decision of the Federal Court of Appeal in their favour could not "defeat" the judgment rendered on the application. This argument, however, overlooks the second paragraph of the rule. If the application proceeds in the absence of the Sister Nations, the judgment will not

determine their rights. They will be able to assert their rights in separate proceedings. Thus, for instance, if the present application results in the Minister making a different decision, nothing would preclude the Sister Nations from applying for judicial review if they are of the view that the new decision impinges upon their section 35 rights.

[16] For this reason, I find that the Sister Nations have failed to show that they will suffer serious or irreparable harm or that their rights will be compromised if the hearing is not adjourned. It is true that it would be inconvenient for them to have to begin new proceedings to assert their rights. Such a scenario, however, remains hypothetical. Two of my colleagues have reached the conclusion that their rights would not be directly affected by the outcome of the present application. As I mentioned above, judicial comity requires me to follow their decisions. Moreover, the issue could become theoretical if the present application for judicial review is dismissed. The mere possibility of such an inconvenience does not weigh heavily in the balance.

[17] Justice Aylen's August 18 order does not alter my assessment. On a fair reading of her reasons, she did not contradict her March 18 order. In this regard, one must bear in mind that the criteria to be added as a party under rule 104 and to be granted leave to intervene under rule 109 are different. Moreover, each motion for leave to intervene must be decided based on the materials provided by the proposed intervener.

[18] The Sister Nations make much of Justice Aylen's statement "that the Respondent's consultations with, and obligations to, the First Nations played a role in her decision and thus are relevant to the consolidated applications" (at paragraph 47 of her August 18 order). I have no

doubt that the Court will have due regard for these considerations. By granting leave to intervene to First Nations organizations, Justice Aylen ensured that the Court will hear an Indigenous perspective on the matter, beyond what the Minister will undoubtedly argue to buttress the validity of her decision. However, the fact that the Minister consulted the Sister Nations does not necessarily mean that their section 35 rights are at play or would have been infringed if the Minister had made a different decision. Thus, Justice Aylen's statement does not jeopardize the basis of her March 18 decision to the extent that a postponement of the hearing is warranted.

[19] On the other side of the ledger is the delay that will inevitably result if the hearing is adjourned. In this connection, the Sister Nations argue that the delay will be short and prejudice no one. I do not share this assessment.

[20] It is unknown when the Federal Court of Appeal will decide the appeal. The Sister Nations have not asked the Federal Court of Appeal to expedite the matter nor to issue interim relief. I remain unconvinced by the explanations given by the Sister Nations in this regard. Realistically, it may be several months, if not a year, before a decision is rendered.

[21] Moreover, this delay will cause prejudice to the Applicants. Once again, I emphasize that I do not wish to be understood as expressing any opinion on the merits of the case. Nonetheless, the Applicants must take immediate measures to comply with the Minister's decision in time for the June 30, 2022 deadline. They must begin the decommissioning of their operations. If they are right to assert that the Minister's decision is invalid, they should be able to obtain an answer

from this Court in a timely fashion. This is the aim of the case management measures taken in this case.

[22] If the Applicants are entitled to a remedy, but this remedy is delayed until the decision of the Federal Court of Appeal, they will have been forced to undertake significant decommissioning measures that would ultimately be found to be unwarranted. The undesirability of such a result weighs heavily against adjourning the hearing.

[23] To summarize, the Sister Nations have not proved that they will suffer any injustice if the hearing proceeds as scheduled, while a postponement will cause serious prejudice to the Applicants. The adjournment is not in the interests of justice. As a result, the motion for adjournment will be dismissed.

JUDGMENT in T-129-21

THIS COURT'S JUDGMENT is that the motion for adjournment of the hearing of this application is dismissed, without costs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-129-21
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 SUZIKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY AND WATERSHED WATCH SALMON SOCIETY

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369

ORDER AND REASONS:	GRAMMOND, J.
DATED:	AUGUST 30, 2021

APPEARANCES:

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