SUPREME COURT OF NOVA SCOTIA
Citation: *Sipekne'katik v. Nova Scotia (Environment)*, 2016 NSSC 178

Date: 20160713
Docket: HFX450765
Registry: Halifax

Between:

Sipekne'katik

Appellant

v.

Nova Scotia (Minister of Environment) and
Alton Natural Gas Storage LP

Respondent

Decision

Judge: The Honourable Justice Michael J. Wood

Heard: June 22, 2016, in Halifax, Nova Scotia

Counsel: Raymond F. Larkin, Q.C. and Balraj Dosanjh
for the appellant, Sipekne'katik

Alexander Cameron for the respondent,
Nova Scotia (Minister of Environment)

Robert Grant, Q.C., Daniela Bassan, and Laura Rhodes
for the respondent, Alton Natural Gas Storage LP

By the Court:

[1] Sipekne'katik is one of 13 First Nations in Nova Scotia and was formerly known as the Shubenacadie Band. It claims aboriginal and treaty rights over hunting and fishing in Nova Scotia particularly in the area of the Shubenacadie River estuary.

[2] Alton Natural Gas Storage LP wishes to develop an underground storage facility for natural gas in the province of Nova Scotia. By providing the ability to store natural gas Alton hopes to provide security of supply and price stability for consumers of the commodity in this province. Not surprisingly, they require a number of regulatory approvals before the facility can be completed and operated. One of these is an Industrial Approval under the *Environment Act*, S.N.S. 1994-95, c. 1 which was issued on January 20, 2016. It authorizes the operation of a brine storage pond and associated works at Fort Ellis, Colchester County, Nova Scotia.

[3] Sipekne'katik objected to the issuance of the Industrial Approval and appealed to the Minister of the Environment under section 137 of the *Environment Act*. The Minister dismissed the appeal by decision issued on April 18, 2016, and Sipekne'katik appeals that determination to this court pursuant to section 138 of the *Environment Act*. The hearing is scheduled for August 17 and 18, 2016.

[4] Sipekne'katik brought a motion for an order staying the Industrial Approval pending a final resolution of their appeal. This is my decision with respect to that motion.

Overview of the Project

[5] The brining pond which is the subject of the Industrial Approval is part of a larger project involving the construction and operation of an underground storage facility for natural gas. The development of the overall project has been underway for many years. The initial registration for environmental assessment took place in July 2007.

[6] The construction involves the creation of underground caverns where natural gas can be stored. This will allow natural gas to be purchased when prices are low and stored until required. This buffer provides a security of supply and a stabilization of prices for consumers.

[7] The underground facility will be built in a salt formation using a technique known as solution mining. This involves pumping water into the structure where it will dissolve the salt thereby creating a cavern. For the Alton project the water to be used in the mining process will come from the Shubenacadie River which is approximately 12 kilometers away. Once the water is removed from the underground excavation it will contain a significant level of dissolved salt. This brine will be returned to the Shubenacadie River where it is diluted and ultimately returned to the river.

[8] The brine storage pond, which is the subject of the Industrial Approval, is the location where the salt solution is kept until it is diluted and returned to the river.

[9] On December 18, 2007, the Minister of Environment and Labour issued the Environmental Assessment Approval for the project. The terms and conditions included the following:

> 2.1 The proponent, as part of the application for Part V Approval under the *Environment Act*, must provide for review the following monitoring programs and plans developed in consultation with the Department of Fisheries & Oceans (DFO). Based on the results of the monitoring programs, the proponent must make necessary modifications to mitigation plans and/or operations to prevent continues unacceptable environmental effects to the satisfaction of NSEL and DFO (sic).
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> (a) An Effects Monitoring Plan including parameters such as frequency and duration. The plan must evaluate potential impacts of sedimentation, salinity and flow alterations on aquatic organisms and include an impact prediction.
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> (b) A program to monitor discharge salinity levels into the estuary to ensure no negative impacts to fish species result. This program should be developed in consultation with Environment Canada (EC).
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> (c) A plan to gather baseline information on water temperature and the presence of Atlantic salmon, Striped bass and Atlantic sturgeon eggs and larvae during one spawning season prior to the commencement of solution mining.
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> (d) A long term monitoring program for Atlantic salmon, Striped bass and Atlantic sturgeon eggs and larvae. This plan must identify operational responses to unexpected impacts to populations.
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> (e) An ongoing monitoring program of fish screens or passive water intakes to determine if impingement is occurring.

[10] Since that time Alton has undertaken the plans and monitoring programs referred to in the Approval. There have been exchanges of information, meetings and consultations among various parties concerning the project. Participants include Alton, staff of the Nova Scotia Department of Environment, representatives of Sipekne'katik, and the Kwilmu'kw Maw-Klusuaqn Negotiation Office (KMKNO). The latter group represents the Mi'kmaq of Nova Scotia in consultations with the province of Nova Scotia. Sipekne'katik participated as part of KMKNO until March 2013 when it withdrew to pursue an independent consultation process.

[11] Through discussions with the various parties the process by which the brine would be diluted and returned to the Shubenacadie River was developed. One objective was to minimize adverse impacts on the environment with particular emphasis on salmon and striped bass.

[12] According to the affidavit of Charles R. Lyons filed by Alton, additional work must be completed prior to starting the solution mining process. The construction schedule attached as an exhibit shows the discharge of diluted brine water into the river would begin August 29, 2016, however the affidavit says it will start in September. The schedule indicates the process will continue until September 2019.

Appeal and Stay Motion

[13] The notice of appeal filed by Sipekne'katik requests that the Minister's decision be reversed and the Industrial Approval be set aside. There are 16 grounds of appeal however the primary argument is that the province has failed to comply with the duty of the Crown to consult with Sipekne'katik and accommodate its interests. Such a duty is said to arise because of the project's potential adverse impact on aboriginal and treaty rights. In addition, Sipekne'katik argues that the Minister breached a duty of procedural fairness and denied them natural justice by considering information as part of her assessment of their appeal which had not been disclosed to them.

[14] This motion seeks an order staying the Industrial Approval pending final resolution of this appeal. There was some confusion about what activities of Alton would be covered by the stay. At the hearing counsel for Sipekne'katik clarified that the only thing they wanted to prevent was the withdrawal of water and return

of diluted brine to the Shubenacadie River. Any other work of Alton would not be affected by the requested order.

Legal Principles

[15] Sipekne'katik has made this motion for a stay of the Industrial Approval dated January 20, 2016, pending final resolution of their appeal under s. 138 of the *Environment Act*. In doing so they rely on *Civil Procedure Rule 7.28* which reads as follows:

> Stay pending judicial review or appeal
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> 7.28 (1) A judge may stay a decision under judicial review or appeal and any process flowing from the decision until the determination of the judicial review or appeal.
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> (2) A motion for a stay must be made at the same time as the motion for directions, unless a judge orders otherwise.
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> (3) The motion must be made by notice of motion in accordance with *Rule 23* - Chambers Motion, although it is mentioned in the notice of appeal or notice for judicial review.
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> (4) A judge may grant an interim stay until the hearing of a motion for a stay.
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> (5) The judge may grant any order, including an injunction, as may be necessary to effectively stay a decision.

[16] A stay of proceedings is a discretionary remedy which is focused on ensuring that an appellant should not be deprived of the fruits of their success as a result of events which occur prior to the determination of their appeal. The courts have developed a three part test which was described by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada* (A.G.) [1994] 1 S.C.R. 311 as follows:

> [43] *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits…

[17] In the earlier decision of *Purdy v. Fulton Insurance Agencies Limited*, 1990 NSCA 23 the Nova Scotia Court of Appeal described the test in the following terms:

> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either
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> 1. satisfy the Court on each of the following:
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> (i) that there is an arguable issue raised on the appeal;
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> (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and
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> (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience.
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> OR
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> failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[18] This passage highlights the flexible nature of this discretionary remedy and recognizes there may be situations where a stay should be granted even though a strict application of the three part test would not lead to that result. Such exceptional circumstances should only be resorted to in order to avoid an injustice which would result from enforcement of the order under appeal.

[19] Cromwell JA, as he then was, described what is meant by "exceptional circumstances" in *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.* 2006 NSCA 129 as follows:

> [11] Very few cases have been decided on the basis of the secondary test in *Fulton*. Freeman, J.A. in *Coughlan et al. v. Westminer Canada Ltd. et al.* (1993), 125 N.S.R. (2d) 171 (C.A., in Chambers) at para. 13 offered as an example of exceptional circumstances a case in which the judgment appealed from contains errors so egregious that it is clearly wrong on its face. As Fichaud, J.A. observed in *Brett v. Amica Material Lifestyles Inc.* (2004), 225 N.S.R. (2d) 175 (C.A., in Chambers), there is no comprehensive definition of "exceptional circumstances" for *Fulton's* secondary test. It applies only when required in the interests of justice

> and it is exceptional in the sense that it permits the court to avoid an injustice in circumstances which escape the attention of the primary test.
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> [12] While there is no comprehensive definition of what may constitute "exceptional circumstances" which may justify a stay even if the applicant cannot meet the primary test, those exceptional circumstances must show that it is unjust to permit the immediate enforcement of an order obtained after trial. So, for example, in *Fulton* itself, Hallett, J.A. found that exceptional circumstances consisted of three factors in combination: first, that the judgment was obtained in a summary proceeding rather than after trial; second, that on the face of the pleadings the appellant raised what appeared to be an arguable issue and, thus, was likely to be successful on appeal; and third, the appellant had a counterclaim and claim to a set off that had not been adjudicated making it premature to execute on the summary judgment.

[20] Most applicants for a stay of proceedings are able to show that there is a serious issue to be tried and as a result the motion is determined on the basis of the second and third criteria. This requires the court to consider the circumstances of the parties and how they may be affected by the granting or refusal of the stay if they are ultimately successful on the appeal.

[21] Where the appeal relates to a monetary judgment the assessment of irreparable harm and the balance of convenience is relatively straight forward. With a non-monetary judgment the analysis becomes more complex. In this case, Sipekne'katik's appeal relies upon alleged breaches of the Crown's duties of consultation and procedural fairness. Each motion must be determined on its own merit, however a survey of the jurisprudence relating to stays and the Crown's duty to consult will be of assistance.

[22] The leading case on the duty to consult is *Haida Nation v. B.C. (Minister of Forest)* [2004] 3 S.C.R. 511. In that decision the court explained when the duty to consult arises as follows:

> [26] Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

> [27] The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

[23] The scope of the duty to consult depends on the circumstances and will be affected by the nature of the aboriginal right and the degree of potential infringement. The Supreme Court described the assessment as follows:

> [43] Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty [page533] on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. '"[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
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> [44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
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> [45] Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect

> reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown [page534] may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[24] Where the underlying appeal raises issues concerning the duty to consult and accommodate the stay motion requires careful consideration about whether implementation of the decision will prevent meaningful consultation should the appeal be successful. In such circumstances the aboriginal group seeking the stay will probably be successful in establishing irreparable harm and the balance of convenience will be in their favour.

[25] In *Taseko Mines Limited v. Phillips* 2011 BCSC 1675 the court granted an interim injunction to preclude exploration activities pending the outcome of a judicial review challenging permits issued by the Province of British Columbia. The stay was sought by one of the six bands that constituted the Tsilhqot'in Nation whose traditional territory included the area covered by the exploration permits. Their judicial review alleged a breach of the Crown's duty of consultation.

[26] The proposed exploration work appeared to be of relatively short duration consisting of small drill holes, shallow test pits, and clearing of trails in an area that was no longer pristine. The Crown and the mining company argued that the loss of the procedural right of consultation could not in law constitute irreparable harm for purposes of the injunction. The court reviewed the evidence and concluded that the physical work proposed to be completed would irreparably harm the aboriginal rights of the band. The court's analysis was as follows:

> [63] Turning to the potential effect of the program on the aboriginal rights of the petitioners, I bear in mind that the result of a successful challenge by the petitioners is on balance unlikely to eliminate the work altogether, though it may reduce it or effect an improved program of mitigation, or both.
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> [64] Taseko submits that much of the harm asserted by the petitioners overstates the actual impact the work will have:
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> > [61] ... The area in which the work under the Approvals will be conducted is not the pristine environment contemplated in some cases in which interlocutory injunctions have been granted. The work is in an area which is already had various mining related activities take place, and some of the current work is in the same location as previous works.

> [65] It seems to me, with respect, that this highlights one of the significant problems raised by the petitioners. Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.
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> [66] The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished. This is supported by the evidence of Chief Baptiste, Alice William and Sonny Lulua.
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> [67] In my view, this not only establishes significant irreparable harm to the petitioners' substantive rights, but also emphasizes again the importance of the process discussed above. It also speaks to the *status quo*.

[27] With respect to the loss of the right to be consulted the court held that this was one of the factors to consider in the balance of convenience and concluded as follows:

> [57] In my view, it follows from that case and many others that in weighing the balance of convenience, it is proper to take into account the fact that if the injunction does not issue, the petitioners will have lost their asserted right to be consulted at a deep level in relation to the exploration program, and their petition will become moot. Granting the injunction, on the other hand, will not deprive Taseko of the opportunity to obtain the geological and engineering information it requires, except to the extent that their proposed program is properly curtailed by the process of appropriate consultation. If the petitioners are ultimately unsuccessful, and the permits upheld, then Taseko will be behind by a few months, but in the overall scheme of its billion-dollar project , I consider that to be a real but relatively minor inconvenience.

[28] The Federal Court of Appeal rejected the argument that loss of the opportunity to consult will always amount to irreparable harm in *Musqueam Indian Band v. Canada* 2008 FCA 214. That litigation involved an application for judicial review requesting an order restraining the sale or disposition of office properties in downtown Vancouver owned by the Government of Canada. The challenge alleged a breach of the duty to consult prior to disposition taking place. The motion judge had granted an interlocutory injunction restraining the sale pending outcome of the judicial review. The Federal Court of Appeal set aside the injunction on the basis that irreparable harm had not been established. There was no allegation of

infringement of an aboriginal right with respect to the disposition of the buildings. As the court indicated, whether irreparable harm results from the loss of an opportunity to consult must be decided on a case by case basis. In the context of that litigation the court said as follows:

> [52] In this case, the loss of an opportunity for Musqueam to consult and be accommodated is insufficient to constitute irreparable harm. I agree with the appellant that if an allegation of inadequate consultation always constituted irreparable harm, that could constitute a veto over the government transferring any title to property which is located in an area claimed as a traditional territory of an Aboriginal group. That would explicitly contradict the comments of the Supreme Court of Canada in *Haida Nation* at para. 48: "This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim." Rather, it is necessary to look deeper in each case and discern whether the failure to consult constitutes irreparable harm.
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> …
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> [59] It was argued that refusing an injunction in this case would set a precedent in that the Crown could always claim that there was no irreparable harm because damages could always be an adequate remedy. I do not agree. Each case has its own particular facts. Where an Aboriginal band leads evidence of unique need, special connections to the land in question, or a potential change in the character of the land in question, the result may well be different.

[29] In *Ahousaht First Nation v. Canada (Minister of Fisheries and Oceans)* 2014 FC 197 ("*Ahousaht #1*") the Federal Court granted an interlocutory injunction pending judicial review of the Minister's decision to approve a fisheries management plan. That plan included a commercial herring fishery in an area which had been closed for the previous nine years due to conservation concerns. The judicial review alleged that the plan breached the aboriginal right to fish and the Minister had not met his duty to consult the applicants prior to approval. The applicant's arguments with respect to irreparable harm were as follows:

> [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.

[30] The court concluded that the applicants had established irreparable harm for a number of reasons including that the Minister's decision was contrary to advice

from DFO staff that the fishery stay closed for conservation purposes. The court also relied on the applicants' loss of the opportunity to have meaningful negotiations about establishment of their aboriginal right to fish. The court commented on that issue as follows:

> [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.

[31] A year later the Federal Court dealt with another motion for an interlocutory injunction prohibiting the opening of a commercial herring fishery pending judicial review of the Minister's decision to approve the fisheries management plan for the same area. In *Ahousaht v. Canada (Minister of Fisheries and Oceans)* 2015 FC 253 ("*Ahousaht #2")* the court refused to grant the injunction. It appears from this decision that consultation had started but had not yet concluded. Based upon the latest scientific information DFO staff were now advising the Minister that the fishery could be opened which was a change from the recommendation made the prior year. The court rejected the applicants' argument that they would suffer irreparable harm for the following reasons:

> [24] While the Applicants' argue that re-opening the WCVI area to roe herring fishery "raises conservations concerns" and "puts the implementation of their established Aboriginal Rights at risk", with respect, these concerns are, at best, speculative, and based on the scientific evidence before me, as well as the evidence of on-going, good faith negotiations by the Respondent to consult with and accommodate the First Nations Applicants' fishing rights in the WCVI area, I do not find that the Applicants have made out a case of irreparable harm. While there may be disagreement about management decisions concerning the roe herring fishery in the WCVI area, an agreement has not yet been reached on an accommodated settlement, that is no basis for a finding of irreparable harm.
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> [25] Moreover, I also agree with the Respondent that there is no reason to assume that the Applicants' rights cannot or will not be reasonably and fairly accommodated simply because other commercial interests participate in a limited commercial fishery in the WCVI area.

[32] The only apparent change from the situation in *Ahousaht #1* was that science now supported a herring fishery and consultation had begun.

[33] In *Buctouche First Nation v. New Brunswick* [2014] N.B.J. 266 the New Brunswick Court of Appeal upheld the denial of an interim injunction that would have prohibited the Government of New Brunswick from entering into forest management agreements with third parties. The appellants intended to start litigation challenging the agreements on the basis that the province failed to consult and accommodate their interests and breached their treaty rights to hunt, fish and harvest. The Court of Appeal found no error in the application judge's conclusion that there was insufficient evidence of irreparable harm. The absence of evidence of an immediate detrimental impact was fatal to the injunction application. The court's analysis is found in the following passage:

> [17] I have not been persuaded that the application judge directed herself incorrectly in law in this regard. She did not err in concluding that the alleged breach of the duty to consult did not amount to irreparable harm. J.D. Irving Ltd. contests the consultation record put forward by the Intended Appellants and insists that consultation is ongoing. In my view, the record demonstrates that the application judge did not have adequate evidence to assess whether there was insufficient consultation to establish there was irreparable harm. It would have been speculative of her to do so. And as she quite rightly pointed out, inadequate consultation does not always constitute irreparable harm: *Canada (Public Works and Government Services) v. Musqueam Indian Band*, 2008 FCA 214, [2008] F.C.J. No. 919 (QL), at para. 52.
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> [18] Much was made by the Intended Appellants of the expression the application judge used, that the alleged harm to Aboriginal and treaty rights had not "crystallized" as of the date of hearing. She essentially concluded that the Intended Appellants had not proven actual harm. Where harm has not yet occurred, the higher standard for *quia timet* (he or she fears) injunctions applies since the Court is asked to predict that harm will occur in the future: Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2013) (loose-leaf), ch. 1 at 31-32. To award an injunction in such circumstances there must be a high degree of probability that harm will occur. While several hyperboles were used to describe the nature of the alleged harm to the environment, the Province characterizing it "as death by a thousand cuts" and the Intended Appellants as "death by the stroke of a pen", the record does not reveal any immediate harmful impact that would support the granting of an interim injunction. Indeed, in the Intended Appellants' written submission they state "this affidavit evidence is clearly relevant to the arguments raised by the Intended Appellants, as it helps to establish <u>likely</u> impacts on their substantive treaty and Aboriginal rights" (para. 59) (emphasis added).

[34] Another case where the court found insufficient evidence of irreparable harm is *Sapotaweyak Cree Nation v. Manitoba* 2015 MBQB 35 where the plaintiff

sought a declaration that the defendants had not adequately consulted with them concerning construction of an electrical transmission line. The court considered a motion requesting an interlocutory injunction to stop clearing land in a specific geographic area until adequate consultation and accommodation had taken place. The court reviewed the evidentiary record in detail and concluded that the plaintiff had not raised a serious issue about whether the defendants had met their duty to consult and

accommodate. The court also found that the plaintiff had failed to establish irreparable harm for the following reasons:

> [220] As observed earlier, SCN failed, to a large degree, to share these concerns with Manitoba or Hydro by failing to participate in the CEC process and by failing to provide a final ATK Report. In this application, SCN has alluded to irreparable harm in general rather than specific terms. It is not enough for SCN to simply allege that harvesting rights and culturally significant sites or burial grounds stand to be negatively affected by the clearing and cutting. In order to establish irreparable harm, SCN is required to specifically identify what harvesting rights will be affected and how and what significant sites and burial grounds will be disturbed. In this case, both Manitoba and Hydro have furnished ample evidence as to the mitigative measures that have been and will continue to be put into place. I will be referring to some of those mitigative measures.
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> [221] From the point of view of providing actual evidence of irreparable damage, SCN has failed to do so.

[35] The court also rejected the argument that inadequate consultation alone was sufficient to constitute irreparable harm relying on the decision in *Musqueam Indian Band*.

[36] The *Sapotaweyak* decision was followed by the Ontario Superior Court of Justice in *Petahtegoose v. Eacom Timber* 2016 ONSC 2481 in which the applicant plaintiffs sought an interlocutory injunction restraining forest licence holders from cutting, road building or aerial spraying on lands which had been promised to them by treaty. They argued they had not been adequately consulted prior to issuance of the licences. As in *Sapotaweyak,* the court reviewed the record and found that the plaintiffs failed to meet the threshold of showing a serious question to be tried in light of the consultation which had taken place. The court went on to conclude that the evidence of irreparable harm was not sufficient for the following reasons:

> [44] Additionally, I am not satisfied on the evidence before me that the applicants have demonstrated that they will suffer irreparable harm if the injunction is not granted. I am mindful that irreparable harm to Aboriginal peoples have been recognized when activities such as logging would interfere with or damage culturally significant sites and artifacts such as burial sites and sacred rights. (para 52 *Wahgoshig First Nation v. Ontario,* 108 O.R. (3d) 647.
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> [45] The fact is that the applicants have not been specific about the harm that they would suffer if an injunction is not granted. The applicants have spoken in terms of generalities. Generalities do not satisfy the degree of proof required to be proven to establish irreparable harm. As stated by the Manitoba Court of Queen's Bench in
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> *Sapotoweyak Cree Nation v. Manitoba,* 251 ACWS (3d) 362, at paragraph 220,
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> > In this application SCN has alluded to irreparable harm in general rather than specific terms. It is not enough for SCN to simply allege that harvesting rights and culturally significant sites or burial grounds stand to be negatively affected by clearing and cutting. In order to establish irreparable harm, SCN is required to specifically identify what harvesting rights will be affected and how and what significant sites and burial grounds will be disturbed.
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> [46] As in the *Sapotaweyak* case, the remedial and protective measures put in place by the Crown after consultation with the First Nation representatives took place are likely ample to offset any harm alleged by the applicants.

[37] One decision where a court did grant an interlocutory injunction in circumstances where a breach of the duty to consult was alleged is *Tłı̨chǫ Government v. Canada (Attorney General)* 2015 NWTSC 9. In that case the underlying litigation was a challenge to legislation which had the effect of consolidating three boards responsible for land and water regulation in a portion of the MacKenzie River Valley. The plaintiff was a First Nation whose traditional territory fell under the jurisdiction of one of the smaller boards. It was entitled to appoint two of the four board members. Under the new regime the plaintiff would only appoint one of ten members. The court was satisfied that a breach of the duty to consult prior to creation of the new board might result in irreparable harm. On that issue the plaintiff's argument was as follows:

> [72] The Tłı̨chǫ Government submits the alleged breach of the duty to consult, as well as the alleged breach of its treaty rights under the Tłı̨chǫ Agreement, give rise to the reasonable possibility of irreparable harm, which will manifest in a number of ways.
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> [73] If it is ultimately determined that Canada failed to fulfill its obligations to consult as required under the Tłı̨chǫ Agreement, ie., that it did not give full and

> fair considerations to the Tłı̨chǫ Government's concerns, the opportunity to engage in meaningful negotiations will be lost, as will the opportunity to reach a negotiated solution. The changes, which include dismantling the regulatory infrastructure through which the Tłı̨chǫ Government participates in decisions affecting Wek'èezhii, will take effect without consultation having occurred in the manner required by the treaty. This loss cannot be quantified and would constitute irreparable harm.
>
> [74] The Tłı̨chǫ Government submits the elimination of the WLWB and the new structure of the MVLWB necessarily means it will play a diminished role in managing the Wek'èezhii area. Decisions affecting the area pending determination of this suit will no longer be entrusted to a board where it is guaranteed that half the members are chosen and appointed by the Tłı̨chǫ Government. Instead, as noted above, the Tłı̨chǫ Government appointee will be able to appoint one member to a panel of eleven.
>
> [75] The amendments contemplate a role for the Tłı̨chǫ Government appointee on smaller panels appointed to hear and determine applications affecting Wek'èezhii, but this is not guaranteed, as it is currently. The amendments provide that should the Chairperson decide it is not reasonable to do so, he or she may decline to appoint the Tłı̨chǫ Government member to the panel. The Tłı̨chǫ Government would have no control over the manner in the chairperson exercises this discretionary power.
>
> [76] The Tłı̨chǫ Government suggests the elimination of the WLWB will necessarily result in unquantifiable, intangible and irreparable losses occasioned by staff and board members leaving, taking with them institutional knowledge and skill sets accumulated over many years. It argues that should the Tłı̨chǫ Government ultimately prevail in this suit, the harm caused by these losses would be profound. The WLWB would have to rebuild its corporate knowledge base, possibly from scratch, thus compromising the ability of the Tłı̨chǫ Government to make effective and appropriate decisions in matters affecting Wek'èezhii.

[38] The court found there was a reasonable likelihood of irreparable harm if an injunction was not granted because once decisions were made by the new consolidated board the plaintiff's ability to participate effectively would be gone. The court described the issue this way:

> [83] Again, the Tłı̨chǫ Government does not appear to be suggesting the decisions of the newly structured MVLWB would necessarily be erroneous. What it does suggest is that if the current regime is not maintained pending the final outcome of this case, decisions affecting Wek'èezhii will be made with significantly less - or, possibly, no - participation by the Tłı̨chǫ Government's appointees. Should that occur, the opportunity to participate in those decisions in the manner in which it does now, will be forever lost.

[39] It is clear from these decisions that an allegation of a breach of the duty to consult and accommodate does not relieve the applicant for a stay from the burden of establishing at least a reasonable likelihood of irreparable harm. That harm could take the form of damage to resources which are subject to aboriginal rights such as the right to harvest. It could also be an impairment of the ability to consult in a meaningful fashion because of intervening events. For example, in *Taseko Mines* the exploration activities would have taken place prior to the final hearing and the damage to the land could not be undone. In that situation, a subsequent judicial review decision requiring consultation would be moot.

[40] It is with these principles in mind that I will consider Sipekne'katik's motion for a stay pending the outcome of its statutory appeal.

Positions of the Parties

Sipekne'katik

[41] Counsel for Sipekne'katik spent considerable time reviewing the history of the project and the interaction between his client and the Province of Nova Scotia to illustrate the lack of consultation and the failure to administer and adhere to the principles of procedural fairness. He says that the requirement to establish a serious issue to be decided on the appeal is easily met.

[42] With respect to the second criteria for a stay, which requires the demonstration of irreparable harm, Sipekne'katik says that the burden is to show a "reasonable likelihood" that such harm will occur which is the standard adopted in *Tłı̨ch*ǫ. If the court ultimately determines that the province breached its duty to consult and accommodate Sipekne'katik says they will have lost the opportunity for meaningful negotiation concerning their aboriginal and treaty rights and this amounts to irreparable harm. In support of this proposition they rely on the *Ahousaht #1* and *Tłı̨ch*ǫ decisions. Sipekne'katik also says potential damage to fish species and fish habitat constitutes irreparable harm. Their position is summarized in the following paragraph from the pre-hearing brief:

> 93. Any adverse impact to the river system and to the fish species and fish habitat from the Alton Gas project would constitute irreparable harm because of the cultural, spiritual and traditional significance of the river system and its fish species to Sipekne'katik. The fact that knowledge gaps and uncertainties remain with respect to the potential impacts on the river and on Striped Bass and Atlantic Salmon fish species specifically, which have not been adequately addressed by

> the Respondents, means that there is a reasonable likelihood that the Alton Gas project would alter the river system and jeopardize the recovery of endangered species traditionally fished by Sipekne'katik. The potential alteration to the river system and fish habitat by the Alton Gas project, and the resulting risk to the endangered fish species that are traditionally harvested by Sipekne'katik create a reasonable likelihood of irreparable harm.

[43] Sipekne'katik argues that if a stay is not granted and they succeed on appeal the result will be largely symbolic because no remedy could address the "irreversible impact that brining would have on the Shubenacadie River".

[44] Sipekne'katik makes similar arguments with respect to the balance of convenience and says that any cost or delay to Alton will not be significant in light of the appeal hearing being scheduled for August 2016.

[45] The final submission of Sipekne'katik is that even if they are unable to satisfy the three criteria for a stay there are exceptional circumstances which would justify that remedy because they would be deprived of the opportunity to engage in meaningful negotiation in relation to their treaty and aboriginal rights.

Nova Scotia

[46] Nova Scotia acknowledges that the serious question criteria is a low threshold but argues that the record demonstrates adequate consultation with Sipekne'katik and other aboriginal organizations. It denies any breach of procedural fairness in the way in which the Minister dealt with the Sipekne'katik appeal.

[47] The province's pre-hearing brief says Sipekne'katik has not provided sufficient evidence of irreparable harm and points out that an allegation of inadequate consultation does not necessarily constitute irreparable harm. It points out the significant investment in the project which will provide jobs and economic benefits for Nova Scotians. This is said to give rise to a significant public interest which must be weighed against any alleged impact on the Sipekne'katik treaty and aboriginal rights. It says the public interest tips the balance of convenience in its favour and justifies refusal of a stay.

Alton Natural Gas Storage LP

[48] Much of Alton's pre-hearing brief was focused on the significant and irrecoverable losses which it argues would result if certain work could not take

place over the summer and fall of 2016. At the hearing it became apparent that the relief sought by Sipekne'katik would not prevent this work from taking place and that the only concern was the potential impact of the brining operation on the river and fish habitat.

[49] Alton pointed out the lengthy process which led to the Industrial Approval. It noted that Alton had voluntarily delayed the project in order to participate in consultation and engagement with First Nations groups including Sipekne'katik. Alton says that a number of changes were made to the project to reflect the results of this engagement including ongoing monitoring of fish and fish habitat. Another change was an agreement to suspend the brining process during the period when striped bass are spawning. When river monitoring discloses the presence of bass eggs brining will stop for 24 days.

[50] Alton's submissions on the issue of a stay focused on the criteria of irreparable harm and the balance of convenience. Like Nova Scotia they say that Sipekne'katik has not met the burden of establishing irreparable harm. They rely on the Federal Court decision in *Ahousaht #2* to say that the required evidence must be clear and not speculative. They point out the existing mitigation measures which have been incorporated into the brining process and are designed to prevent harm to the Shubenacadie River and fish habitat. In the face of such measures Alton says that Sipekne'katik cannot rely on a theoretical threat of harm.

[51] To the extent that there are any "data gaps" about the potential impact of brining Alton says that these have been addressed through the monitoring and testing plans developed and incorporated in the application for Industrial Approval.

[52] With respect to the balance of convenience Alton refers to the public interest in having the project completed and the benefits which would accrue to Nova Scotians. They argue that the mitigation measures already incorporated, which include ongoing monitoring of environmental impacts and salinity levels, adequately addresses the concerns of Sipekne'katik with respect to potential impact on treaty and aboriginal rights.

Analysis

Serious Question

[53] Sipekne'katik's appeal is based upon an allegation that the province did not meet their duty of consultation and accommodation because of the project's

potential impact on treaty and aboriginal rights. It also says that the Minister's appeal was conducted in a way that denied them natural justice because the Minister considered a report which had not been provided to them.

[54] There does not appear to be much disagreement that the Alton Natural Gas Storage project gave rise to a duty to consult with the Mi'kmaq of Nova Scotia. There are terms of reference for formal consultation which have been established by a tripartite agreement between the Mi'kmaq of Nova Scotia, the province of Nova Scotia and the Government of Canada. The process described in those terms of reference was triggered in this case and resulted in consultation with KMKNO on behalf of all Mi'kmaq in Nova Scotia as well as separate consultation with Sipekne'katik once they withdrew from the KMKNO process in March 2013.

[55] Whether the separate engagement with Sipekne'katik was sufficient to meet the Crown's obligation will be the focus of the substantive appeal hearing. I am satisfied there is a serious question to be decided about this issue and that this criteria for a stay has been met.

[56] I am also satisfied there is a serious question with respect to whether the Minister breached a duty of procedural fairness by considering information not provided to Sipekne'katik as part of the appeal. Whether the duty of fairness exists and was breached in the circumstances of this particular appeal is also a matter to be decided by the hearing judge.

Irreparable Harm

[57] I agree with the respondents that Sipekne'katik must provide some evidence that it will suffer irreparable harm if a stay is not granted. It is not sufficient to simply allege a breach of the duty to consult. This is not a situation where the appeal will be moot if a stay is not granted unless Sipekne'katik can establish something that cannot be undone or modified through subsequent consultation and accomodation. If they are successful on their appeal the relief they seek is that the Industrial Approval be set aside. Presumably the Minister would then be required to engage in a further process of consultation and accommodation.

[58] I believe the issue of irreparable harm, and ultimately whether a stay should be granted, depends upon the assessment of risk to the Shubenacadie River and fish habitat which might result if the brining operation begins before the appeal decision is issued.

[59] Sipekne'katik argues that I should ignore all of the mitigation measures built into the Industrial Approval, including ongoing monitoring and risk assessment, because these were arrived at in breach of the duty to consult. I disagree with their position. At this stage I am not in a position to make any determination as to whether the duty to consult has been met or not. In assessing risk of harm there is no logical reason to exclude established mitigation measures designed to reduce or avoid potential damage. This is consistent with the approach taken in the *Sapotaweyak* and *Petahtgoose* decisions where remedial and protective measures were considered on the issue of irreparable harm even though a breach of the duty to consult was alleged.

[60] I would also note that the mitigation measures adopted in this case were developed through a process of consultation and accommodation with another aboriginal organization, KMKNO, who would have similar interests in the welfare of the Shubenacadie River system.

[61] It appears that there are two potential aspects of the brining operation which might impact on the Shubenacadie River habitat. The first is the removal and return of relatively large volumes of water which could cause eggs and small fish to be damaged. The other is the introduction of diluted brine to the river.

[62] With respect to removal and return of water it should be noted that the Shubenacadie is a tidal river system and so water is constantly in motion. The question is whether the mechanism for intake and discharge creates potentially hazardous circumstances. According to the materials in the record a diffusion system will be constructed that reduces water velocity to acceptable levels so as not to harm fish larvae and eggs.

[63] The process for return of diluted brine to the river has been designed to ensure that the salinity level is within the range that naturally occurs due to the tidal nature of the estuary. There will be monitoring of salinity in the river and the discharge operation will be reduced or stopped if excessive levels are detected.

[64] The two fish species of particular concern are striped bass and salmon. Striped bass spawn in the area of the brine operation in the spring of the year. Once the water temperature has increased to a point where spawning can occur there will be daily monitoring to detect eggs. When eggs are found the brining operation will be shut down for 24 days. Should eggs be detected after brining resumes the Nova Scotia Department of Environment and Department of Fisheries and Oceans will be contacted to determine if any further action is required.

[65] Salmon do not spawn in the area of the brining pond because of the lack of a gravel substrate. It is estimated that salmon spawning may take place as far as 30 kilometers upstream. Salmon smolt will traverse the area of the brining operation as part of their normal migration.

[66] The brining operation will not begin until sometime in September 2016 and will continue for approximately three years. The appeal will be heard in mid-August 2016 and I think it is reasonable to expect that the decision might be reserved for a period of time. If no stay is granted I think it is fair to assume that brining will occur for a number of weeks and perhaps a few months. If the decision is ultimately in favour of Sipekne'katik and the Industrial Approval set aside I must consider if they are able to engage in meaningful consultation at that time or whether it is too late. In my view Sipekne'katik has not shown a reasonable likelihood that irreparable harm will have occurred which would prevent such consultation from taking place.

[67] The concerns with respect to the impact of brining on the spawning of striped bass will be much reduced since the season for spawning is in the spring. With respect to salmon there is no evidence to indicate that smolt passing through the area where diluted brine is released will be affected since the level of salinity will not change. This is not a situation where the welfare of fish habitat has been ignored and the risk of harm has not been considered. To the contrary there has been significant study devoted to mitigating and avoiding harmful impacts. Monitoring and assessment of risk will be ongoing under the terms and conditions applicable to the Industrial Approval.

[68] When one considers duty to consult cases where interim injunctions or stays have been granted the existence of irreparable harm is quite apparent. In *Tłı̨ch*ǫ the supervisory board established by treaty was being replaced by one where the First Nations participation was reduced from 50% to 10%. There was evidence of a loss of institutional knowledge and ongoing water and land management decisions which would be made without any effective input. Those decisions could not be undone and the loss of institutional knowledge not replaced if an interim injunction was refused. In *Ahousaht #1* the permit to allow commercial fishing was done against the recommendation of DFO staff which was based on conservation concerns. There was no scientific basis for the Minister's decision in light of the staff advice. As suggested in the following passage the result might have been different where the Minister had followed the advice of staff and relied on scientific evidence:

> [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.

[69] This appears to be what happened in *Ahousaht #2* when an injunction was refused a year later. In that case the Minister's decision followed DFO staff advice and was supported by scientific evidence.

[70] In *Taseko Mines* there was evidence of actual damage to the habitat through mining exploration activities and the court concluded that once the damage was done consultation about those permits was moot.

[71] For the above reasons I have concluded that Sipekne'katik has not met the requirement to show they will suffer irreparable harm if a stay is not granted.

Balance of Convenience

[72] The balance of convenience is relatively equal based upon the evidence on this motion. I would adopt my comments concerning the proof of harm by Sipekne'katik which I made as part of my analysis of the irreparable harm criteria.

[73] The evidence from Alton was focused on the construction work proposed to be carried out this summer. As I previously noted this work is not affected by the requested stay. This means that the only issue is whether a delay of several weeks in the brining will affect the overall schedule for the project and I had no specific evidence on that. The fact that brining could be suspended for various reasons including the existence of striped bass eggs and elevated salinity suggests that there is some uncertainty in the estimate that the work will take three years. It is probably reasonable to assume that a stay of the brining operation would delay the overall project somewhat but it is not possible to quantify that with any degree of certainty.

[74] Had I found that Sipekne'katik had established irreparable harm which satisfied the second criteria I would have also found in their favour on the balance of convenience.

Exceptional Circumstances

[75] Where an applicant does not satisfy the three primary requirements for a stay the court has a residual discretion to grant one in any event. It will only do so in exceptional circumstances keeping in mind the underlying principle that a stay is to be used to ensure that a party is not deprived of the fruits of the litigation should they ultimately succeed. In my view the presence or absence of irreparable harm is the most important of the three criteria required for a stay. It is difficult to imagine exceptional circumstances which would justify a stay in the absence of such evidence.

[76] This project has been the subject of consultation between the Crown, Alton, and the Mi'kmaq of Nova Scotia even though Sipekne'katik says that the specific consultation with them was deficient. The consultation process has resulted in mitigation and risk management measures being adopted. These are directed at the specific issues of concern to Sipekne'katik, being the species and habitat that are integral to the treaty and aboriginal rights which they claim. In addition, the duration of the brining operation while the appeal is outstanding will be relatively short. It will not extend into the next spawning season for striped bass.

[77] The circumstances disclosed by the evidence in this motion does not justify the court exercising its residual discretion to issue a stay even though the three criteria set out by *Fulton Agencies* and *RJR-MacDonald* have not been satisfied.

Conclusion

[78] I have concluded that Sipekne'katik has not met the burden of satisfying the necessary criteria for a stay under *Civil Procedure Rule 7.28*. In particular it has not satisfied me that there is a reasonable likelihood it will suffer irreparable harm if the stay is not granted. They have also not established exceptional circumstances that would justify a stay in the absence of such harm. The motion is dismissed.

Wood, J.