

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** St. Mary's Bay Coastal Alliance Society v. Nova Scotia (Fisheries and Aquaculture), 2013 NSSC 105

**Date:** 20130318

**Docket:** Hfx 352001

**Registry:** Halifax

**Between:**

St. Mary's Bay Coastal Alliance Society, The Village of Tiverton, The Village of Westport, Freeport Community Development Association, Atlantic Salmon Federation

Appellants

v.

Minister of Fisheries and Aquaculture and Kelly Cove Salmon Ltd.

Respondents

- and -

Attorney General of Canada

Intervenor

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**Decision on Costs - Rule 12 Motions**

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**Judge:** The Honourable Justice Patrick J. Duncan

**Heard:** By correspondence - Final Submission February 5, 2013

**Counsel:** Hugh Wilkins for Appellants  
Edward A. Gores, Q.C. for Minister of Fisheries and Aquaculture  
A. William Moreira, Q.C., and Scott Campbell, for Kelly Cove Salmon Ltd.  
Angela Green, for Attorney General for Canada

**By the Court:**

**Introduction**

[1] The appellants filed an appeal pursuant to section 119 of the **Fisheries and Coastal Resources Act**, SNS 1996, c. 25 from the decisions of the Minister of Fisheries and Aquaculture (Nova Scotia) which granted Leases and Licences to Kelly Cove Salmon Ltd. for aquaculture and related activities for two sites in the St. Mary's Bay area of Digby County, Nova Scotia.

[2] The first ground of appeal is:

The Minister did not have the jurisdiction to grant Leases and Licences 1353 and 1354 because the federal Crown has the exclusive jurisdiction to regulate the management of fisheries under section 91(12) of the **Constitution Act, 1867**.

[3] There is a second ground of appeal that cites nine reasons that the Minister's decision was unreasonable and should be quashed.

[4] Kelly Cove filed a motion pursuant to **Nova Scotia Civil Procedure Rule 12** seeking to determine the following question of law:

On an appeal pursuant to section 119 of the **Nova Scotia Fisheries and Coastal Resources Act**, may a party raise for determination, and does the Supreme Court of Nova Scotia have jurisdiction to decide, whether the **Fisheries and Coastal Resources Act** is *ultra vires* the Nova Scotia legislature by virtue of the **Constitution Act, 1867**?

[5] The matter came on for hearing on December 20, 2012. No one appeared on behalf of the appellants. Counsel for Kelly Cove advised that they and other participating counsel were informed late on the evening of December 19, 2012 that the appellants did not intend to appear, and were withdrawing their opposition to the motion.

[6] Following representations from counsel in attendance, I rendered an oral decision answering the question of law in the negative, and issuing this declaration:

On an appeal brought pursuant to section 119 of the **Nova Scotia Fisheries and Coastal Resources Act**, a party may not raise for determination, and the Supreme Court of Nova Scotia does not have jurisdiction to decide, whether the **Fisheries and Coastal Resources Act** is *ultra vires* the Nova Scotia Legislature on a Division of Powers basis, by virtue of sections 91 and 92 of the **Constitution Act, 1867**.

[7] I invited submissions in writing if the parties could not agree as to costs. They have not agreed and I have received their submissions.

### **Positions of the parties**

[8] Kelly Cove seeks an order for costs in the amount of \$500 payable in the cause. They submit that notice from the appellants of the intention to withdraw their opposition to the motion came too late to avoid the cost of preparation by their two legal counsel, who were to present the motion. A court appearance was still required, and although the motion was unopposed, representations were required. They refer the court to **Tariff C** as the basis for setting the amount of costs.

[9] The Attorney General for Canada and the Minister of Fisheries and Aquaculture (Nova Scotia) do not seek costs.

[10] The appellants submit that it is not an appropriate case to make an award of costs because:

1. The motion was important. Whether the Minister had jurisdiction to grant the leases and licences is critical to the appeal. The motion had to be opposed.
  
2. The appellants sought to reduce all parties' costs. The reason that opposition was withdrawn is that a negotiated settlement of the dispute with the Minister appeared imminent. A key aspect of that agreement was apparently achieved late on December 19. Counsel for the appellants takes the position that it eliminated the need to oppose the **Rule 12** motion and this was conveyed to opposing counsel as soon as possible.
  
3. The application for judicial review is in the public interest and an award of costs negatively impacts on access to justice where, as here, the litigants are "villages, community associations and public interest groups seeking clarification from the courts" as to the "jurisdiction and process used for the granting of aquaculture leases and licences". Their objective is "to protect the interests of their communities."

## Conclusion

[11] A judge has a general discretion to award costs that will do justice between the parties. see, **Rule 77.02 (1)**.

[12] **Rule 77.03(3)** provides that: "Costs of a proceeding follow the result, unless a judge orders or a **Rule** provides otherwise."

[13] **Rule 77.05** applies in this case since it was an interlocutory motion. The

**Rule** reads:

(1) The provisions of **Tariff C** apply to a motion, unless the judge hearing the motion orders otherwise.

(2) A judge may assess costs, and provide for payment of costs, when a motion is withdrawn or abandoned.

[14] The provisions of **Tariff C** that are relevant to this issue are:

(1) Based on this **Tariff C** costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under **Tariff A**.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this **Tariff C**, may award costs that are just and appropriate in the circumstances of the application.

[15] The hearing lasted about 50 minutes. The presumptive range for a hearing of less than one hour is \$250 to \$500. As such, the position of Kelly Cove is within the range called for by **Tariff C**.

[16] I have considered the arguments of the appellants and, with respect, do not agree with their position.

[17] The particulars of the agreement that caused them to withdraw their opposition to the motion have not been provided. It is apparent that it is a matter between the Minister and the appellants, and that it had not, as at the time of the hearing of this motion, resulted in termination of the appeal. Further, it is not clear how the "agreement" impacts on the interests of Kelly Cove Salmon Ltd. which has the benefit of the leases and licences subject to challenge. The **Rule 12** motion was presented by Kelly Cove. I have no way of knowing whether the

appeal will be abandoned so as to leave Kelly Cove with the benefit of the leases and licences.

[18] While the appellants advised counsel of their intention not to oppose the motion, no formal withdrawal was communicated to the court. A decision on the merits of the motion was still required, and while much simpler than it might have otherwise been, there were still issues to be addressed in the hearing with respect to the scope of the order to be granted.

[19] Kelly Cove correctly notes that the preparation of its counsel was already complete by the time it learned of the appellants' decision, and so costs were incurred.

[20] I agree that the motion was important, but this was equally so for Kelly Cove, who was the successful party.

[21] As to the public interest argument, I agree that there are circumstances where costs may be refused and for the reasons put forward by counsel for the appellants. The appellants include incorporated municipal units and interested



community associations who fear a negative impact from the private commercial activities of Kelly Cove. The amount of costs sought is nominal and would not, in my view, act to deter public interest litigation.

[22] In view of the position adopted by each of the parties, I order that costs in the amount of \$500 be payable in the cause as between the appellants and Kelly Cove Salmon Ltd. There will be no order for costs as between the appellants and the Attorney General of Canada or of the Minister of Fisheries and Aquaculture (Nova Scotia).

[23] Order accordingly.

Duncan J.