

SUPREME COURT OF NOVA SCOTIA

Citation: *Potlotek First Nation v. Nova Scotia (Attorney General)*, 2021 NSSC
291

Date: 20211027

Docket: *Halifax*, No. 505696

Registry: Halifax

Between:

CHIEF WILBERT MARSHALL on his own behalf and on behalf of the members
of POTLOTEK FIRST NATION, and MICHAEL BASQUE

Applicants

v.

ATTORNEY GENERAL OF NOVA SCOTIA REPRESENTING HER
MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA

Respondent

v.

UNIFIED FISHERIES CONSERVATION ALLIANCE

Proposed Intervenor

INTERVENTION DECISION

Judge: The Honourable Justice Kevin Coady

Heard: October 5, 2021, in Halifax, Nova Scotia

Written Decision: October 27, 2021

Counsel: Jason T. Cooke and Ashley Hamp-Gonsalves, for the
Applicants
Sean Foreman, Q.C. and Neil Kuranyi, for the Respondent
Jeff Galway, for the Proposed Intervenor

By the Court:

[1] On April 20, 2021 the Applicants filed a Notice of Application in Court pursuant to *Civil Procedure Rule 5.07*. They seek an Order declaring that:

1. The licensing provisions and prohibitions contained in the *Fish Buyers Licensing and Enforcement Regulations*, enacted pursuant to the *Fisheries and Coastal Resources Act*, SNS 1996, infringe upon , and are inconsistent with, the Applicants' treaty rights under the Mi'kmaw Treaties of 1760-61, and are therefore unconstitutional and of no force or effect, or application, in relation to all aspects of the sale, purchase and processing of fish harvested by the Applicants pursuant to community authorization by virtue of section 35 and 52 of the *Constitution Act*, 1982;
2. Any enforcement actions taken by the Respondent pursuant to Regulation 19, including but not limited to those that prevent the Applicants from meaningfully exercising their Treaty Right to fish for a Moderate Livelihood would breach the Honour of the Crown; and
3. Regulation 19 violates Section 15(1) *Canadian Charter of Rights and Freedoms*.

[2] On September 3, 2021 the Respondent filed a Notice of Contest which included the following grounds of contest:

11. In this proceeding, the Applicants raise issues involving and flowing from their treaty right to fish in pursuant of a moderate livelihood, as first discussed by the Supreme Court of Canada ("SCC") in *R. v. Marshall*, [1999] 3 SCR 456 ("Marshall #1") and *Marshall v. Canada*, [1999] 3 SCR 533 ("Marshall #2"), collectively referenced herein as "*Marshall*".
12. While the Province acknowledges that the members of Potlotek possess treaty rights to fish in pursuit of a moderate livelihood, the Applicants and the Province currently have differing views with respect to the definition and scope of this treaty right, and the impacts (if any) that the current provincial legislative and regulatory regime has on the ability of the Applicants to exercise it.

Generally speaking this dispute relates to the Applicant's inability to market their product as a result of regulation 19 of the *Fish Buyers Licensing and Enforcement Regulations*. That regulation states, *inter alia*, that "No person shall buy fish or fish products caught by a person who does not hold a valid commercial fishing licence issued by Fisheries and Oceans Canada".

[3] On June 23, 2021 the Unified Fisheries Conservation Alliance ("UFCA") filed a Notice of Motion. It seeks an Order joining it as an Intervenor in this proceeding pursuant to *Civil Procedure Rule 35.10*. The UFCA describes itself as follows at paragraphs 4 and 5 of the Notice of Motion:

4. The UFCA is a not-for-profit alliance of commercial fishery stakeholders representing thousands of multi-species commercial fishermen, fishery associations, and associated businesses across Atlantic Canada. Its membership participates in all of the major commercial fisheries in Atlantic Canada, including lobster, Queen (snow) crab, swordfish, halibut and haddock. The UFCA was created to promote and advocate for responsible regulation, conservation, and commercial utilization of the Atlantic Canadian fishery, including through public relations, communications and representations to governments regarding relevant laws, policies and administration, and legal process.
5. The UFCA respects and acknowledges the rights of Indigenous peoples to participate in the commercial fishery in accordance with the current regulatory and constitutional framework.

The UFCA claims its members have a real, substantial and identifiable interest in the subject matter of this proceeding.

[4] The Applicants oppose the UFCA motion. The Respondent's position is that the "Attorney General does not oppose the motion to intervene filed by the UFCA". This motion was heard on October 5, 2021.

[5] On May 10, 2021 Chief Wilbert Marshall, on his own behalf, and on behalf of the members of Potlotek First Nation filed a Notice of Application in Court (Hfx. No. 506010) against the Attorney General of Canada. They seek the following relief:

1. A declaration that the *Fisheries Act (Canada)*, RSC 1985, c F-14, and the regulations promulgated thereunder, namely the *Fisheries (General) Regulations*, SOR/93-53, the *Maritime Provinces Fishery Regulations*, SOR/93-55, the *Atlantic Fishery Regulations*, 1985 SOR/86-21, and the *Aboriginal Communal Fishing Licenses Regulations*, SOR 92-332 (the "Regulations") unjustifiably infringe upon the Applicants' treaty right affirmed by the Supreme court of Canada in *R. v. Marshall*, [1999] 3 SCR 456 ("Marshall 1") and *Marshall v. Canada*, [1999] 3 SCR 533 ("Marshall 2") to fish for a moderate livelihood (the "Treaty Right") by prohibiting or unduly restricting the Applicants from exercising the Treaty Right, failing to prioritize the Treaty Right, and constituting a unstructured discretionary administrative regime that fails to outline specific criteria for the exercise of that discretion in a framework that properly accommodates the existence of the Treaty Right;
2. A declaration that the *Fisheries Act* and the *Regulations* including provisions related to enforcement, are constitutionally inapplicable to the Applicants, and of no force or effect, pursuant to section 35(1) and section 52(1) of the *Constitution Act*, 1982 to the extent they prohibit, or unduly restrict, the exercise of the Applicants' Treaty Right;
3. An injunction enjoining the Fisheries and Oceans Canada from enforcing the provision of the *Fisheries Act* and *Regulations* against Mi'kmaq harvesters authorized by Potlotek First Nation fishing in compliance with the Livelihood Fisheries Plan; and
4. Such further and other relief as this Honourable Court may deem fair and just in the circumstances.

While the grounds set forth in the Federal case are not exactly similar to the grounds in the Provincial case, the import of both applications are the same. The Applicants take the view that Provincial and Federal laws are frustrating First Nations' ability to fulfill their Treaty Right to a moderate livelihood.

[6] On July 16, 2021 the Attorney General of Canada filed a Notice of Contest.

While that response is particular to that application, the message is the same. It states at paragraph 11:

11. At this time, the Applicants and Canada have differing views with respect to the scope of the treaty right, and the impact that the current legislative and regulatory regime has on the ability of the Applicants to exercise it.

[7] On June 23, 2021 the UFCA filed a motion asking to be joined as an Intervenor in the federal application. On September 24, 2021, after a hearing, Justice John Keith released his decision granting the UFCA Intervenor status (2021 NSSC 283). In that case the Attorney General of Canada did not oppose UFCA intervention.

[8] The UFCA argues that Justice Keith's decision is very persuasive and I agree. The Applicants in this motion would have to distinguish the federal case from the case before this Court, in order successfully oppose this application. I conclude they have not done so. The regulation of the fishing industry is an integrated regime. The Federal Government regulates the harvest process while the

Province regulates the trade of the product. The critical issue in the trial will be about the impact of both sets of regulations on the moderate livelihood treaty rights of the Applicants.

[9] Justice Keith’s decision provides a very comprehensive analysis of *Civil Procedure Rule* 35.10. He addresses in detail whether intervention will unduly delay the proceeding or cause other serious prejudice to a party. He canvasses the evidentiary burden as stated in *Reading v. Johnson*, 2011 NSSC 87. Justice Keith fully addressed the four circumstances set forth in *Civil Procedure Rule* 35.10(2)(a) – (d). He explored “public interest” in detail as well as the role of residual discretion.

Conclusion

[10] I have come to the conclusion that the UFCA should be granted intervenor status in the present case. I agree fully with Justice Keith’s analysis and conclusion and I adopt it fully in support of my decision. The UFCA’s motion to intervene is allowed with costs, if any, to be determined.

Coady, J.