

SUPREME COURT OF NOVA SCOTIA

Citation: Specter v. Nova Scotia (Fisheries and Aquaculture), 2011 NSSC 266

Date: 20110630

Docket: Hfx. No. 350371

Registry: Halifax

Between:

Marian and Herschel Specter

Appellants

v.

Minister of Fisheries and Aquaculture, Kelly Cove Salmon Ltd.

Respondents

Judge: The Honourable Justice Peter P. Rosinski.

Heard: June 29, 2011, in Halifax, Nova Scotia

Written Decision: June 30, 2011

Counsel: Marc Dunning, for the Appellants
Darlene Willcott, for the Respondent,
Minister of Fisheries and Aquaculture
A. William Moreira, Q.C., and Olivia Sobey,
for the Respondent, Kelly Cove Salmon Ltd.

By the Court:

Introduction

[1] The Minister granted Aquaculture licenses / leases to Kelly Cove Salmon Ltd. (Kelly Cove). Pursuant to s. 119 *Fisheries and Coastal Resources Act*, the Herschels claim that they are “aggrieved persons” as a result of that decision and appeal the Minister’s decision.

[2] The Herschels did not join Kelly Cove as a Respondent party and now that Kelly Cove seeks to be joined as a Respondent party, oppose Kelly Cove’s request to this Court.

[3] The central issues are whether Kelly Cove must be or should be added as a Respondent or whether Kelly Cove is entitled only to mere intervenor status?

[4] There is little jurisprudence directly on point. If Kelly Cove is not required to be a party, I am, in such a discretionary decision, particularly captive to the circumstances of this particular case.

[5] I conclude that as a matter of law, granting the fullest procedural rights to a potential party is in the interests of justice, unless undue prejudice would result to the existing parties in this appeal.

[6] My resolution of these competing interest follows.

Position of Parties

[7] The Minister supports adding Kelly Cove as a Respondent

[8] Kelly Cove argues it should be added as a Respondent (under CPR 35.01(e))

because:

- It was the original applicant for the aquaculture licenses / leases granted by the Minister
- It was a participant in the regulatory process which led to their being granted by the Minister
- It is the holder of the licenses / leases granted by the Minister

- It easily meets the test as an “intervenor” [CPR 35.10(2) (a) and (b)] and has a direct interest in the outcome of the appeal - at least as significant as the Herschels who are an **Appellant Party**.

[9] The Herschels argue that Kelly Cove should only be added as an intervenor because, to add a party is an exercise in discretion, and, the following factors incline to only adding Kelly Cove as an intervenor:

- (i) CPR 35.04(1) is not applicable - therefore no Rule compels Kelly Cove’s addition to this appeal;
- (ii) Kelly Cove was made aware of Herschels’ intent to appeal;
- (iii) Kelly Cove can still participate in the appeal as an intervenor, but without the cost consequences to the Herschels if they are ultimately unsuccessful against the Minister **and** Kelly Cove as Respondents;
- (iv) The cost consequences to Herschels are “more significant to them than to Kelly Cove”

Must or should Kelly Cove be added as a Respondent or as an Intervenor?

[10] Kelly Cove will be added as a Respondent. Let me explain why.

[11] Firstly, *Civil Procedure Rule 35.04(1)* reads:

A party who starts a proceeding for... an appeal must, unless a judge orders otherwise, name as respondents the decision-making authority, **each person who is a party to** the process under review or appeal or **the process that led to the decision under review or appeal**, and any other person required by legislation to be a respondent.

[12] I find this Rule is applicable to Kelly Cove. Kelly Cove was a party to the process that led to the decision under appeal.

[13] Secondly, if I am wrong in that, I would exercise my discretion and add Kelly Cove as a Respondent. I consider the following -

- (i) The Minister (Respondent) consents to Kelly Cove being added as a Respondent;
- (ii) CPR 35.08(2) “presumes that the effective administration of justice requires each person who has an interest in the issues to be before the court in one hearing”;

- (iii) CPR 35.09 recognizes that some “peripheral” Respondents may be joined in proceedings “that include claims in which the party has no interest”. This suggests that the Rules contemplate Respondents who have differing degrees of interest at stake in proceedings, yet may remain as Respondents;
- (iv) It seems illogical that the Herschels, who seek to quash the Minister’s decision, should be a “party” to the appeal, yet Kelly Cove, which has a tangible existing interest in the outcome of the appeal, should be relegated to mere intervenor status;
- (v) An example of the liberal interpretation of “party” status used by the Courts to ensure the fullest rights possible are extended to persons in proportion to the level of their interest in the outcome and participation in the process can be seen in *Brighton v. Nova Scotia (Minister of Aquaculture and Fisheries)* 2006 NSSC 160, MacDonald, ACJ (as he then was) at para. 7.
- (vi) Costs against them if unsuccessful in the appeal is the only significant concern that Herschels put forward to argue for limiting Kelly Cove to intervenor status.

[14] A decision to order costs is a discretionary one which can be carefully tailored to the precise circumstances of each case. Generally costs follow the result, and *Tariff C* would suggest between \$750 - \$1000 for a contested Special Chambers (< ½ day) hearing **and** the use of a multiplier in appeals - *Peach v. Nova Scotia* 2010 NSSC 207, Moir, J. Presumably the Herschels had legal advice from their counsel about the consequences of an unsuccessful appeal. Moreover, CPR 77.04 permits a judge to relieve appropriate unsuccessful litigants of the burden of costs in case of “poverty”.

[15] I conclude that these factors, and the submissions made, satisfy me that I should, in the interests of justice, order Kelly Cove Salmon Ltd. to be added as a Respondent henceforth.

[16] Each party shall bear its own costs on this Motion.

J.