SUPREME COURT OF NOVA SCOTIA

Citation: *Chief Michelle Glasgow et al. v. Attorney General of Canada v. Unified Fisheries Conservation Alliance*, 2024 NSSC 185

Date: 20240621
Docket: HFX No. 510920
Registry: Halifax

Between:

Chief Michelle Glasgow on Her Own Behalf
and on Behalf of the Members of Sipekne'Katik

Plaintiff

v.

Attorney General of Canada

Defendant

v.

Unified Fisheries Conservation Alliance

Intervenor

DECISION

Judge: The Honourable Justice John A. Keith

Heard: June 19, 2024, in Halifax, Nova Scotia

Counsel: Nathan Sutherland and Ronald Pink, K.C., for the Plaintiff
Jonathan Tarlton, Gwen MacIsaac, and Jack Townsend, for the Defendant
Richard Norman, John Boyle, and Alex Cameron for the Third Party

By the Court:

Introduction

[1] This is a joint request by the Plaintiffs Chief Michelle Glasgow, on her own behalf and on behalf of the members of Sipekne'katik (referred to collectively as the "Sipekne'katik") and Defendant Attorney General of Canada to release a five-week trial scheduled to begin May 12, 2025 together with all of the pre-trial deadlines I established as case management judge. Sipekne'tatik and the Attorney General of Canada seek to mediate the differences that this action has exposed. They point to the jurisprudence which very clearly states that negotiated resolutions to these types of indigenous claims are to be preferred. They say that a pause in the litigation is necessary to engender trust and create the necessary space in which the parties' time and energy might be more productively focussed on the preferred good faith negotiations.

[2] The Third Party, Unified Fisheries Conservation Alliance ("UFCA"), does not oppose settlement discussions between Sipekne'katik and the Attorney General of Canada but it says negotiations should occur parallel to (not in place of) the ongoing litigation process. UFCA argues that the destabilizing influences of the underlying legal questions and constitutional issues have gone on for far too long and that the resulting uncertainty has been confusing, dividing communities, and, at times, led to various forms of violent unrest. They say that the problems are not getting better with time and they require clarity sooner rather than later. They argue that the scheduled trial at least establishes a fixed timeline within which the clarity will begin to emerge – either through settlement negotiations or, if not, through judicial determinations. They ask that the trial dates not be lost to facilitate mediation and that the Court establish a new pre-trial schedule which ensures the trial dates are preserved.

Context

[3] Sipekne'katik commenced this proceeding in 2021. It raises a number of important issues regarding access to, and regulation of, the fisheries in their ancestral lands. At the heart of this litigation are related, critical questions regarding the scope and content of the Plaintiffs' treaty and constitutional right to fish for (or for the purpose of earning) a moderate livelihood. For clarity, there is absolutely no

argument and no doubt regarding the existence of this constitutional right. However, thorny problems remain including:

1. Whether the right to fish is to be conceived broadly so as to incorporate harvesting any form of marine life from the oceans for a social, cultural, or commercial purpose. Or, alternatively, whether the treaty right was limited to certain species of marine life based on the parties' intentions at the time the treaty concluded. I briefly described this issue at paragraphs 40 – 48 of my earlier disclosure decision 2023 NSSC 35 and, for emphasis, I repeat my caution at paragraph 48 of that same decision that I have made no conclusions regarding the impact of *R. v. Marshall*, [1999] 3 S.C.R. 456 ("Marshall #1") and *R. v. Marshall*, [1999] 3 S.C.R. 533 ("Marshall #2") beyond simply declining the discretion to determine the underlying legal and factual questions which arise.

2. The meaning and impact of a "moderate livelihood" in describing the purpose and limits of the Plaintiffs' constitutional right. Within the outwardly smooth concept of a "moderate livelihood" lie tough, practical questions as to its precise definition (including how a "moderate livelihood" might be more precisely described, assessed or measured) and, as importantly, how this concept is applied when assessing whether the Plaintiffs' constitutional right to fish has been infringed or fulfilled; and

3. Whether the federal *Fisheries Act* and related regulations failed to accommodate or otherwise infringed upon the Plaintiff's constitutional right to fish. If so, a further question arises as to whether any such infringement is justified – as the concept of justification is understood in the controlling jurisdiction including *R v Badger*, [1996] 1 SCR 77. Included with this question are related issues around whether the Plaintiffs' constitutional right to fish ought be regulated by the indigenous communities which enjoy the right or, alternatively, a central, federal authority such as the Department of Fisheries.

[4] These questions have lingered for many years. November 17, 2024 (less than 5 months from today) marks the 25th anniversary of the date upon which the Supreme Court of Canada issued its landmark decision in *Marshall #2*. It was in this decision that the Supreme Court of Canada confirmed the Mi'kmaq constitutional right to

fish for a moderate livelihood – a right which arose centuries before, in the Peace and Friendship Treaties of 1760 between the British and the Indigenous communities that lived here. In that decision, Binnie, J. wrote among other things: "The emphasis in 1999, as it was in 1760, is on assuring the Mi'kmaq equitable access to identified resources for the purpose of earning a moderate living." (at paragraph 38)

[5] Despite the passage of time (now almost 25 years), uncertainty continues to affect the communities which live with these issues. Those questions have strained the relationship between the affected First Nations communities and the Federal Government. And they have had a certain destabilizing impact on the relationship between Indigenous communities that seek to assert their constitutional rights and non-Indigenous communities who rely upon the fisheries. From time to time, the uncertainty has prompted more direct and, at time, volatile and regrettable confrontation.

[6] I pause here to clearly emphasize two equally important observations:

1. First, Sipekne'katik's interests are constitutionally protected and, as such, cannot be equated with (or vested with the same legal heft as) the interests claimed by non-Indigenous persons similar to those being advanced by the Intervenor, Unified Fisheries Conservation Alliance ("UFCA"). The realities, of course, are that the underlying resource is:

    a. important to all who rely upon it;

    b. finite;

    c. must inevitably be protected and shared.

    Nevertheless, it would be wrong to ignore or diminish the fact that Sipekne'katik Treaty Rights are fortified with constitutional protection; and

2. Second, I do not say (and my reasons should not be interpreted as saying) that nothing has happened over the past almost 25 years; or that the governments have drifted along without turning their mind to these issues; or that the constitutional right in this case has been entirely ignored; or that we have collectively failed to make any progress whatsoever down the path towards reconciliation. These sorts of conclusions would be both unfair and inaccurate.

[7] I simply seek to underscore the plain fact that important questions that remain unanswered and the resulting, destabilizing uncertainties can still be felt socially, culturally and economically.

[8] This is important context because it helps to explain the urgency which compelled Sipekne'katik to commence this proceeding and which justifiably prompted the parties to agree upon an accelerated schedule that would have this matter proceed to trial as soon as reasonably possible.

[9] Given the importance of the issues, the Court agreed to assist with the parties' request for an expedited process. I was appointed as case management judge to help shepherd the process. More importantly, on an exceptional basis, the Court extended preferential treatment enabling the parties to this matter down for a 5-week trial beginning on May 12, 2025 even though, for example:

1. The process of disclosure or discovery had not yet even begun, yet alone been completed. By contrast, under Nova Scotia's Civil Procedure Rules of Civil Procedure, trial dates can not even be requested until the parties are made full disclosure and completed discovery of the parties; and

2. Expert Reports had not yet been filed. Again, by contrast, the Civil Procedure Rules contemplate a much more relaxed pace. This particular concession is notable because the historic, sociological, and economic complexities of this case almost certainly demanded the assistance of expert opinion evidence.

[10] All parties worked collaboratively and diligently with me, as the case management judge, to establish and then maintain a pre-trial schedule. The parties themselves worked out the original schedule for all pre-trial milestones. At times, the schedule was tweaked but always with a view to holding firm to early trial dates. As one example of the parties' efforts, the Defendant Federal Crown made great efforts to complete the relatively onerous task of disclosure before discovery examinations were scheduled to begin. I understand that the Defendant Federal Crown ultimately disclosed more than 21,000 documents involving a multitude of sources across many federal departments.

[11] The point is that:

1. The Plaintiffs were right to challenge whether their constitutional right to fish was being fully respected;

2. The Defendant was right to defend its actions and regulatory scheme and, as well, seek recognition of the efforts it has made to date in recognizing the constitutional right in question;

3. The Third Party was right to seek additional clarity on issues that are of importance to its members; and

4. All parties were right to impress this action with the importance and urgency it deserves.

[12] This leads me to Monday, April 15, 2024 when the parties agreed to begin discovery examinations. They had previously agreed upon the persons who were to be examined and had also agreed upon a tentative schedule to conduct those examinations.

[13] On Friday, April 12, 2024 at about 4:25 p.m. (i.e. effectively just before discovery examinations were scheduled to begin), I received a letter from counsel for the Plaintiffs Sipekne'katik but written jointly on behalf of Sipekne'katik and the Defendant Attorney General of Canada. It stated that: "the Plaintiffs, Sipekne'katik, and the Defendant, the Attorney General of Canada, have agreed to enter into mediation in an effort to resolve this proceeding."

[14] The letter continued:

> "As a result of this agreement, Sipekne'katik and Canada wish to adjourn the discoveries scheduled to begin next week, and seek the Court's permission to do so. We regret the late timing of this request, but we consider the parties' recent agreement to mediate to be a positive development and believe adjourning the discoveries without day to be important to that process.
>
> We also understand that adjourning the discovery dates may mean the trial dates themselves have to be released. We have discussed this with counsel for Canada, and the parties are willing to release the trial dates in order to fully explore resolution through mediation."

[15] It is not clear precisely when the agreement to mediate was reached although I do note that counsel for the Plaintiffs indicated during a case management call in December, 2024 that settlement discussions were ongoing. And I note the affidavit

of Brian Dorey, Director of Operations for the Plaintiff Sipekne'katik, that the Plaintiffs and Defendant began discussing the possibility of settlement as early as July, 2023. That said, the agreement to mediate was a much more recent development made shortly before April 12, 2024.

[16] I accept that the Plaintiff Sipekne'katik and the Defendant, Attorney General of Canada are committed to mediation and good faith negotiations and that they have engaged a mediator to assist. Still, the evidence around the mediation process was vague. For example, the parties have not yet even agreed on the dates upon which the mediation will occur, despite having reached an agreement to mediate more than 2 months ago. Indeed, the parties were not even able to provide an outside date upon which the mediation process would reasonably be concluded or the litigation could reasonably be resumed. Rather, they simply proposed that the litigation be suspended indefinitely and would only be re-activated if/when the Plaintiff and the Defendant believed that they had exhausted their efforts or now required judicial intervention.

[17] There is also a degree of confusion regarding the scope of the mediation. Mr. Dorey (who was cross-examined on his affidavit) was circumspect in responding to the question as to whether all the issues raised in the action would be mediated. Ultimately, he was only able to say that Sipekne'katik wanted to mediate all of the issues raised in this action but the agenda was still the topic of discussion with the Attorney General of Canada. I recognize and agree that the ability to discuss these matters was complicated and constrained by the fact that settlement privilege must be protected. Nevertheless, the question as to whether all the issues in dispute would be addressed in the mediation was left unclear.

[18] The request to release the trial dates caught the Intervenor, UFCA, by surprise. UFCA states that it was unaware the Plaintiffs Sipekne'katik and Defendant Attorney General of Canada would request a release of discovery and trial dates to accommodate mediation. They appropriately realize that they may not insist upon participating in the mediation. The action could clearly be resolved by agreement between the Plaintiff Sipekne'katik and the Defendant without any involvement by (or input from) UFCA. Nevertheless, UFCA does properly point to the fact that it has an interest in this matter and, as a party to this litigation, is afforded certain procedural protections. On that basis, as indicated, it opposes adjourning the trial dates.

Decision

[19] The request to release the trial dates is properly made under Civil Procedure Rule 4.02 entitled "Adjournment of Trial Dates".

Sipekne'katik and the Attorney General of Canada say that the legal test to be applied in these circumstances was formulated by Justice Chipman's decision in *Annapolis Group Inc.* v *Halifax (Regional Municipality)*, 2022 NSSC 87. At paragraphs 17 – 19, Justice Chipman writes:

> "[17] The general test to be applied on a motion to adjourn was discussed in *Caterpillar Inc. v. Secunda Marine Services Ltd.*, 2010 NSCA 105. In *Caterpillar*, a fire occurred aboard a ship in 2001, and the parties filed their pleadings in 2004. The plaintiff brought a motion to adjourn the trial after the Finish Date, based on a scheduling conflict for its counsel. The Chambers Judge denied the motion (*Secunda Marine Services Ltd. v. Caterpillar Inc.*, 2010 NSSC 392). The Court of Appeal reversed that decision and adjourned the trial.
>
> [18] Justice Fichaud stated that the Chambers Judge had correctly identified the three prejudices which must be considered for a post-Finish Date motion under Rule 4.20(3), namely:
>
> 1. prejudice to the moving party, if the party is required to proceed to trial;
>
> 2. prejudice to the other parties, if they lose the trial dates; and,
>
> 3. prejudice to the public.
>
> [19] I am mindful that I must consider the first two prejudices as I decide HRM's motion to adjourn. The reasons have not factored in prejudice to the public because we are not past the Finish Date of April 22, 2022. In any event, the parties are essentially in agreement concerning the applicable law governing this motion."

[20] There was a discussion regarding Justice Chipman's final comments as to whether the public interest is a factor which may be considered when the adjournment request is made prior to the Finish Date. Justice Chipman correctly concluded observed that, in the normal course, prejudice to the public interest will generally not be a relevant factor when considering adjournment requests prior to the Finish Date. Moreover, in that case, the parties were in agreement as the relevant law.

[21] The inclusion of the "public interest" as a factor in adjournment requests is connected to the express wording of Rule 4.20(3). It states:

> (3) A judge hearing a motion for an adjournment after the finish date must consider each of the following:

> (a) the prejudice to the party seeking the adjournment, if the party is required to proceed to trial;
>
> (b) the prejudice to other parties, if they lose the trial dates;
>
> (c) the public interest in making the best use of court facilities, judges' time, and the time of court staff.

[22] The obligation under Rule 4.20(3) is mandatory. The judge "must" consider all of the factors enumerated in Rule 4.20(3). On this, I note that Civil Procedure Rule 2.03(3)(a) expressly limits a judge's discretion in these circumstances. It states that:

> "The general discretions do not override any of the following kinds of provisions in these Rules:
>
> (a) a mandatory provision requiring a judge to do, or not do, something;"

[23] Rule 4.20(3) is also germane in considering the impact of the public interest in the context of a request to adjourn trial dates made after the Finish Date. It states:

> "The judge who hears a motion for an adjournment after the finish date must presume both of the following, unless the contrary is established:
>
> (a) losing trial dates adversely affects a party's tangible and intangible interests;
>
> (b) a late adjournment adversely affects the efficient scheduling of facilities and time."

[24] Overall, these Rules emphasize the critical importance of trial readiness as of the Finish Date. They impress upon the parties that there will be serious consequences associated with late adjournments (i.e. after the Finish Date). They require a judge to consider the public interest and impact on the effective administration of justice when these requests are made after the Finish Date. The Rules mandate that the public interest must be considered a relevant factor.

[25] However, Rules 4.20(3) and (4) do not mean (and Justice Chipman did not conclude) that the public interest is never a relevant factor so long as the adjournment of a trial is requested prior to the Finish Date. Nor did Justice Chipman otherwise circumscribe the judge's discretion when assessing other relevant factors which may

apply to adjournment requests made prior to the Finish Date – particularly where, as here, there are unique circumstances that may merit consideration such as the impact on the Court's case management powers; existing Court Orders in the form of case management directions; and the Court's ability to efficiently control its own judicial processes where exceptional efforts have been made to accommodate and accelerate cases which are important and deserve preferential treatment.

[26] I agree that the factors which bear upon a request for an adjournment prior to the Finish Date should involve the weighing of the relative prejudices of the parties in the manner suggested by Rules 4.20(3)(a) and (b). However, the Court retains the discretion to consider other relevant factors in appropriate circumstances – including, for example, concerns which engage the Court's interest in controlling its own processes where the parties were afforded case management and preferential treatment in trial scheduling.

[27] In my view, prejudice to the UFCA's interests and the Court's own judicial process (including case management) are relevant considerations in the unique circumstances of this case.

[28] With respect to the prejudice UFCA will suffer if the trial dates are lost, UFCA has an interest in this litigation, as recognized in my decision granting UFCA intervenor status. I note that the Attorney General of Canada did not oppose UFCA's intervention and agreed that it offered a unique perspective, given its members reliance on a sustainably managed fishery. As a party, UFCA is entitled to rely upon, for example, the promise of Rule 1.02 which states that: "These Rules are for the just, speedy, and inexpensive determination of every proceeding."

[29] Given past history and the passage of time, UFCA is appropriately concerned about the corrosive effects of further delay – socially and economically. That said, I hasten to add that UFCA has not pointed to any imminent threat and has not tendered any evidence in this motion. As such, counsel for Sipekne'katik characterizes this risk as speculative and without any evidentiary foundation.

[30] In my view, of greater concern in this case, is the prejudice to the Court's process. My reasons include:

1. Even though settlement negotiations began in July 2023, the parties were unable to agree on mediation until literally the evening before discovery examinations were scheduled to begin. This delay set in

motion a cascading effect which undermined the pre-trial schedule and compromised agreed trial dates. In particular:

a. The Court did not receive notice of the mediation initiative until the day upon which discovery examinations were scheduled to begin. I immediately convened a conference call on Friday, April 19, 2024 but a week of discovery examinations had been lost and that process was effectively derailed.

b. The litigation plan and schedule was carefully crafted with compressed timelines to ensure the trial dates could be preserved. I had previously warned the parties on several occasions that there was almost no slack left in the schedule. The timing of this adjournment request and its inevitable consequences left the Court with no room to pivot and potentially salvage trial dates.

In the end, this timing and nature of the proposed mediation process irreversibly and effectively unilaterally jeopardized the trial dates. Respectfully, this undermines the Court's case management powers and, more importantly, fails to take into account the unique preferential treatment afforded the parties. The directions which I provided as case management judge (including the Litigaiton Plan) may be enforced as a Court Order. (Rule 26A.04(3)) This last-minute mediation initiative necessarily means that those directions cannot be fulfilled and the timing prevents the Court from developing a new and reasonable pre-trial schedule. With respect to the Intervenors' arguments, there is simply insufficient time over the next 11 months to schedule new discovery examinations; address any discovery issues; answer undertakings; complete the process of exchanging expert opinion; and ultimately be ready for trial in May, 2025. On this, I am compelled to note that the Plaintiffs and Defendant's argument that the Finish Date has not yet passed is of little potency in this particular proceeding. The Finish Date is established in the normal course during a Date Assignment Conference and the specific date is calculated based on specific calculations for time contained in the Rules. None of that applies here because the Court agreed on an exceptional and preferential basis to provide the parties with early trial dates. Given the importance of the issues, the Court also agreed to essentially allow these parties to jump the queue and take 5 weeks of Court

time in May and June, 2025 in order to have these issues heard as soon as reasonably possibly. As case management judge, I established a unique, tailor-made schedule outside the default timelines set out in the Rules because all parties were committed to an accelerated process.

2. I agree with UFCA that it is axiomatic that parties to this type of litigation are entitled to stop and start litigation whenever they believe negotiations are appropriate. To do so would undermine the Court's ability to control its own process and it bears repeating that the parties in this case chose to engage the Court's process and also agreed to an accelerated schedule. While I appreciate the Plaintiffs preference to focus their energy and resources on mediation, I am compelled to note that it is not at all unusual for settlement efforts to occur parallel to (not instead of) litigation. These forms of dispute resolution can easily co-exist and both can work together to promote a just outcome. The litigation process is not anathema to effective negotiations. While civil litigation in Canada operates under an adversarial model, our Courts also symbolize an important commitment to the civilized resolution of disputes. The Courts have both the power and independence to do what is just and moral. We issue an open invitation for people locked in conflict to come to Court to work out their differences. All that is required in return is a willingness to treat others as equals and to engage respectfully. It is adversarial and discussions can be heated, but it is also designed to instill and protect a sense of decorum. It is a place where parties dedicate themselves to focussed and principled discussion which not merely allows each party the freedom of their own mind but also demands that you listen and perhaps imagine yourself in the shoes of that person on the other side. Especially when you know that person will, and must, have their turn to speak.

[31] Having said all that, I am satisfied that the prejudice which would follow from forcing the parties forward to the May trial dates greatly outweighs the prejudices identified above.

[32] Fundamentally, the abundance of case law referenced by the Plaintiffs and Defendants which confirms that a nation-to-nation resolution is better achieved through negotiations rather than an adversarial process of litigation in which a third party decides the constitutional rights of an indigenous community. (*Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511 at para 14; *Beckman v*

Little Salmon/Carmacks First Nation, [2010] 3 SCR 103 at para 103; *Tsilhgot'in Nation v British Columbia*, 2014 SCC 44 (CanLII), [2014] 2 SCR 257, at para 17; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24; *R v Desautel*, 2021 SCC 17, [2021] 1 SCR 533 at para 87; *Shot Both Sides v Canada*, 2024 SCC 12 at para 61) Notably, all of this jurisprudence is stamped with the imprimatur of the Supreme Court of Canada.

[33] For clarity, this caselaw does not stand for the proposition that any party to an action involving these types of indigenous issues can demand that a properly instituted action may be derailed at any time so that negotiations may occur. However, these decisions certainly and very clearly express a preference for negotiation – and for good reason as the broader goal of reconciliation is better achieved by way of agreement not Court Order. There are clear advantages associated with a resolution of these issues by agreement. A negotiated solution has the potential to properly and finally address the concerns of all parties, bearing in mind that the Crown's interests engage broad, societal concerns. In addition, to be effective, the parties engaged in a negotiation must listen respectfully to one another; they must be prepared to understand and compromise where appropriate; and, perhaps most importantly, on such sensitive issues, the outcome can be based on mutual agreement rather than imposed by judicial fiat. Obviously but for emphasis, this does not mean that judicial intervention is somehow inferior or inappropriate. On the contrary, the Courts are the bedrock of our system of justice and access to the Courts to resolve these types of disputes should not be eroded or diminished. However, negotiations provide the parties are given a measure of control and an opportunity to control their own fate, bearing in mind that no one party can dictate the terms of a mutual agreement.

[34] I am compelled to add that, based on the facts before me, the preference for negotiations may not have alone been sufficient to release the trial dates and upend the case management scheduled previously agreed upon by the parties and approved by the Court. This would be, in my view, a very serious mistake. At the risk of repetition, a preference in favour of negotiated solutions is not a tool which may be used to turn the litigation process "or" or "off" at a party's convenience. Still, based on the unique circumstances of this case and on a more practical level, it is simply not feasible and would not provide the parties with sufficient time to now complete the tasks which must be completed prior to trial. Moreover, respectfully, this is not the sort of case where, as UFCA submitted, the Court should issue draconian directions in which a party might completely lose their pretrial procedural protections and would neither be appropriate nor produce a just outcome. I

recognize UFCA's interest in an early resolution. However, regardless of how we came to this place in the litigation, it is imperative that the judicial process bend towards fairness and justice. In my view, the trial dates are irretrievably lost. To try and preserve them would simply set in motion a flawed process which is doomed to fail and create even greater problems and justifiable complaints.

[35] Further, not all is lost. The parties have now completed disclosure and, with that information, are presumably ready to move forward expeditiously if negotiations fail.

[36] That said, I also do not agree that with Sipekne'katik and the Attorney General of Canada that the best way forward is to effectively place this process in suspended animation, waiting to be reactivated by either the Plaintiff or Defendant. It is my understanding that the Plaintiff and Defendant will move forward in good faith to take full advantage of the opportunity to negotiate being requested. Nevertheless, I am seized of this matter. My obligation (with the parties' agreement) is to case management – not indefinite suspension of the litigation.

[37] For these reasons and on the understanding the Plaintiff Sipekne'katik and the Defendant Attorney General of Canada that will advance their agreement to mediate efficiently, expeditiously and in good faith:

1. The trial dates will be released;

2. The pre-trial schedule will similarly and necessarily be released and lifted;

3. I am prepared to provide the parties with time to mediate but it must be done with reasonable despatch. The litigation will be temporarily paused but only until December 12, 2024. That will have provided the Plaintiff and Defendant 8 months to pursue mediation. In my view, that time period is more than reasonable amount to conduct the requested mediation; and

4. Our next case management call will be scheduled for December 12, 2024. My judicial assistant will provide the parties with the necessary details including the precise time. If the matter is not resolved, negotiations may obviously (and, if necessary or appropriate, should) continue. However, the remaining steps to take this matter to trial will occur at that time.

Keith, J.