OSLER

First Nation denied injunction based on prejudice to corporate respondent

MAY 2, 2018 3 MIN READ

Related Expertise

- Environmental
- Food and Beverage
- Indigenous

Authors: Maureen Killoran, KC, Tommy Gelbman, Sean Sutherland, Komal Jatoi

Notwithstanding a "real and non-speculative likelihood of irreparable harm"[1] to the 'Namgis First Nation (NFN), the Federal Court in *'Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)* [PDF] refused to grant NFN an interlocutory injunction because of its delay and lack of reciprocal consultation with the affected fish farm operator.

This decision confirms that prejudice to operators and project proponents is a basis to refuse otherwise meritorious interlocutory injunctive relief.

Background

NFN applied to enjoin the Minister of Fisheries, Oceans and Coast Guard from issuing a licence (Transfer Licence) to Marine Harvest Canada Inc. (Marine Harvest). The Transfer Licence would authorize Marine Harvest to transfer up to one million Atlantic salmon smolts to its aquaculture facility at Swanson Island (the Facility) located on NFN's asserted territory. NFN also sought to enjoin Marine Harvest from seeking, obtaining or acting upon a Transfer Licence in connection with the Facility.

NFN's motion was for interlocutory injunctive relief pending ultimate determination of its judicial review of a Fisheries and Oceans Canada policy of not testing smolts for piscine orthoreovirus or heart and skeletal muscle inflammation (Diseases) prior to issuing transfer permits.

Decision

The Court applied the established tripartite test for interlocutory injunctive relief as follows.[2]

Serious issue to be tried: The parties agreed that there are serious issues to be tried regarding the Minister's obligation to regulate fish transfers and duty to consult and accommodate.

Irreparable harm: Based largely on extensive expert evidence, NFN established a serious risk of irreparable harm because of, among other things:

1. the complete lack of ministerial consultation with NFN regarding the transfer into its asserted territory, notwithstanding a strong claim to fishing rights; and,
2. serious risk of salmon depletion in the fishery if the Diseases spread.

Balance of convenience: Notwithstanding the risk of irreparable harm to NFN, the Court found

that the balance of convenience favoured Marine Harvest—and denied the injunction—based on the following:

1. Marine Harvest had been operating the Facility with Transfer Licences for years;
2. Marine Harvest would suffer a $2.1-million loss if injunction were granted; and,
3. NFN filed its urgent injunction application only a few days before the smolt transfer was scheduled to begin—approximately 11 weeks after Marine Harvest informed NFN of its transfer plans.

In reaching its conclusion, the Court noted that "Aboriginal groups should not frustrate good faith attempts at consultation."[3] The Court found that, by and large, Marine Harvest had maintained dialogue with NFN; in contrast, NFN did not give Marine Harvest any warning of an impending motion for interlocutory relief. Had NFN informed Marine Harvest it would seek an injunction, or filed its injunction on a timely basis, Marine Harvest would have been in a position to mitigate its risk of harm.[4]

Lessons for operators and proponents

The decision confirms that prejudice to operators and proponents is a basis to refuse interlocutory injunctive relief that an affected Indigenous group would otherwise be entitled to. Further, as good operating practice and to protect legal rights, operators and proponents should at all times offer to consult and discuss with affected Indigenous groups regarding potential impacts on asserted or established rights and title. Where Indigenous groups decline to comply with their reciprocal consultation obligations, relief should be denied.

---

[1] *'Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334 at para 93 [Decision].

[2] *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 at 347-349.

[3] Decision at para 109.

[4] *Ibid.*