NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Aboriginal Affairs) v. Northern Pulp Nova Scotia Corporation*, 2019 NSCA 12

Date: 20190207
Docket: CA 484447
Registry: Halifax

Between:

Her Majesty the Queen in right of the Province of Nova Scotia,
as represented by the Minister of Aboriginal Affairs

Appellant

v.

Pictou Landing First Nation

Respondent

Judge:	Bourgeois, J.A.
Motion Heard:	February 7, 2019, in Halifax, Nova Scotia in Chambers
Written Decision:	February 20, 2019
Held:	Motion for intervention granted
Counsel:	Sean Foreman, Q.C., and Payton Tench, Articled Clerk, for the appellant Brian Hebert, for the respondent Harvey L. Morrison, Q.C., for the proposed intervenor

Decision:

[1] On February 7, 2019, I heard a motion brought by Northern Pulp Nova Scotia Corporation ("Northern Pulp") seeking to intervene in an appeal recently brought by Her Majesty the Queen in right of the Province of Nova Scotia, as represented by the Minister of Aboriginal Affairs ("the Crown"). The Crown took no position on the motion. The respondent Pictou Landing First Nation ("PLFN"), however, opposed the intervention.

[2] After hearing from Northern Pulp and PLFN on the motion, I advised it was appropriate to grant the motion, with reasons to follow. These are my reasons.

Background

[3] By Notice of Appeal filed January 22, 2019, the Crown appeals the decision and resulting order of Justice D. Timothy Gabriel. That decision and order relate to an Application for Judicial Review brought by PLFN challenging a decision of the Office of Aboriginal Affairs ("OAA").

[4] The background of the matter and summary of the arguments before the reviewing judge were set out in his decision (2018 NSSC 306) as follows:

> [1] Northern Pulp Nova Scotia Corporation ("Northern Pulp") owns and operates a bleached kraft pulp mill and associated facilities located at Abercrombie Point, Pictou County. This latter has been referred to by the parties as "the mill" and I will continue to refer to it as such within the body of these reasons.
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> [2] Pictou Landing First Nation ("PLFN") has applied for Judicial Review of a decision of the office of Provincial Minister of Aboriginal Affairs to deny consultation with respect to the issue of whether the Province will or should fund the construction of a new effluent treatment facility at Boat Harbour, Pictou County, Nova Scotia. For the reasons which follow, the application is granted.
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> …
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> [6] As the Province indicates in its brief:
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> > 4. Northern Pulp is in the planning stages to formally apply for Environmental Assessment ("EA") approval pursuant to Part IV of the *Environmental Act* for the design, construction and operation of a new Effluent Treatment Facility ("ETF") to replace the existing Boat Harbour Treatment Facility, which must be closed as required by the *Act* ("the pending ETF Application").

> 5. The Province is currently engaged in active consultation with the PLFN regarding the Pending ETF Application. The Province has confirmed $70,000.00 in capacity funding to support PLFN's meaningful participation in that process.

[7] The Province continues:

> 7. The Province has disclosed it is also engaged in confidential discussions directly with Northern Pulp regarding potential crown funding that may be provided to support construction of the new ETF (the "Potential Crown Funding"). No such decision has yet been made.
>
> 8. PLFN takes the position that any such Potential Crown Funding to Northern Pulp by the Province is a separate "decision" that triggers an independent duty to consult with PLFN, as this decision "will have the effect of continuing the operation of the Mill beyond January 30, 2020" and therefore further impact the asserted rights and interests asserted by PLFN.
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> 9. The Province disagrees that any decision to provide some form of Potential Crown Funding would be a "decision" or "action" that itself triggers an independent duty to consult with PLFN. Simply put, Potential Crown Funding to Northern Pulp does not meet the established legal test to trigger consultation, as any such potential decision or action itself <u>does not authorize</u> continued operation of the Mill beyond January 30, 2020 (as claimed by PLFN) and therefore has no additional or potential adverse impact on the rights and interests asserted by PLFN. [Emphasis of Province]

[8] After reminding me that the Boat Harbour Treatment Facility and the circumstances of Boat Harbour have been publicly referred to by provincial spokespersons in the past "as an example of environmental racism" (*Applicant brief, para. 7*), PLFN goes on to point out:

> 8. The Mill requires a new treatment facility if it is to continue operating. A new treatment facility, if built, will allow the Mill to be operated for many years to come and will mean the continued release of contaminants from the Mill during the pulping process during that period. Those contaminants, some of which are toxic, will find their way to Pictou Landing First Nation and will be breathed in by the men, women and children living there.
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> 9. The Province of Nova Scotia is considering financial assistance to Northern Pulp to assist with the construction of the new treatment facility being proposed by Northern Pulp.
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> 10. The Province is currently consulting with Pictou Landing First Nation on the pending decision of the Province to approve the effluent treatment facility under the *Environmental Act*. The consultation focuses on the

> physical impacts of the design, construction and operation of the new effluent treatment facility. As such it is not focused on emissions from the ongoing pulping operations at the Mill.
>
> 11. The Province has denied Pictou Landing First Nation's request to expand the present consultation to include the funding decision, suggesting that the decision cannot lead to any adverse impacts and therefore does not trigger the duty to consult.

> [9] The record filed in conjunction with this matter is miniscule. It contains merely two documents. The first is a letter from Brian Hebert (counsel for PLFN) dated January 11, 2018, seeking confirmation of the scope of consultation and capacity funding for PLFN. The second consists of a letter from the Nova Scotia Office of Aboriginal Affairs ("OAA") to Brian Hebert, PLFN counsel, in response to his January 1, 2018 letter, confirming the scope of the consultation regarding the Northern Pulp ETF and the quantum of capacity funding for consultation ($70,000.00). This second letter is dated February 26, 2018.
>
> [10] The second letter was written by Beth Lewis, OAA's consultation advisor. Although OAA agreed to provide funding to accommodate consultation upon potential physical impacts to Treaty Rights in relation to the design, construction and operation of the ETF, they would not commit to do so with respect to whether the Province will finance the actual construction of it.

[5] The reviewing judge identified two issues for determination:

1. Was PLFN treated in a procedurally fair manner by OAA?
2. Was the Crown's determination that it had no duty to consult with PLFN as to whether it will fund the ETF, correct?

[6] It would appear for the purposes of the appeal, it is only the reviewing judge's conclusion with respect to the second issue that is challenged. After providing extensive reasons, he concluded:

> [88] The application is granted. The consultations between the parties must necessarily include *inter alia* whether the Province should fund the construction and design of the ETF and pipeline, and, if so, what form that financing will take.

[7] In its Notice of Appeal, the Crown set out the following grounds of appeal:

1. The reviewing judge erred in law in determining that any potential Crown funding to Northern Pulp triggers an independent duty to consult with PLFN, pursuant to s. 35 of the *Constitution Act, 1982*;
2. The reviewing judge erred in law in determining that any potential Crown funding to Northern Pulp meets the test outlined by the

Supreme Court of Canada as a "strategic, higher level decision" by the Crown that may create an adverse impact on rights asserted by PLFN;

3. The reviewing judge erred in law in speculating that if the Crown provided potential Crown funding to Northern Pulp, as a "lender" or otherwise, it could be tied into a system of penalties and/or rewards for achieving proposed emission or effluent targets for continued operation of Norther Pulp's paper mill facility beyond 2020; and

4. The reviewing judge erred in law in determining that consultation between the Crown and PLFN must necessarily include, *inter alia*, whether the Crown should fund the construction and design of the ETF and pipeline and, if so, what form that financing will take.

[8] On January 23, 2019, Northern Pulp filed a Notice of Motion seeking to intervene in the appeal. The motion was supported by the affidavit of Terri Fraser, Technical Manager of Northern Pulp. The motion was contested by PLFN, and an affidavit of Chief Andrea Paul was filed in opposition. Neither affiant was cross-examined at the hearing of the motion.

The Law

[9] The principles relating to a motion for intervention are not contentious. In *Global Maxfin Investments Inc. v. Crowell*, 2015 NSCA 9, Justice Fichaud set out the following:

> [23] The motions are brought under Civil Procedure Rule 90.19:
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> **Intervention**
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> **90.19** (1) A person may intervene in an appeal with leave of a judge of the Court of Appeal.
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> (2) A judge of the Court of Appeal may make an order granting leave to intervene on terms and conditions the judge sets.
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> …
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> (5) A motion for leave must concisely describe all of the following:
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> (a) the intervenor;
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> (b) the intervenor's interest in the appeal;
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> (c) the intervenor's position to be taken on the appeal;

> (d) the submissions to be advanced by the intervenor, their relevancy to the appeal, and the reasons for believing that the submissions will be useful to the Court of Appeal and will be different from those of the parties.

[24] Rule 90.19(1) is the successor to Rule 62.35(1) of the former *Rules*. *Logan v. Nova Scotia (Workers' Compensation Appeal Tribunal)*, 2006 NSCA 11 (chambers) described the test under the former Rule 62.35(1):

> [7] Under *Rule* 62.35(1) the chambers judge exercises a discretion whether to permit the intervention. The question is whether I should exercise that discretion.
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> [8] The authorities have described a flexible menu of criteria to govern that discretion. I refer to Justice Cromwell's decision in *R. v. Regan* (1999), 174 N.S.R. (2d) 1 (C.A.) at ¶ 29-53, and Justice Bateman's decision in *Nova Scotia (Attorney General) v. Arrow Construction Products Ltd.* (1996), 148 N.S.R. (2d) 392 (C.A.), at ¶ 5. Generally, an intervention should (1) target the parties' existing *lis* and (2) accommodate the process of the existing appeal while (3) augmenting and not just duplicating the parties' submissions or perspectives to assist the court's consideration of the parties' issues. …

The same principles apply to Rule 90.19: *e.g.* see *R. v. Chehill*, 2009 NSCA 85 (chambers), paras 11, 14 and *A.B. v. Bragg Communications Inc.*, 2010 NSCA 70 (chambers), paras. 8-10.

[25] In *A.B. v. Bragg*, *supra*, (para. 8), Justice Farrar adopted the passage from John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal*, 2nd ed., (Toronto: Butterworths Canada Ltd., 2000), pp. 255-56:

> A person who seeks leave to intervene in an appellate court is constrained by the same general considerations as is a person who seeks leave to intervene at trial. As at trial, intervention is discretionary and is based on the legislative criteria governing intervention in that jurisdiction. The proposed intervenor must convince the court that it brings something additional to the Appeal that the parties may not be able to supply. …

[10] I was guided by the above principles in exercising my discretion.

Analysis

[11] Northern Pulp was not a party before the reviewing judge. It did not receive formal notice of the application and argues it should have. I do not intend to decide whether Northern Pulp ought to have been a party in the court below. In my view, it is not necessary in order to assess the merits of the motion to intervene.

[12] Regardless of its lack of involvement earlier, Northern Pulp says it should now be permitted to intervene given its direct interest in the subject matter of the appeal. Unlike public-interest groups who often are denied intervention because of a lack of a direct interest, it says its interest in this appeal could not be more direct.

[13] I agree that Northern Pulp, as the potential recipient of Crown funds, has a direct interest in whether PLFN must be consulted in discussions of any financial arrangements.

[14] I also agree with the submission of Northern Pulp that, as a potential recipient of government funding, it will likely bring a different perspective to the duty to consult than the Crown.

[15] In its written submissions, Northern Pulp set out the two positions it seeks to advance as intervenor:

1. The appeal should be allowed on the ground that the discussions between Northern Pulp and the Crown were settlement discussions in respect of which there is no duty of consultation owed to PLFN; and
2. The appeal should be allowed on the ground that, whether the discussions are characterized as settlement discussions or not, the continued operation of the Mill will not result in the infringement of aboriginal or treaty rights, and consequently no duty of consultation is owed to PLFN.

[16] I am further satisfied that the inclusion of Norther Pulp as an intervenor will not unduly delay the hearing of the appeal, or expand the core issues to be addressed by this Court. Despite granting the intervention, all three parties were ready and eager to set an early appeal hearing.

Conclusion

[17] The motion is granted, without costs. Northern Pulp, as intervenor, is confined to the arguments as set out above.

Bourgeois, J.A.