SUPREME COURT OF NOVA SCOTIA

Citation: Saint Mary's Bay Coastal Alliance Society v. Nova Scotia (Fisheries and Aquaculture), 2014 NSSC 50

Date: 20140131
Docket: Hfx. No. 352001
Registry: Halifax

Between:

Saint Mary's Bay Coastal Alliance Society, the Village of Freeport, the Village of Tiverton, the Village of Westport, Freeport Community Development Association, and Atlantic Salmon Federation

Appellants

v.

Minister of Fisheries and Aquaculture and Kelly Cove Salmon Limited

Respondents

and

Attorney General of Canada and Atlantic Canadian Fish Farmer's Association

Intervenors

Revised Decision:	This text of the original decision has been corrected according to the attached erratum dated February 10, 2014.
Judge:	The Honourable Justice Patrick J. Murray
Heard:	October 17, 2013, in Halifax, Nova Scotia
Written Decision:	January 31, 2014
Counsel:	John Swaigen and Marc Dunning, counsel for the Appellants A. William Moreira, QC, and Scott R. Campbell counsel for Kelly Cove Salmon Ltd. Matthew G. Williams, counsel for Atlantic Canadian Fish Farmer's Association Edward A. Gores, QC, Minister of Fisheries and Aquaculture Angela Green, counsel for Attorney General of Canada

By the Court:

Introduction

[1] This is a motion for costs.

[2] The Respondent, Kelly Cove Salmon Limited (Kelly Cove) seeks costs in a substantial amount against the Appellants (Appellants or Saint Mary's Bay). There are six Appellants in total including three municipalities, a municipal development association and the Atlantic Salmon Federation (ASF).

[3] The moving party Kelly Cove relies upon *Civil Procedure Rules 9* and *77*. Evidence in support of the motion is contained in the Affidavit of Jeff Nickerson, sworn to on July 23, 2013 and filed on August 16, 2013. The motion was heard on October 17, 2013 in Halifax, Nova Scotia.

[4] The Appellants rely on the affidavits referred to in paragraph three of their Brief. These include affidavits of Jeff Nickerson, Kirsten Mikadze, Dean Allbright, Kendall Crocker, Karen Crocker, Jonathan Carr and Sheldon Dixon.

Background

[5] On June 8, 2011 the Minister of Fisheries and Aquaculture (the Minister) issued Aquaculture leases and licences to Kelly Cove for two fish farms in Saint Mary's Bay, Nova Scotia. The fish farms are large. They are located in Grand Passage and Freeport. Subsequent to the issuing of the licences they were stocked with young salmon.

[6] Subsequent to the issuing of the leases and licences the sites were also developed by Kelly Cove who began installing facilities and infrastructure. This occurred in June, 2011 after the licences were issued. One site (Grand Passage) was stocked at the end of June, 2011 and the other site (Freeport) was stocked in August, 2011.

[7] On July 7, 2011 the Appellants filed a Notice of Appeal of the Minister's decision. They appealed the decision to issue the leases and licences pursuant to section 119(1) of the *Coastal Resources Act*, SNS 1996 c. 25.

[8] The appeal was ultimately abandoned with a Notice of Discontinuance being filed by the Appellants on April 29, 2013.

[9] The appeal continued for 23 months before it was discontinued. Kelly Cove was named in the Appeal and now seeks costs against the Appellants for the (near) two year period.

[10] The decision to discontinue the appeal came about as a result of negotiations between the Appellants and government. The outcome of these discussions is an important factor on this motion. The outcome was that there would be policy reforms by the Minister for future plans in aquaculture. The Minister announced the appointment of an expert panel to recommend improvements to the regulatory framework of the aquaculture industry.

[11] The appeal was discontinued three (3) months before scheduled the hearing date.

[12] Kelly Cove seeks the amount of $83,000 in costs. In the alternative, Kelly Cove seeks the amount of $23,000.

[13] Both of these amounts are based upon on the formula contained in Tariff "F" of *Rule 77* dealing with costs. The key to determining the costs is the "amount involved". That formula is set out in Kelly Cove's brief at paragraph 13 as follows:

> Subject to the discretion of the Court, Kelly Cove submits that pursuant to Tariff "F", costs payable on discontinuance "shall not be more than" $5,000 plus 2 percent of the amount by which the "amount involved" is in excess of $100,000.

[14] The Appellants argue the amount sought is out of all proportion to Kelly Cove's actual legal fees.

[15] The Appellants further submit this was a "non monetary" appeal. The Appellants say there was no improper motive in challenging the licences or leases which the Appellants did, as of right.

[16] A more detailed review of the positions of each party is merited.

Positions - Kelly Cove

[17] Kelly Cove maintains the settlement reached between Saint Mary's Bay and the government had little to do with the grounds of appeal. The terms of the

settlement show an improper motive for the Appeal. This was essentially a lobbying effort by the Appellants seeking reform, says Kelly Cove.

[18] They argue the appeal did not need to involve Kelly Cove. They argue further that the constitutional challenge was unwarranted.

[19] Meanwhile, Kelly Cove had much at stake. They maintain, their facilities and infrastructure costs were $4 million.

[20] Kelly Cove maintains costs should be based on the "amount involved", which is easily determined. Kelly Cove relies upon the affidavit of Jeff Nickerson at paragraphs 26, 27 and 28 for the amounts involved.

[21] Kelly Cove argues that in addition to the amount involved being easily determined, it is the appropriate method to determine these costs as illustrated in the "**Polycorp"** decision. It is significant, they submit, that no agreement on costs was sought from Kelly Cove in advance of the settlement. The affidavit of Mr. Nickerson states that Kelly Cove made it clear that it was not waiving costs in the event of any settlement.

[22] Kelly Cove argues that the Appellants were aware costs would have to be dealt with and the amount being sought was never discussed or agreed upon.

[23] Kelly Cove submits that the improper motive (as alleged) warrants an increased cost award.

Position - Saint Mary's Bay et al

[24] The Appellants maintain that other than three motions for directions, there is little else in the way of steps taken by Kelly Cove upon which costs should be awarded.

[25] There was an interim application for a stay of proceedings. This was withdrawn and Kelly Cove waived costs in relation to same. There was a *Rule 12* motion to determine jurisdiction, Duncan, J., heard this motion on December 20, 2012. The motion was unopposed. He ruled that the division of powers ground of appeal (stated as ground number 1) be struck from the Notice of Appeal.

[26] Justice Duncan invited submissions on costs and ruled in a subsequent decision that costs in the amount of $500 be payable as between the Applicants and Kelly Cove on the so called *Rule 12* motion. These costs have been paid as confirmed in the affidavit of Kirsten Mikadze submitted on behalf of the Appellants.

[27] No costs on the *Rule 12* motion were awarded payable as between the Appellants and the Attorney General Canada or of the Minister of Fisheries and Aquaculture (NS).

[28] Consequently, in terms of procedural steps, Saint Mary's Bay submits this leaves only the three (3) motion for directions, which were held during the involvement of Kelly Cove.

[29] The Appellants submit that Kelly Cove had nothing to do in relation to the appeal after May 23, 2012.

[30] The Appellants question whether costs should be awarded on Motions for Directions at this stage, arguing it is simply too late.

[31] Further, the Appellants submit they are "public interest" litigants. The grounds of appeal were bonafide. The Appellants are and were concerned with protection of the environment and in preserving the wild salmon fish stocks.

[32] While they are not immune from costs and recognize Kelly Cove may be entitled to some costs, the Appellants argue that the Court should exercise caution in assessing the amount(s) put forth by Kelly Cove.

[33] Finally, the Appellants argue that Kelly Cove seeks costs on the three motion for directions as costs and again as costs on the discontinuance. This is not proper and amounts to double recovery.

Considerations

[34] There are two important aspects in respect of this matter which must be considered. First, no evidence has been given as to Kelly Cove's actual legal costs. Secondly, no evidence has been presented as to the Applicants' capacity to bear a cost award.

[35] A third consideration is whether Kelly Cove assumed risk by proceeding to place infrastructure and develop the sites, before the appeal period expired and while the Appeal was underway. The Applicants suggest it did, referring to the November 14, 2011 affidavit of Mr. Nickerson (paras 5, 6, 9 &10).

[36] I turn now to discuss the law on costs and the appropriate tariff. *Rule 77* of the *Nova Scotia Civil Procedure Rules* is the applicable *Rule*.

Law on Costs in Nova Scotia

[37] An appropriate award of costs is in the discretion of the Court. Such discretion must be exercised judicially. This is done by applying general principles as laid down in the case law and as set out in the *Rules* governing costs.

[38] The overriding principle is that the Court may "at any time", grant an Order that will "do justice" as between the parties (*Rule 77.02*).

[39] The *Rules* state that costs shall be awarded in accordance with the Tariffs set out in *Rule 77* unless otherwise ordered (*Rule 77.06*). The Court may award costs in a lump sum, if it is deemed appropriate.

[40] Costs are normally awarded to the successful party, but once again it is contingent on what will do justice, in the particular circumstances, as between the parties.

[41] I turn now to discuss the circumstances before me as between Kelly Cove and the Appellants.

Analysis

[42] Kelly Cove relies heavily on the decision of Warner, J. in **Polycorp Properties Inc.** v. **Halifax (Regional Municipality)**, 2011 NSSC 241. In **Polycorp,** following a three (3) day trial, the Court awarded costs in favour of the developer payable by the Municipality on the basis of Tariff "A" of *Rule 77*. The Court determined that the amount involved for tariff purposes was the purchase price paid by the developer for the land.

[43] At paragraph 177, Warner, J. stated:

> My basis for accepting **Polycorp's** 'amount involved' is that if the City had succeeded, either in its defence of the first application or its prosecution of the second application and the Property was restricted to use as "open recreation space" it would likely have no value to **Polycorp**.

[44] Justice Warner further stated that the starting point is to determine the amount involved and offered an alternative, if this amount is not apparent, stating at paragraph 176:

> The starting point of the analysis under *Tariff A* is to determine the "amount involved". Sometimes there is no apparent "amount involved" and the Court is required to apply other considerations such as those enumerated in *Tariff C* related to the complexity of the matter, the importance of the matter to the parties and the amount of effort involved.

[45] Kelly Cove submits like **Polycorp**, the value of their property was imperiled and placed in jeopardy by this Appeal. It submits that the present case is distinguishable from the **Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Company Ltd.,** 2011 NSSC 423, relied upon the Appellants, because in **Bowater** the value of the property was not imperiled. In **Bowater**, the Court accepted that the risk for the company was related to the time when it would achieved cost savings, not whether it would do so. The issue in **Bowater** was the potential cost of an injunction.

[46] In **Polycorp**, the Court found that "the amount involved" was "easily determined" to be not less than $1,275,000, the purchase price of the property.

[47] In the present case, Kelly Cove puts forth two (2) amounts, the second in the alternative. The first amount is $4,000,000 representing the capital cost to Kelly Cove of the facilities, the use of which is permitted by both the leases and licences. Kelly Cove says the facilities would have had "no value" to Kelly Cove had the Appeal succeeded on its merits.

[48] The second figure put forth by Kelly Cove is a lesser, but still substantial amount of $500,000 representing the cost to remove the infrastructure. For the calculation under Tariff "F", Kelly Cove doubled this figure to reflect the cost of "later reinstatement". While this is somewhat unclear the amount calculated would be "not more than $23,000 in costs". This represents a substantial reduction as compared to the capital costs calculation of $4 million which would be "not more than $83,000". The difference is $60,000 in costs.

[49] In **Polycorp** the Court went on to consider whether it should deviate from Tariff "A", because determining the Tariff "A" amount involves an exercise of discretion. For the sake of argument, Tariff "A" and Tariff "F" are similar in that they call for the "amount involved", except Tariff "A" addresses a trial situation and Tariff "F" deals with a proceeding which is discontinued or settled. There is no prescribed method in either Tariff for determining the amount involved where the claim is not a monetary one.

[50] Like **Polycorp**, Kelly Cove was attempting to develop land except instead of being an owner, they were leasing the site. Both needed approvals to proceed, in **Polycorp's** case, a municipal permit/approval, and in Kelly Cove's a licence(s) and lease(s).

[51] As an owner, **Polycorp** had a more direct stake in being able to use the land, for the purpose it was purchased.

[52] It's true, Kelly Cove was bound by terms of the leases. The suggestion by Kelly Cove is that it was able to mitigate, an inference drawn from the alternative cost proposal. Further details have not been submitted in that regard. It appears

Kelly Cove proceeded immediately upon approval, to spend the money on the project.

[53] I think that is a factor for which Kelly Cove must bear some responsibility, in terms of costs. They assumed that risk when they proceeded with the development.

[54] Returning to the **Polycorp** analysis, the Court looked to the three factors enumerated in Tariff "C" for guidance: 1) complexity; 2) importance; and 3) amount of time and effort expended. This was to determine whether it was appropriate to deviate from Tariff "A".

[55] In the present case, Kelly Cove in its brief discusses "importance", in terms of the significant financial consequences. As well, Kelly Cove argues the appeal would have been a "final" determination, as the *Fisheries and Coastal Act* excludes any further appeal.

[56] The additional factors of complexity and time spent were not the focus in Kelly Cove's submissions before me. It did maintain from the start, that the

constitutional ground had no merit. This was confirmed by the ruling on the *Rule 12* motion.

[57] The focus by Kelly Cove centered on the appeal having nothing to do with the merits. In other words, there was no "justicable issue" that necessitated the involvement of Kelly Cove in the Appeal.

[58] Before leaving **Polycorp**, I will set out further thoughts on the comparison to the present case. In **Polycorp** there was a three (3) day trial held. Here there was no hearing on the Appeal. There was, however, notice that the matter had been settled prior to the Appeal. This was prior to the date the briefs were due.

[59] Unlike **Polycorp** there is no value given here as to what the land was worth without the leases or licences. This casts a degree of uncertainty upon the amount put forth by Kelly Cove. Kelly Cove acknowledges that its position on the $83,000 costs claim is an aggressive one. The July 23, 2013 affidavit of Mr. Jeff Nickerson does not state that the facilities would have "no value" to Kelly Cove, (if the appeal were successful). It stands to reason, however, that the facilities would have less value.

[60] It is clear from **Polycorp** that the Court was able to assess to some degree, the amount of time and effort in determining that the Tariff "A" costs should not be reduced. The Court stated at paragraph 185:

> The additional processes which arose by HRM's joining of four additional parties and additional issues, resulted in eight discoveries, five in Halifax and three in Toronto and additional sets of counsel for five parties plus an intervenor (who was discovered). The additional expense reflects the additional parties, issues, discoveries and steps.

[61] I conclude, there is no basis in the present case upon which the Court can easily assess whether the Tariff "F" cost claim would result in a partial but incomplete indemnity or in the alternative, a windfall for Kelly Cove. That is the danger in simply awarding costs based on the $4 million figure.

[62] I find here there is little in the way of a yard stick to measure the proposed amounts against the three factors outlined in Tariff "C". While Kelly Cove is not compelled (under Tariff "F") to provide an indication of actual legal fees, it would have been helpful in these circumstances, if even an approximation of the time spent.

[63] I reiterate the Appellants' position, that it is only costs on three motions for directions, which the Court should assess.

[64] The Court is therefore left to determine what involvement Kelly Cove had including these motions, in order to obtain a sense of other procedural steps or the work completed by Kelly Cove.

[65] While I find the comparison between this case and **Polycorp** helpful. I am not convinced that using the $4 million figure would produce a fair and just cost award. I am not satisfied doing so would satisfy the principle of the award being a partial but incomplete indemnity for Kelly Cove's actual legal costs.

[66] I turn now to discuss additional factors, and in particular, Kelly Cove's argument that there was an improper motive for the Appeal.

Improper Motive

[67] Kelly Cove argues that Appellant's purpose in appealing had nothing to do with the merits of the Minister's decision to issue the leases and licences. Kelly

Cove says the Appellants' purpose was to lobby the provincial government as to the regulatory scheme which applies to aquaculture in Nova Scotia.

[68] Kelly Cove states that improper purpose should enhance the award to Kelly Cove as it involved the pursuit of other issues that did not require the licence holder to be involved in the litigation.

[69] Kelly Cove makes the same argument about the constitutional issue claiming it was properly a matter between the Appellants and the federal and provincial governments.

[70] Kelly Cove refers to paragraphs 10 - 12 of Mr. Nickerson's affidavit, to show that its counsel last participated in settlement negotiations on January 20, 2012. It refers also to an email from Appellants' counsel of December 19, 2012 wherein there existed "a general understanding on terms of settlement". This, Kelly Cove, refers to this as a non-justicable issue, submitting it could only have been lobbying on the part of the Appellants.

[71] I am not persuaded that the Appellants approach to settlement clearly caused Kelly Cove to incur increased costs. Until the hearing of the Appeal, the Appellants were entitled to pursue a settlement on terms satisfactory to them.

[72] At the hearing of the Appeal, the Appellants would have been required to argue the appeal on its merits, or alternatively, abandon the Appeal. Either way Kelly Cove did not waive costs, nor would it be required to waive costs.

[73] It is not for this Court to weigh and assess the merits on the grounds of appeal. Suffice it to say the Appellants were entitled to file a Notice of Appeal, which they did.

[74] By filing a Notice of Appeal, the Appellants sought to overturn the decision to issue the leases and licences to Kelly Cove. It was only logical to name the licence holder, (in the Appeal), who stood to lose the most, if the decision was overturned. It would seem improper not to name Kelly Cove, as they were most affected by the Appeal. Not to have named the licence holder would have left the most interested party, on the “sidelines”.

[75] Persons and entities settle legal proceedings for various reasons. Ultimately, it is those reasons that matter in terms of any decision to discontinue the proceeding.

[76] I therefore reject the lobbying argument made by Kelly Cove.

Public Interest Litigants

[77] The Appellants seek a reduction, or no costs at all on the basis that they were serving a public interest and protecting the environment.

[78] Paragraphs 24 and 26 of the Appellants' brief states as follows:

> 24. DFO concluded that uncertainty pervades the analysis of how exactly these feedlots will affect the population of wild Atlantic salmon which are already under stress. DFO stated:
>
> > The relative severity of potential impacts from the ... aquaculture sites relative to other anthropogenic sources cannot be determined. However, these impacts have the potential to undermine the effectiveness of actions to improve the viability of salmon populations and to prevent their extirpation.
>
> 26.Community opposition to the feedlots was strong. Before the leases and licences were granted, a petition showed that 80% of the populations of Freeport, Tiverton, and Westport opposed the feedlots. The three villages also passed resolutions opposing the feedlots. In addition, 31 separate organizations with interests ranging from the potential impacts on the lobster fishery, to community

> relations, to endangered wild Atlantic Salmon, made submissions to the province and the Government of Canada.

[79] The Grounds of Appeal appear to reflect some of these considerations.

[80] One of the Appellants' main arguments is the "chilling effect" the awarding of costs would have on sincere parties, who wish to challenge matters affecting the community as a whole, particularly against opponents with extensive resources.

[81] There is evidence to support a finding that issues of public importance have been brought forward in the present case. There are three municipalities and thirty one various organizations with interests. There is, at least, an endangered species (wild salmon) and an existing fishery (lobster) which have been represented, and have expressed concerns.

[82] I find there is, on the evidence, a public interest component to the Appellants' grounds of appeal. The caselaw put forth by the Appellants support the notion that in such cases the party raising the issue will not necessarily bear the successful party's cost.

[83] The Supreme Court of Canada has said that raising issues of public importance will not automatically entitle a litigant to preferential treatment regarding costs. It depends on the circumstances of each case. In **Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)**, 2007 SCC 2, the Court stated at paragraph 35:

> Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously: see *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395 (B.C.S.C.), at pp. 406-7, aff'd (1995), 126 D.L.R. (4th) 437 (B.C.C.A.).

[84] Turning to the circumstances before me, it is difficult for the Court to weigh an appropriate award as relevant evidence, is lacking in my view. With respect to the Appellants, there is no evidence of their financial circumstances or ability to respond to a cost award. With respect to Kelly Cove the Court has no indication of the actual costs of the actual time spent by its counsel.

[85] The Appellants request that this Court draw an inference that Kelly Cove is better equipped financially to bear costs than the Appellants'. It has also argued, that the capital costs figures put forth by Kelly Cove are arbitrary and uncertain and should not be used to determine the "amount involved" under Tariff 'F'. It cannot in the same breath argue that these figures should be relied upon to draw an

inference as to the financial ability of Kelly Cove to more easily handle a cost award, even though that may be the case. There are persons and entities involved on the Appellants' side among whom the burden of a cost award could be shared.

[86] In **Conseil scolaire francophone de la Colombie-Britannique** v. **British Columbia**, 2013 SCC 42, costs were awarded to an unsuccessful party, (who were also Appellants), for having raised a novel issue in the context of a charter challenge. The issue was the ability of francophone parents to have exhibits to affidavits written in the french language.

[87] On the other hand, in **Little Sisters,** the Court noted that the challenge to the customs procedures, (in admitting literature) involved only four books. In the present case, the two feeding lots are large in size as compared to others in Nova Scotia. The stocking of fish was substantial.

[88] Kelly Cove maintains it opposed ground number one, the constitutional issue from the start, as it had no merit. Kelly Cove states the remaining grounds were avoided by the Appellants on their merits as part of the settlement discussions.

[89] While I am prepared to acknowledge a public interest aspect to the appeal, I am not prepared to draw an inference that the Appellants have no ability to respond or that they should be immune from party and party costs all together. This is my view even if Kelly Cove is in the better financial position to handle costs.

[90] There are gaps in the information which made it difficult for the Court to decide a just reward. In order to determine appropriate costs, it is necessary for the Court, to determine, or attempt to determine what steps were completed by Kelly Cove that would entitle them to a reasonable cost award.

[91] In **The Valhalla Wilderness Society v. R.**, 1997 CanLII 2099 (BC SC), the Court was able to conclude in matters of unquestionable public interest, that the consequences were far more significant to the Petitioner than to the Respondent, forest company. As stated, the Court here is not in as clear a position to achieve that end. Even if it were, financial consequences by itself is not a reason to not award costs.

[92] I find that the better approach to deal with the cost award, is to follow the approach suggested by Moir, J. in **Bevis and Karela v. CTV Inc, Burns and**

Kelly, 2004 NSSC 209. That approach is to consider the Tariff system as contained in the *Rules* and the factors referred to therein.

[93] Reasonable approaches to determine the "amount involved" cannot, in the present case, be made with certainty. Nor does it result in any certainty that the cost award would be fair. I am entitled, therefore, to use my discretion and consider a lump sum award, having regard to the actual costs facing the successful party or the labour expended by their counsel (Tariff "C").

[94] Without evidence of actual costs before me, I have reviewed the affidavit of Mr. Nickerson to obtain a sense of the labour expended by the Appellants' counsel.

[95] The Notice of Appeal was filed in July, 2011 and shortly thereafter the three (3) motions for directions were held on September 8, 2011, September 23, 2011, and October 4, 2011.

[96] A summary of the dates set by Justice R. Coughlan is attached as Exhibit "B" to Mr. Nickerson's affidavit. Numerous dates were set including dates for the constitutional issue hearing, and for additional motions for further evidence. The

complex chambers appeal hearing date was scheduled for three (3) days on July 9, 10 and 11, 2012. On July 10, 2012 there was an agreed upon adjournment and new dates were set by Justice D. MacAdam. On that occasion, the complex chambers appeal hearing was set for August 6, 7, and 8, 2013. There was a detailed list of other dates set for the other procedural matters.

[97] Shortly after the three motions for directions, the parties engaged in settlement discussions. Exchanges were made on November 9, 2011, December 13, 2011, and again on December 14 and 16, 2011 in relation to the *Rule 12* motion scheduled for December 19, 2011, which would be adjourned.

[98] Further discussions were held in February, 2012 regarding adjournments of various hearing dates to allow for a meeting of experts. This led to the May 23, 2012 meeting attended by the parties without legal counsel.

[99] On December 7, 2012, Mr. Moreira, counsel for Kelly Cove, was contacted by the Appellants who proposed to withdraw the stay motion if Kelly Cove waived costs otherwise payable on that motion. Subsequent to that, Mr. Moreira received the December 19, 2012 email from the Appellants that a general understanding had

been reached and the *Rule 12* motion scheduled for December 20, 2012 would not be opposed.

[100] Without detailing further events, it is known that the general understanding culminated with the letter of April 29, 2013 confirming settlement.

Decision

[101] I have considered this matter carefully in terms of the cost award. Based on the foregoing analysis and for the following reasons, I find that the amount of $2,500 put forth by the Appellants does not meet the principle of partial, but incomplete indemnity for Kelly Cove's costs.

[102] In addition to the steps which I have outlined, there were numerous affidavits filed in the matter. These were extensive with numerous exhibits. These were required to be reviewed and discussed by counsel with their respective clients. Positions needed to be formulated and communicated to the opposing parties.

[103] Procedural matters required consideration including when matters would be ready to proceed. In addition the following questions would need to be addressed: What evidence needed to be filed and responded to? When evidence could be compiled and presented? What dates would be available and prudent in the logical sequence of events? While we do not have an accounting of counsel's time, it is reasonable to conclude that all this takes considerable time and effort.

[104] Had the matter proceeded to the three day hearing, Tariff "C" under special chambers, would have allowed $2,000 per day with the ability to apply a multiplier when an Order determines the entire proceeding. The multiplier can be 2, 3, or 4 times, depending on the factors of complexity, importance and amount of effort.

[105] A multiplier of two (2), for example, would result in costs of $12,000. Once again, this assumes the matter had gone to the appeal hearing.

[106] I think it is relevant to consider the alternative cost figure proposed by Kelly Cove here because the hearing did not proceed. That proposal stipulated the sum of $500,000 as an amount involved to remove the infrastructure put in place by

Kelly Cove. It was doubled by Kelly Cove to account for "later reinstatement", resulting in costs claimed of $23,000.

[107] I can see merit in one removal cost but not two, because Kelly Cove knew or ought to have known the appeal period was still open when it started its work. Claiming even the initial removal cost is questionable when a party is aware the appeal period has not expired. Arguably, it is an act which one does at its own peril.

[108] I expect there are many considerations which are involved in such a decision to proceed once the leases and licences are issued, of which monetary is but one. While using the $500,000 figure may be questionable, it is useful to consider it, as a "middle ground" between Kelly Cove's figure of $23,000 and the $2,500 figure put forth by the Appellants. Using the $500,000 as the amount involved under Tariff "F" would result in costs of $13,000 under the formula in Tariff "F" (not more than $5,000 plus 2% of the amount in excess of $100,000).

[109] There are additional factors to be considered such as the stage at which the proceeding was discontinued, *(Rule 9.06)*. The briefs for the August, 2013 hearing

were due June 30 and July 14, 2013. The settlement in April, 2013 saved considerable costs in this regard.

[110] There is also the public interest factor which I have found has merit. I am of the view that while it should result in some reduction, it should not eliminate a cost award against the Appellant. Notwithstanding good intentions, such an appeal time consuming. It is also major disruption to the Respondent business enterprise. We have seen where one ground of appeal was dismissed.

[111] The so called "chilling effect" upon public interest litigants is best served a balancing of the interests. A decision on the merits of the remaining grounds of appeal was never reached.

[112] Exercising my discretion, I find that the amount claimed by Kelly Cove of $83,000 does not honour the principle of costs as a partial indemnity. It is difficult to measure, as I have said whether this represents fair value or well in excess of fair value for Kelly Cove's legal services.

[113] Taking all factors into account and realizing that these circumstances compel a degree of arbitrariness (due to the lack of a legal account and the ability of the Respondent's to incur a cost award), I find imposing a lump sum pursuant to *Rule 77.07* is an appropriate method to achieve justice as between the parties.

[114] To that end, I award costs to the Respondent, Kelly Cove, payable by the Appellants' in the amount of $12,500, less a reduction of $2,000 for net costs of $10,500. This shall include any and all costs pertaining to the three motions for direction, so as to prevent double recovery. Order accordingly.

_____

Murray, J.

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E R R A T U M

Revised Decision: The text of the original decision has been corrected according to the attached Erratum (February 10, 2014).

Judge: The Honourable Justice Patrick J. Murray

Heard: October 17, 2013, in Halifax, Nova Scotia

Written Decision: January 31, 2014

Counsel:	John Swaigen and Marc Dunning, counsel for the Appellants A. William Moreira, QC, and Scott R. Campbell counsel for Kelly Cove Salmon Ltd. Matthew G. Williams, counsel for Atlantic Canadian Fish Farmer's Association Edward A. Gores, QC, Minister of Fisheries and Aquaculture Angela Green, counsel for Attorney General of Canada

Erratum:

[1] At paragraph 6 the word "also" to be inserted after the word "were" in the first line.

[2] At paragraph 9 the word "two" shall be inserted in place of the number 2.

[3] At paragraph 21 the word "Polycorp" in the third line shall be placed in quotations.

[4] At paragraph 24 the words "there is" shall be inserted before the word "little", in the first line.

[5] At paragraph 28 a comma shall be placed after the word "directions", in the second line.

[6] At paragraph 30 the apostrophe shall be removed after the word "Appellants".

[7] At paragraph 33 the word "amounts" shall be inserted instead of the word "amount" in the third line.

[8] At paragraph 45 the word "that" shall be inserted after the word "submits", in the second line.

[9] At paragraph 85 an apostrophe shall be added to the word "Appellants". Eg. Appellants'.

[10] At paragraph 111 the word “reviewed” shall be replaced with the word “served”.

Murray, J.