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FEDERAL COURT QUASHES FEDERAL POLICY ALLOWING TRANSFER OF SALMON INTO FISH FARMS WITHOUT TESTING FOR CONTAGIOUS VIRUS OR CONSULTING WITH INDIGENOUS PEOPLES

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On Feb. 4, 2019, the Federal Court issued its reasons for judgment regarding certain decisions made by the Minister of Fisheries, Oceans and Canadian Coast Guard. The Court's reasons were extensive, spanning roughly 200 pages.

'Namgis First Nation, alongside biologist Alexandra Morton, challenged a policy relating to the process associated with authorizing the transfer of smolts (juvenile salmon) grown on land-based hatcheries into ocean-based fish farms.

Specifically, the Department of Fisheries and Oceans ("**DFO**") had an established policy of not testing for the presence of Piscine Orthoreovirus ("**PRV**") or Heart and Skeletal Muscle Inflammation ("**HSMI**") prior to issuing licences authorizing such a transfer (the "**Policy**").

DFO had reconsidered, but maintained, the Policy on several occasions. In this litigation, 'Namgis and Ms. Morton challenged the latest iteration of the Policy, which the Minister confirmed on June 28, 2018. 'Namgis additionally challenged a decision by DFO to issue a specific license pursuant to the Policy, authorizing a transfer of smolts to restock a particular fish farm situated in its territorial waters.

In brief, s. 56 of the Fishery (General) Regulations ("**FGRs**") provides the Minister with the discretion to authorize such transfers. However, s. 56(b) requires the Minister to deny a transfer licence if fish have a disease or disease agent that "may be harmful to the protection and conservation of fish."

Ms. Morton had earlier challenged the Minister's approach to s. 56(b) in Morton v. Canada (Fisheries and Oceans), 2015 FC 575 ("***Morton 2015***"). That challenge also arose in the context of testing for PRV prior to authorizing transfers.

At issue in Morton 2015 was a condition DFO had included in fish farms' licenses to operate. This condition allowed the operator to itself authorize transfers if it deemed certain criteria were satisfied. The Court in Morton 2015 held that (i) this approach constituted an impermissible delegation of the Minister's regulatory authority to fish farm operators, and (ii) s. 56(b) requires the Minister to take an approach consistent with the precautionary principle when considering transfer requests.

Following the Federal Court's decision in Morton 2015, DFO eliminated the license condition held to be illegal, and adopted the Policy, which included a new legal interpretation of the phrase "the protection and conservation of fish" in s. 56(b). These actions by DFO, together with Morton 2015, provided, in significant part, the legal backdrop associated with 'Namgis' and Ms. Morton's 2018 challenge.

'Namgis' 2018 challenge

Both 'Namgis and Ms. Morton argued that the Policy was unlawful because the legal interpretation of s. 56(b) it was premised upon was inconsistent with (i) a proper interpretation of the phrase "the protection and conservation of fish", and (ii) the precautionary principle, which Morton 2015 held was "embodied" in s. 56(b). 'Namgis also advanced the argument that the Policy was enacted in bad faith and in breach of the Crown's duty to consult owed to it under s. 35 of the Constitution Act, 1982.

Regarding the individual transfer licence issued pursuant to the Policy, 'Namgis submitted that it was similarly unlawful, owing to its issuance in noncompliance with s. 56, and because it was also issued in the absence of Crown consultation as required by s. 35(1) of the Constitution Act, 1982.

Decision

(a) The Policy was unreasonable

The Court accepted 'Namgis' and Ms. Morton's submissions on the unlawfulness of the Policy, focusing on the legal interpretation of s. 56(b) contained within it. Both argued that it conflicted with s. 56(b) of the FGRs and the Federal Court's earlier holding in Morton 2015. Ms. Morton also submitted that the Policy was enacted in an improper attempt to

circumvent Morton 2015, while 'Namgis asserted that it was enacted for the improper purpose of promoting the interests of the aquaculture industry, without proper regard for the protection and conservation of fish as required by s. 56.

The Court found the Policy was unreasonable because it allowed any transfer of smolts that have a disease or disease agent, unless genetic diversity, species, or conservation units of fish may be harmed "such that it cannot sustain biodiversity and the continuance of evolutionary and natural production processes". Accordingly, the Court reasoned that the level of potential harm contemplated by the interpretation was inconsistent with the standard required by s. 56(b) (to prevent a transfer that "may be harmful to the protection or conservation of fish") by "incorporating a level or magnitude of potential harm at the species or conservation unit level before s. 56(b) will preclude a transfer".

Additionally, the Court observed that Morton 2015 found that s. 56(b) requires, "as a matter of sound public policy", that fish transfers be approached with regard to the precautionary principle articulated by the Supreme Court of Canada in Castonguay Blasting Ltd. v Ontario, 2013 SCC 52.

However, the Court found that in view of the high level of harm permitted before a transfer would be denied (i.e. allowing a transfer unless harm to an entire stock or conservation unit was of such a magnitude that it "cannot" sustain biodiversity) it was not "difficult to see" that it was inconsistent with the precautionary principle. For this additional reason, the Policy was also found to be unreasonable.

Further, the Court considered that the health of wild Pacific salmon was (i) a relevant factor required to be taken into account but was not, and (ii) that not accounting for this was additionally contrary to the precautionary principle, which further rendered the Policy unreasonable.

In support of its position that the Policy was enacted for an improper purpose, 'Namgis argued that DFO had, for example, enacted it in reliance on data on PRV and HSMI known to be flawed, which it said was demonstrated by the evidence before the decision-maker and by its own expert affidavits.

The Court did not accept that submission, and found all of the expert evidence filed in the matter inadmissible because it did not fit into any exception to the general rule that judicial review is restricted to the evidence that was before the decision-maker. The Court did, however, comment that what the voluminous competing scientific evidence did establish was that "extra care is required in decision-making concerning PRV and HSMI with respect to wild Pacific salmon."

(b) The Minister breached the duty to consult 'Namgis regarding the Policy

As an independent basis for setting the Policy aside, the Court also found that the Crown breached its constitutional duty to consult 'Namgis. That duty is triggered when the Crown (i) has knowledge (real or constructive), of the potential existence of the Aboriginal right or title and (ii) contemplates conduct that (iii) might adversely affect it.

It was not at issue that the Crown had knowledge of 'Namgis' right to fish in their territorial waters and that the Policy constituted Crown conduct, satisfying elements (i) and (ii) of the test. However, the Minister argued that the potential adverse impact alleged by 'Namgis was not novel to the Policy, because the fish farm at issue had been operating in substantially the same way for many years. The Minister also argued that because the Policy was "based on its scientific conclusion that PRV is not harmful to fish" that 'Namgis was engaging in "speculation and conjecture" regarding any potential harm to its Aboriginal rights.

In that regard, the Court first observed that DFO had reconsidered the Policy on numerous occasions and considered that, by such actions it "recognizes that PRV may give rise to a real potential harm." The Court further noted that the record before DFO had established that the science surrounding PRV and HSMI was rapidly evolving, and that wild Pacific salmon could be impacted differently than farmed salmon. The Court therefore accepted that because the Policy did not take wild Pacific salmon into account, it had the potential to adversely affect 'Namgis' Aboriginal rights. The Court therefore accepted that element (iii) of the test to trigger duty to consult had been met.

In the Court's view, the Crown's duty to consult arose from DFO's refusal (contrary to its claimed ongoing consultation practices with respect to aquaculture) to respond to 'Namgis' requests for consultation concerning the Policy's potential impacts to Aboriginal rights. That duty was breached when the Minister failed to consult with 'Namgis' both when (i)'Namgis raised its first raised concerns about continued transfers without testing for PRV and (ii) the Minister later reaffirmed the Policy on June 28, 2018.

However, the Court found that the duty to consult did not arise regarding the issuance of individual transfer licences, principally because the Court observed that it was "impractical" to do so. In view of its findings respecting the illegality of the Policy, the Court found it unnecessary to address the lawfulness of the specific transfer licence that 'Namgis challenged, because it had "expired" by the time of the hearing of the judicial review, and the Minister had since amended the standard form language of the transfer licence held to be illegal in Morton 2015. Accordingly, the Court reasoned that there was

"nothing to be gained by the Court reviewing the reasonableness of the prior process".

(c) Minister required to develop a new, legally compliant version of the Policy

In the result, the Court set aside the Policy because it was inconsistent with s. 56 of the FGRs and the precautionary principle, failed to account for the health of wild Pacific salmon, and because the Crown failed to consult 'Namgis' before the Minister made his decision to reaffirm it.

The Court suspended its judgment for four months to allow DFO time to comply with it.

Gowling WLG (Canada) LLP is honoured to represent the 'Namgis First Nation in this matter. Paul Seaman acts as lead litigation counsel, and was assisted by a team that includes Scott Smith, Max Faille, and Aaron Christoff.

Related Climate Change and Environmental Law, Indigenous Law

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