

2007 FC 45, [2007] 2 C.N.L.R. 233

2007 CarswellNat 53

Native Council of Nova Scotia v. Canada (Attorney General)

The Native Council of Nova Scotia, Applicant and Attorney General of Canada,  
Respondent

Federal Court

C. Layden-Stevenson J.

Heard: November 9, 2006  
Judgment: January 16, 2007  
Docket: T-872-05

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Counsel: D. Bruce Clark, Brian K. Awad, for Applicant

Jonathan D.N. Tarlton, for Respondent

Subject: Public; Constitutional; Civil Practice and Procedure; Estates and Trusts; Contracts; Natural Resources

Aboriginal law --- Constitutional issues -- Aboriginal rights to natural resources -- General principles

Duty to consult and accommodate -- Native Council ("NCNS") represented Nova Scotians living off-reserve and claiming Aboriginal ancestry -- NCNS formed commission to manage hunting and fishing by issuing Aboriginal and Treaty Access ("ATRA") passports to applicant members participating in communal hunting and fishing -- From 1992 on, NCNS entered into series of fisheries management agreements with Department of Fisheries and Oceans ("DFO"), including Protocol for handling harvesting practices -- In 1995, NCNS and DFO signed Aboriginal Fisheries Arrangement ("AFA") agreeing to co-manage harvesting by ATRA passport holders ("PH"), and set out annual harvesting plan forming basis for NCNS's Licence -- 2004-2005 AFA allowed 40 lobsters per day from lobster fishing area ("LFA") 33 and 20 per day from LFA 34 -- After DFO unsuccessful at curtailing illegal lobster harvest, DFO's marine biologist advised limiting harvest to 20 lobsters per LFA -- DFO notified NCNS of plans to impose limits and held meetings with and invited alternative suggestions from NCNS; in end, though, DOC advised NCNS that limits would be introduced -- NCNS applied for judicial review of DFO's decision -- Application dismissed -- Constitution Act, 1982, s. 35, recognized and affirmed existing treaty rights of the Aboriginal peoples of Canada such as Nova Scotia Mi'kmaq -- NCNS membership, though, comprised both non-Mi'kmaq and Mi'kmaq Aboriginal people, so some non-Mi'kmaq Aboriginal people without Mi'kmaq right to fish held ATRA passports -- The right to fish for food, social and ceremonial purposes did not belong, nor was it alleged to belong, to entire membership of NCNS -- Without Aboriginal right to assert in pleadings, and without evidence supporting Aboriginal right to fish in relation to NCNS membership, constitutional challenge had no basis -- Nor did NCNS's claim that DFO's knowledge of NCNS's asserted right to fish for food, social and ceremonial purposes from various

2007 FC 45, [2007] 2 C.N.L.R. 233

fishery agreements between NCNS and DFO or ATRA registration cards, or previous litigation provide basis for constitutional challenge -- Furthermore, s. 35 was not adequately engaged on record, which consisted of two affidavits and some DFO correspondence.

Aboriginal law --- Practice and procedure -- Miscellaneous issues

Judicial review -- Procedural fairness -- Native Council ("NCNS") represented Nova Scotians living off-reserve and claiming Aboriginal ancestry -- NCNS formed commission to manage hunting and fishing by issuing Aboriginal and Treaty Access ("ATRA") passports to applicant members participating in communal hunting and fishing -- From 1992 on, NCNS entered into series of fisheries management agreements with Department of Fisheries and Oceans ("DFO"), including Protocol for handling harvesting practices -- In 1995, NCNS and DFO signed Aboriginal Fisheries Arrangement ("AFA") agreeing to co-manage harvesting by ATRA passport holders ("PH"), and set out annual harvesting plan forming basis for NCNS's Licence -- 2004-2005 AFA allowed 40 lobsters per day from lobster fishing area ("LFA") 33 and 20 per day from LFA 34 -- After DFO unsuccessful at curtailing illegal lobster harvest, DFO's marine biologist advised limiting harvest to 20 lobsters per LFA -- DFO notified NCNS of plans to impose limits and held meetings with and invited alternative suggestions from NCNS; in end, though, DOC advised NCNS that limits would be introduced -- NCNS applied for judicial review of DFO's decision -- Application dismissed -- It was agreed that NCNS was owed duty of fairness -- As to nature of decision and effect of decision on individual, NCNS cited several legal authorities in support of claims to importance of decision, but tendered no actual evidence -- Harvesting of lobster was undoubtedly important to ATRA passport holders, but no evidence placed before court to that effect -- NCNS claims that on-going formal relationship since 1992 involving meetings, discussions and consultations at least once per year gave rise to legitimate expectations that NCNS would receive higher level of fairness were not supported by sufficient evidence, either -- While NCNS argued adequate consultation required proper assessment of alternatives, it was unclear what alternatives NCNS wanted DFO to consider, as NCNS had not responded in any real, productive way to DFO's invitation -- NCNS participated in consultation process, had opportunity to express its view, had its views considered, and the hearing was therefore fair and reasonable and appropriate in the circumstances.

Judges and courts --- Jurisdiction -- Exchequer and Federal Courts -- Miscellaneous

Where issue becoming academic or moot -- Native Council ("NCNS") represented Nova Scotians living off-reserve and claiming Aboriginal ancestry -- NCNS formed commission to manage hunting and fishing by issuing Aboriginal and Treaty Access ("ATRA") passports to applicant members participating in communal hunting and fishing -- From 1992 on, NCNS entered into series of fisheries management agreements with Department of Fisheries and Oceans ("DFO"), including Protocol for handling harvesting practices -- In 1995, NCNS and DFO signed Aboriginal Fisheries Arrangement ("AFA") agreeing to co-manage harvesting by ATRA passport holders ("PH"), and set out annual harvesting plan forming basis for NCNS's Licence -- 2004-2005 AFA allowed 40 lobsters per day from lobster fishing area ("LFA") 33 and 20 per day from LFA 34 -- After DFO unsuccessful at curtailing illegal lobster harvest, DFO's marine biologist advised limiting harvest to 20 lobsters per LFA -- DFO notified NCNS of plans to impose limits and held meetings with and invited alternative suggestions from NCNS; in end, though, DOC advised NCNS that limits would be introduced -- NCNS applied for judicial review of DFO's decision -- Application dismissed -- Matter was moot, but court decided to exercise its discretion and consider case as circumstances satisfied applicable criteria -- Adversarial relationship continued -- Because of nature of dispute, it would have always disappeared before ultimately resolved, and 2005-2006 licence contained identical conditions to those prompting dispute in previous licence, so future conditions not strictly hypothetical -- There was public interest element in matter, and much was to be gained from resolving current conflict and establishing on-going co-operation and negotiation, and it was to benefit of all concerned that matter be determined.

Contracts --- Performance or breach -- Breach -- General principles.

Cases considered by C. Layden-Stevenson J.:

2007 FC 45, [2007] 2 C.N.L.R. 233

*Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) -- followed

*Borowski v. Canada (Attorney General)* (1989), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232, 1989 CarswellSask 241, 1989 CarswellSask 465 (S.C.C.) -- considered

*Canadian Pacific Railway v. Vancouver (City)* (2006), 18 M.P.L.R. (4th) 1, 262 D.L.R. (4th) 454, 221 B.C.A.C. 1, 364 W.A.C. 1, 2006 SCC 5, 2006 CarswellBC 404, 2006 CarswellBC 405, 88 L.C.R. 161, 40 R.P.R. (4th) 159, 345 N.R. 140, [2006] 1 S.C.R. 227 (S.C.C.) -- referred to

*Dorsey v. Millhaven Penitentiary* (2002), (sub nom. *Dorsey v. Millhaven Penitentiary (Independent Chairperson)*) 224 F.T.R. 309, 2002 FCT 1085, 2002 CarswellNat 2880, 2002 CFPI 1085, 2002 CarswellNat 4069 (Fed. T.D.) -- considered

*Duguay v. Canada (Department of Fisheries & Oceans)* (1996), 1996 CarswellNat 2058, (sub nom. *Duguay v. Canada (Ministre des Pêches & Océans)*) 120 F.T.R. 227, 7 Admin. L.R. (3d) 88 (Fed. T.D.) -- distinguished

*Durant v. Canada (Minister of Fisheries & Oceans)* (2002), 2002 CarswellNat 2249, 2002 CFPI 327, 218 F.T.R. 143, 2002 FCT 327, 2002 CarswellNat 688 (Fed. T.D.) -- considered

*Everett v. Canada (Minister of Fisheries & Oceans)* (1994), 80 F.T.R. 160 (note), 169 N.R. 100, 25 Admin. L.R. (2d) 112, 1994 CarswellNat 848 (Fed. C.A.) -- considered

*Haida Nation v. British Columbia (Minister of Forests)* (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) -- distinguished

*Knight v. Indian Head School Division No. 19* (1990), [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489, [1990] 3 W.W.R. 289, 30 C.C.E.L. 237, 90 C.L.L.C. 14,010, 43 Admin. L.R. 157, 83 Sask. R. 81, 1990 CarswellSask 146, 1990 CarswellSask 408, 106 N.R. 17 (S.C.C.) -- followed

*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) -- considered

*Native Council of Nova Scotia v. Canada (Attorney General)* (2002), 2002 CarswellNat 18, 2002 FCT 6 (Fed. T.D.) -- followed

*Pathak v. Canada (Human Rights Commission)* (1995), (sub nom. *Pathak v. Canadian Human Rights Commission*) 180 N.R. 152, (sub nom. *Pathak v. Canadian Human Rights Commission*) 94 F.T.R. 80 (note), (sub nom. *Canada (Human Rights Commission) v. Pathak*) [1995] 2 F.C. 455, 1995 CarswellNat 666, 1995 CarswellNat 666F (Fed. C.A.) -- referred to

*Pathak v. Canada (Human Rights Commission)* (1995), 198 N.R. 237 (note) (S.C.C.) -- referred to

2007 FC 45, [2007] 2 C.N.L.R. 233

Phillips v. Nova Scotia (Commissioner, Public Inquiries Act) (1995), 1995 CarswellNS 12, 1995 CarswellNS 83, 39 C.R. (4th) 141, 31 Admin. L.R. (2d) 261, (sub nom. Phillips v. Richard, J.) 180 N.R. 1, (sub nom. Phillips v. Richard, J.) 141 N.S.R. (2d) 1, (sub nom. Phillips v. Richard, J.) 403 A.P.R. 1, (sub nom. Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)) 98 C.C.C. (3d) 20, (sub nom. Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)) 124 D.L.R. (4th) 129, (sub nom. Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)) [1995] 2 S.C.R. 97, (sub nom. Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)) 28 C.R.R. (2d) 1 (S.C.C.) -- considered

R. v. Denny (1990), 1990 CarswellNS 388, 94 N.S.R. (2d) 253, [1990] 2 C.N.L.R. 115, 247 A.P.R. 253, 55 C.C.C. (3d) 322 (N.S. C.A.) -- considered

R. v. Sparrow (1990), 1990 CarswellBC 105, 1990 CarswellBC 756, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) -- considered

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) -- considered

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 -- considered

Fisheries Act, R.S.C. 1985, c. F-14

Generally -- referred to

s. 7 -- considered

s. 43(f) -- referred to

Societies Act, R.S.N.S. 1989, c. 435

Generally -- referred to

Tariffs considered:

Federal Court Rules, 1998, SOR/98-106

Tariff B, Table, column III -- referred to

2007 FC 45, [2007] 2 C.N.L.R. 233

Regulations considered:

Fisheries Act, R.S.C. 1985, c. F-14

Aboriginal Communal Fishing Licences Regulations, SOR/93-332

Generally -- referred to

s. 2 "aboriginal organization" -- considered

s. 2 "licence" -- considered

s. 2 "organisation autochtone" -- considered

s. 2 "permis" -- considered

s. 4 -- considered

s. 5(1) -- considered

s. 7 -- considered

s. 8 -- considered

s. 9 -- considered

APPLICATION by Native Council for judicial review of decision of Minister of Fisheries and Oceans Canada.

***C. Layden-Stevenson J.:***

1 This application for judicial review concerns a decision of the Minister of Fisheries and Oceans Canada to limit the permitted lobster catch under an Aboriginal Communal Food, Social and Ceremonial Fishing Licence in two lobster fishing areas in Nova Scotia. The applicant claims that the decision contravenes the government's duty to consult aboriginal peoples, breaches principles of procedural fairness and violates the terms of a fisheries agreement between the parties.

2 The respondent takes the position that the government's duty to consult and accommodate is not engaged within the context of this dispute. Even if the obligation arises (which is denied), Fisheries and Oceans Canada discharged its common law duty to consult and no breach of procedural fairness occurred. The Aboriginal Fisheries Arrangement was honoured both in spirit and in substance. Further, the application is moot because the impugned licence has expired.

3 I conclude that the deficiencies in the record, most notably the paucity of evidence supporting the applicant's asserted aboriginal right to fish, are such that constitutional analysis is not appropriate. Consequently, this matter cannot be determined on the basis of the constitutional argument advanced by the applicant.

4 In relation to the alleged breach of administrative law principles, I do not find that the requisite content of procedural fairness was greater than that which was accorded. The applicant was provided an opportunity to

2007 FC 45, [2007] 2 C.N.L.R. 233

participate and to express its views. It availed itself of that opportunity. The evidence demonstrates that its position was considered. No breach of procedural fairness occurred in the circumstances of this matter.

5 The argument regarding a purported violation of the Aboriginal Fisheries Arrangement is similarly flawed. Although the agreement expresses the parties' intent to work together, it does not mandate that consultation must yield a mutually acceptable resolution. Here, consultation did occur. There is no evidence, or allegation, of bad faith. Consequently, the applicant's argument fails.

6 Finally, although the application for judicial review is technically moot, it is appropriate to exercise discretion to determine the matter.

### **The Parties**

7 The applicant Native Counsel of Nova Scotia (NCNS) was organized and created in 1974 as an Aboriginal Peoples Representative Organization to assist and give a collective voice to Mi'kmaq and other Aboriginal persons living "off-reserve" in Nova Scotia. It is a registered society under the *Societies Act*, R.S.N.S. 1989, c. 435 and is a regional affiliate of the Congress of Aboriginal Peoples (CAP), a national organization. Both CAP and NCNS lobby various levels of government regarding services, benefits and programs for their members.

8 Membership in NCNS is voluntary and open to any Mi'kmaq or Aboriginal person living off-reserve in Nova Scotia. There are different categories of membership. Approximately 3300 to 3500 persons are "full members". Full members include Mi'kmaq, Inuit, Métis, or others who claim Aboriginal ancestry.

9 In 1987, NCNS formed the Netukulimkew'e'l Commission (the Commission) as the "Natural Life Management Authority" for the community of Mi'kmaq/Aboriginal People residing off-reserve throughout Nova Scotia. Its stated purpose is to manage the hunting and fishing activities of the community. NCNS and the Commission require full members wishing to participate in the communal activities of hunting or fishing to apply for a community "harvester" permit. The permit issued to each individual harvester is known as an Aboriginal and Treaty Rights Access Passport (ATRA Passport).

10 The respondent Attorney General represents the Minister of Fisheries and Oceans (the Minister) and the Department of Fisheries and Oceans (DFO). The Department is also known as Fisheries and Oceans Canada (FOC). The acronyms DFO and FOC are used interchangeably in the parties' submissions and throughout these reasons.

### **Background**

11 In 1990, NCNS approached DFO to initiate discussions. In 1992, the Aboriginal Fisheries Working Agreement (AFWA) was signed between NCNS and Her Majesty, as represented by the Minister and DFO. Its purpose, stated at section 2.1, was "to provide a general framework for discussions between the Parties with respect to matters set out in Section 3.0 of [AFWA]" which, in general terms, deal with fisheries management issues. Since 1992, DFO and NCNS have entered into a series of written agreements, arrangements and a protocol designed to address fisheries management issues, including conservation, protection and enforcement.

12 On August 12, 1993, the Protocol Agreement (the Protocol) between NCNS and DFO was implemented. Its purpose was to establish a process through which the parties would work together cooperatively to (a) share information...and (b) discuss issues of concern, including the most appropriate action to be taken when faced with situations where NCNS harvesting practices had a negative impact on the management and conservation of fisheries resources. The Protocol set forth a process whereby a committee of NCNS and FOC representatives discussed incidents of harmful harvesting practices and resolved transgressions by NCNS harvesters in accordance with the principles of Aboriginal restorative justice. The terms of the Protocol provided that it could be terminated by either

2007 FC 45, [2007] 2 C.N.L.R. 233

party upon 90 days notice in writing to the other party. The Protocol was used between 1993 and 1999. Apparently, DFO terminated the Protocol in 2000. The record is silent as to detail in this respect.

13 On October 3, 1995, the Commission and DFO entered into the Aboriginal Fisheries Arrangement (1995 AFA). In it, the parties professed a commitment to "work together to develop initiatives related to increasing the involvement of the Commission in the management of fish harvesting by ATRA [Passport] Holders in Nova Scotia". The 1995 AFA provided that NCNS and DFO would use the process delineated in the Protocol, where applicable, to find mutually acceptable solutions to issues arising out of the AFA. A schedule to the AFA provided a detailed annual "harvesting plan" for the fishing of 40 species of fish throughout Nova Scotia (including lobster) for food, social and ceremonial purposes. This gave rise to the Communal Food, Social and Ceremonial Purposes (FSC) Licence granted to the NCNS.

14 The licence permits NCNS to designate aboriginal persons to harvest fish under the authority of the licence through the issuance of certain documents and certificates. There are also monitoring and catch reporting requirements. The licence and its conditions are 23 pages in length and contain various provisions dealing with conservation, protection and other matters pertaining to the management of the fishery. The conditions that are subject to complaint in this judicial review application relate to one species of fish -- lobster -- in two specific areas of Nova Scotia. I will provide further detail regarding the impugned conditions and the particular areas later in these reasons.

15 For ATRA Passport Holders (unlike commercial fishing licencees), lobster fishing season is open all year throughout the province. The FSC Licence conditions specify prescribed gear, a designated number of tagged traps, size limits, the mandatory return of egg-bearing ("berried") female lobsters immediately to the water and a prohibition regarding possession of female lobsters marked with a v-shaped notch in the right flipper of the tail. The conditions apply province-wide and, historically, were used as conservation measures prior to the issuance of the FSC Licence.

16 In relation to lobster specifically, the FSC Licence specifies a recommended Netukulimk -- a Mi'kma'wey concept referring to the use of the natural bounty provided by the Creator for the subsistence and well-being of the individual and community at large -- of six lobster trap tags per ATRA Passport Holder, within lobster fishing areas (LFAs) 25 to 35. Although it is not entirely clear from the record, at some point after the execution of the 1995 AFA, the number of traps that could be used in certain LFAs (LFAs 33, 34 and 35 in particular) was refined to provide that ATRA Passport Holders could no longer use all six traps in one LFA.

17 Under the 2004-2005 AFA, in LFA 33, a maximum of 40 lobsters could be taken per day using a total of two traps or two hoop nets per ATRA Passport Holder. In LFA 34, a maximum of 20 lobsters per day could be taken using one trap or two hoop nets per ATRA Passport Holder. Only the 1995 AFA and the 2004-2005 AFA are included in the record. These AFAs are said to be representative of the various AFAs entered into by the parties. The dispute in this matter centers on the 2004-2005 AFA's numerical restriction of 20 lobsters per trap in LFAs 33 and 34. These combined lobster fishing areas encompass coastal waters extending from Halifax to Digby. The circumstances giving rise to the restriction are discussed in the paragraphs that follow.

18 The commercial lobster season in LFAs 33 and 34 is open from the end of November until the end of May. During the summer of 2002, DFO detected an escalating problem in LFA 34, specifically, an illegal lobster fishery during the closed season. DFO Fishery Officers observed illegal fishing being carried out under the guise of an aboriginal FSC Licence. Certain aboriginal harvesters acting alone, or in cooperation with non-aboriginals, were selling quantities of lobster caught under FSC Licences.

19 In June 2004, Fishery Officers with the Digby and Meteghan detachments prepared enforcement plans to deal with illegal lobster poaching in both St. Mary's Bay and Yarmouth Harbour. The enforcement plans identified 28

2007 FC 45, [2007] 2 C.N.L.R. 233

persons suspected of involvement in illegal lobster poaching operations, including six members of the NCNS, six members of other First Nations and one person who self-identified as Métis.

20 After unsuccessfully attempting to address the problem through surveillance operations and prosecution under the *Fisheries Act*, R.S.C. 1985, c. F-14 (the Act), DFO determined that there would be no reasonable prospect of successful convictions if numerical limits on allowable lobster catch were not established under the Act, its Regulations, or as a condition of a FSC licence. In the meantime, tension in the lobster fishery community increased as the commercial lobster fishery population grew increasingly angry over the illegal fishing.

21 The Regional Director of the Fisheries and Aquaculture Management, Maritimes Region (the Regional Director) consulted a marine biologist at DFO and asked for "his input regarding a reasonable limit" for lobster obtained through a FSC Licence in LFA 34. The marine biologist examined data in relation to lobster catches in LFA 34 in September 1998 and found that the traps yielded approximately 14 to 16 legal-sized lobsters per catch. He also reviewed the data from the 2001 commercial fishery in LFA 34 and found that the mean opening day inshore catch was 11.5 legal-sized lobsters per trap. Based on this information, he concluded and advised that a limit of 20 lobsters per trap was a reasonable amount. DFO regarded the numerical limit as the "most viable alternative" to the "lengthy and costly undercover operations" used in 2004 to combat the rise in illegal lobster fishing.

22 At a scheduled meeting on November 2, 2004, at Truro, NCNS and DFO officials met to discuss fisheries issues. The illegal lobster poaching problem was raised, although the formality of the discussion is a matter of debate. On the one hand, NCNS claims that the primary focus of the meeting was DFO's new "Aboriginal Aquatic Resources and Oceans Management Program". The DFO representative ostensibly "raised the issue of illegal lobster poaching in South Western Nova Scotia" near the end of the meeting. DFO, on the other hand, maintains that the poaching issue was one of two agenda items. In any event, it is common ground that DFO presented a draft of its proposed new conditions for the FSC Licence (in LFAs 33 and 34). The draft conditions would limit each NCNS ATRA Passport Holder to 20 lobsters per trap per day.

23 On January 26, 2005, NCNS and DFO entered into the 2004-2005 AFA. Apparently, it was not unusual for the formal execution of these agreements to be delayed well beyond their implementation

24 On February 28, 2005, the Regional Director sent a letter to NCNS enclosing a draft of the proposed conditions for the harvesting of lobster under the prospective FSC Licence. He suggested that DFO and NCNS meet again to discuss the proposed changes and requested suggestions for a meeting date.

25 On April 11, 2005, NCNS and DFO met to discuss the proposed conditions for the FSC Licence (20 lobsters per trap per day in LFAs 33 and 34). NCNS voiced its objections to the proposed conditions. NCNS officials asserted that the numerical limit would not resolve the problem of illegal harvesting and it maintained that it was unfair to limit the rights of the entire NCNS membership because of the actions of a few members. The evidence of the NCNS witness, although equivocal, is to the effect that NCNS officials suggested its preferred alternatives: reinstatement of the Protocol; crate tagging; and engaging the NCNS membership community in a broad debate on the issue.

### **The Decision**

26 By correspondence dated April 22, 2005, the Regional Director acknowledged the objections of NCNS on the issue of the proposed conditions, but informed NCNS that the conditions would be introduced and would be effective June 1, 2005.

### **Procedural Background**

2007 FC 45, [2007] 2 C.N.L.R. 233

27 NCNS filed an application for judicial review of the DFO April 22, 2005 decision on May 15, 2005. The applicant requests an order "quashing the decision of FOC". It will be recalled that FOC refers to Fisheries and Oceans Canada. The specified grounds for judicial review delineated in the application, as filed, are:

1. FOC's decision is contrary to the principles of fundamental justice and procedural fairness;
2. FOC's decision is contrary to its duty to consult and accommodate aboriginal people; and
3. FOC's decision is contrary to the Native Council of Nova Scotia's right to hunt and fish for "food, social and ceremonial" purposes.

28 DFO moved to strike the second and third grounds of the application. On the return of the motion, NCNS withdrew ground 3 and replaced it with the following:

3. FOC's decision violates the Aboriginal Fisheries Arrangement between DFO and NCNS dated the 26<sup>th</sup> day of January, 2005.

29 Prothonotary Morneau, in dismissing the motion, noted that the law with respect to the duty to consult remains in a state of development and is still being defined and interpreted. Additionally, the issue as to whether "aboriginal procedural rights can exist independently from the aboriginal substantive rights remains open and... requires further argument and examination prior to determination". Accordingly, the prothonotary concluded that while it was possible that the second ground of the application would be unsuccessful on judicial review, it was "not plain and obvious" that it was devoid of merit. The substituted third ground was "deemed to replace the initial wording of the third ground in the application without the necessity for [NCNS] to serve and file an Amended Notice of Application".

### **The Legislation**

30 The Minister is empowered under section 7 of the *Fisheries Act* to issue licenses for fishing. The *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332 (ACFL Regulations) are enacted pursuant to subsection 43(f) of the Act. For ease of reference, the pertinent provisions of the ACFL Regulations are set out below. Section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, is also reproduced.

*Fisheries Act*, R.S., c. F-14

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

(2) Except as otherwise provided in this Act, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.

*Aboriginal Communal Fishing Licences Regulations*, SOR/93-332

2. In these Regulations,

"aboriginal organization" includes an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community; (*organisation autochtone*)

"licence" means a communal licence issued under subsection 4(1); (*permis*)

4. (1) The Minister may issue a communal licence to an aboriginal organization to carry on fishing and related activities.

(2) The Minister may designate, in the licence,

(a) the persons who may fish under the authority of the licence, and

(b) the vessels that may be used to fish under the authority of the licence.

(3) If the Minister does not designate the persons who may fish under the authority of the licence, the aboriginal organization may designate, in writing, those persons.

(4) If the Minister does not designate the vessels that may be used to fish under the authority of the licence, the aboriginal organization may designate, in writing, those vessels.)

5. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition respecting any of the matters set out in paragraphs 22(1)(b) to (z.1) of the Fishery (General) Regulations and any condition respecting any of the following matters, without restricting the generality of the foregoing:

(a) the species and quantities of fish that are permitted to be taken or transported;

(b) the method by which and when the licence holder is to notify the Minister of designations, the documents that constitute proof of designation, when, under what circumstances and to whom proof of designation must be produced, the documents or information that designated persons and vessels must carry when carrying on fishing and related activities, and when, under what circumstances and to whom the documents or information must be produced;

(c) the method to be used to mark and identify vessels and fishing gear;

(d) the locations and times at which landing of fish is permitted;

(e) the method to be used for the landing of fish and the methods by which the quantity of the fish is to be determined;

(f) the information that a designated person or the master of a designated vessel is to report to the Minister or a person specified by the licence holder, prior to commencement of fishing, with respect to where and when fishing will be carried on, including the method by which, the times at which and the person to whom the report is to be made;

(g) the locations and times of inspections of the contents of the hold and the procedure to be used in conducting those inspections;

(h) the maximum number of persons or vessels that may be designated to carry on fishing and related activities;

(i) the maximum number of designated persons who may fish at any one time;

2007 FC 45, [2007] 2 C.N.L.R. 233

(j) the type, size and quantity of fishing gear that may be used by a designated person;

(k) the circumstances under which fish are to be marked for scientific or administrative purposes;  
and

(l) the disposition of fish caught under the authority of the licence

7. No person carrying on fishing or any related activity under the authority of a licence shall contravene or fail to comply with any condition of the licence.

8. No person other than a designated person may fish under the authority of a licence.

9. (1) No person who is authorized to fish under the authority of a licence shall fish for or catch and retain any species of fish in any area of the waters referred to in subsection 3(1) during the close time beginning on December 29 and ending on December 31.

(2) The close time established by subsection (1) is considered to be fixed separately and individually with respect to any species of fish found in any of the waters referred to in subsection 3(1).

*Constitution Act, 1982* Schedule B, Part II, Rights of the aboriginal peoples of Canada

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

*Loi sur les pêches*, S.R., ch. F-14

7. (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences d'exploitation de pêcheries -- ou en permettre l'octroi --, indépendamment du lieu de l'exploitation ou de l'activité de pêche.

(2) Sous réserve des autres dispositions de la présente loi, l'octroi de baux, permis et licences pour un terme supérieur à neuf ans est subordonné à l'autorisation du gouverneur général en conseil.

*Règlement sur les permis de pêche communautaires des Autochtones*, DORS/93-332

2. Les définitions qui suivent s'appliquent au présent règlement.

« organisation autochtone » S'entend notamment d'une bande indienne, d'un conseil de bande indienne, d'un conseil de tribu et d'une association qui représente une collectivité territoriale autochtone. *aboriginal*

*organization*)

« permis » Permis communautaire délivré en vertu du paragraphe 4(1). (*licence*)

4. (1) Le ministre peut délivrer un permis communautaire à une organisation autochtone en vue de l'autoriser à pratiquer la pêche et toute activité connexe.

(2) Le ministre peut désigner dans le permis:

- a) les personnes autorisées à pêcher au titre du permis;
- b) les bateaux qui peuvent être utilisés au titre du permis.

(3) Dans le cas où le ministre ne désigne pas les personnes autorisées à pêcher au titre du permis, l'organisation autochtone peut les désigner par écrit.

(4) Dans le cas où le ministre ne désigne pas les bateaux qui peuvent être utilisés au titre du permis, l'organisation autochtone peut les désigner par écrit.

5. (1) Afin d'assurer une gestion et une surveillance judicieuses des pêches et de voir à la conservation et à la protection du poisson, le ministre peut, sur un permis, indiquer notamment toute condition relative aux points visés aux alinéas 22(1)b) à z.1) du Règlement de pêche (dispositions générales) et toute condition concernant ce qui suit:

- a) les espèces et quantités de poissons qui peuvent être prises ou transportées;
- b) par quel moyen et à quel moment le titulaire du permis avise le ministre des désignations, les documents attestant la désignation, à quel moment, dans quelles circonstances et à qui les attestations de désignation doivent être produites, les documents ou les renseignements que les personnes ou les bateaux désignés doivent respectivement avoir sur elles ou à bord lorsqu'ils pratiquent la pêche et toute activité connexe et à quel moment, dans quelles circonstances et à qui les documents ou les renseignements doivent être produits;
- c) la méthode de marquage et d'identification des bateaux et des engins de pêche;
- d) les endroits et les moments où le poisson peut être débarqué ou amené à terre;
- e) la méthode à utiliser pour débarquer le poisson et les méthodes pour en déterminer la quantité;
- f) les renseignements que la personne désignée ou le capitaine du bateau désigné doit, avant le début de la pêche, transmettre au ministre ou à la personne indiquée par le titulaire du permis quant aux endroits et aux moments où la pêche sera pratiquée, ainsi que le mode et les moments de transmission et leur destinataire;
- g) les endroits et les moments des inspections du contenu de la cale et la procédure à suivre lors de celles-ci;
- h) le nombre maximal de personnes ou de bateaux qui peuvent être désignés pour pratiquer la pêche et toute activité connexe;

2007 FC 45, [2007] 2 C.N.L.R. 233

- i) le nombre maximal de personnes désignées qui peuvent pêcher en même temps;
- j) le type, la grosseur et la quantité des engins de pêche que toute personne désignée peut utiliser;
- k) les circonstances dans lesquelles le poisson peut être marqué à des fins scientifiques ou administratives;
- l) l'aliénation du poisson pris en vertu du permis.

7. Il est interdit à quiconque pratique la pêche ou toute activité connexe autorisées en vertu d'un permis de contrevenir ou de déroger aux conditions de ce permis.

8. Il est interdit à quiconque n'est pas désigné de pêcher en vertu d'un permis.

9. (1) Il est interdit à quiconque est autorisé à pêcher en vertu d'un permis de pêcher, de prendre ou de garder toute espèce de poisson dans toute zone des eaux visées au paragraphe 3(1) pendant la période de fermeture commençant le 29 décembre et se terminant le 31 décembre.

(2) La période de fermeture établie au paragraphe (1) est réputée fixée séparément pour toute espèce de poisson qui se trouve dans toute zone des eaux visées au paragraphe 3(1).

*Loi de 1982 sur la constitution, Annexe B, Partie II, Droits des peuples autochtones du Canada*

35. (1) Les droits existants -- ancestraux ou issus de traités -- des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits -- ancestraux ou issus de traités -- visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

## **Issues**

31 NCNS asserts that its grounds for judicial review involve three overlapping issues: an administrative law issue (procedural fairness), a constitutional issue (section 35 of the *Constitution Act, 1982*) and a contractual issue (the 2004-2005 AFA). It is the "constitutional issue" that is the primary focus of its arguments.

## **Duty to Consult and Accommodate**

### *Overview of the NCNS Position*

32 The NCNS submission is founded on recent jurisprudence from the Supreme Court of Canada which

2007 FC 45, [2007] 2 C.N.L.R. 233

emphasized the importance of the Crown's duty to consult aboriginal communities before taking actions or making decisions that could negatively impact the lands or resources over which aboriginal claims are asserted. The crux of the NCNS argument emanates from the Supreme Court's comments in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.) (*Haida*); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (S.C.C.) (*Taku*) and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (S.C.C.) (*Mikisew*).

33 NCNS's written submissions rely on *Haida Nation* as support for, among other things, the "timing" of the duty to consult. The "great jurisprudential significance" of *Haida Nation*, according to NCNS, is its confirmation that the government is required to consult aboriginal persons *before* an aboriginal or treaty right has been proved or admitted. There is a duty to engage in "pre-proof" consultation and to do so in good faith. The honour of the Crown requires no less. Further, NCNS asserts that *Mikisew Cree First Nation* teaches that the duty to consult is a procedural rather than a substantive (e.g. hunting, fishing, trapping) right.

34 Although the NCNS written argument is largely devoted to the concepts of "duty to consult" and the "honour of the Crown", NCNS maintained, at the hearing, that it was not alleging that DFO failed to consult. Rather, its concern relates to the content or scope of the consultation and the steps (or lack thereof) taken to accommodate its concerns.

35 Regarding the problem of illegal poaching in Yarmouth Harbour and St. Mary's Bay, NCNS agrees that it must be stopped. It does not defend illegal lobster harvesting. However, it contends that it is critical that the method chosen to address the problem strikes a balance. The constitutional rights of the members of NCNS members must be treated with honour and respect.

36 NCNS claims that DFO initially recognized its obligation to consult in June of 2004, when the lobster poaching enforcement plans were prepared. However, by the fall of 2004, it made a decision to proceed in a particular direction. The November meeting (in the same year) provided a forum for DFO to disclose its proposed course of action and, in the end, it simply mobilized the enforcement part of its plan over (and notwithstanding) the objections of NCNS. There was no DFO analysis conducted regarding the alternatives to the numerical limit proposed by NCNS. Moreover, NCNS was not told of the alternatives that DFO considered, if any; NCNS was informed of the DFO rationale, without more. NCNS claims that DFO had a duty to accommodate (grounded in the Crown's honour and corresponding obligation to achieve reconciliation) and an obligation to give good faith consideration to aboriginal concerns. *Mikisew Cree First Nation* is unequivocal: the objective is the reconciliation of aboriginal people and non-aboriginal peoples and their respective claims, interests and ambitions.

37 NCNS contends that, in addition to imposing a numerical limit for lobsters per trap in LFAs 33 and 34, DFO criminalized the matter by providing that the numerical limit applies to "catch, prevention and detention". From the perspective of NCNS, DFO completely failed in its obligation to accommodate because it did not adapt its decision to address the concerns voiced by NCNS.

38 In terms of the honour of the Crown "spectrum", NCNS places this matter at the high end because it involves food, social and ceremonial aboriginal fishing rights. Even at the lower end of the spectrum, it maintains that DFO's duty to solicit information, listen carefully, and attempt to minimize adverse impacts remains unfulfilled. NCNS asserts that DFO gave advance notice of discussion and advised, but did not truly consult because it did not provide information in a timely manner. The DFO decision was a "done deal" by November 2004.

39 In sum, NCNS contends that DFO properly identified its obligation and did not intend to limit the NCNS members' food, social and ceremonial fishing rights. However, the consultation process lacked proper content with respect to "give and take". DFO had a duty to take the NCNS feedback seriously and to accommodate its concerns. The NCNS position is that DFO failed in this respect.

2007 FC 45, [2007] 2 C.N.L.R. 233

### *Analysis*

40 In my view, this matter does not lend itself to a section 35 of the *Constitution Act, 1982* (section 35) analysis primarily because section 35 is not adequately engaged on the record before me. I will have more to say about this later in these reasons. However, it is important not to lose sight of the policy which dictates restraint in constitutional analysis, as "unnecessary constitutional pronouncements may prejudice future cases": *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.) at para. 9. Regarding the section 35 argument, this application is fraught with difficulties. I do not intend to itemize all of them, but I will highlight those which are particularly problematic.

41 The record is unusual in that it is not a "record" that was before the decision-maker. NCNS relies on the affidavits of Timothy Kenneth Martin, a member of the NCNS Board of Directors, sworn July 4, 2005 and September 14, 2005. Exhibited to his affidavits are a number of documents that provide useful background information, but little else. With the exception of copies of FOC correspondence from D. Leslie Burke, dated February 28, 2005, and April 22, 2005, and FOC correspondence from Neil A. Bellefontaine dated May 27, 2005, the affidavits are scant on information regarding the issue before the court. The respondent's record is more fulsome and contains the affidavits of four deponents including exhibits, which provide information regarding: the litigation history between the parties; details with respect to the poaching problem; articles and correspondence descriptive of the climate existing in 2004; copies of proposed enforcement plans; research documentation on the stock status of lobster in LFA 34; and NCNS lobster landing records from 1995-2005. The cross-examinations of D. Leslie Burke (DFO) and Mr. Martin are included in the respective records of the parties.

42 The respondent raises the issue of standing and contends that NCNS, an incorporated political organization, does not possess aboriginal rights. In view of my conclusion regarding the unsuitability of section 35 in relation to this matter, it is not necessary for me to determine whether NCNS has the requisite standing to mount a section 35 challenge. For present purposes I assume, without deciding, that it does. However, that does not end the matter.

43 The first difficulty with engaging in a section 35 analysis is that the alleged "aboriginal right" does not directly correspond with the alleged "right of consultation" put forth by the NCNS. NCNS argues that adequate consultation requires that the government consult with the aboriginal community using the mechanisms chosen by the community. Because the off-reserve aboriginal population of Nova Scotia chose the NCNS to represent them in their dealings with DFO, the NCNS (as an organization) holds the procedural right of consultation while its individual members hold the substantive right to fish. However, even accepting that a duty to consult may be owed to an aboriginal organization, the Nova Scotia Mi'kmaq right to fish for food, social and ceremonial purposes does not belong (and is not alleged to belong) to the entire membership of NCNS. The organization's membership is comprised of Mi'kmaq and other aboriginal people who reside off-reserve in Nova Scotia. Mr. Martin, in cross-examination, acknowledged that an application for an ATRA Passport, although more circumscribed than the general NCNS membership application, was open to anyone within the membership. Non-Mi'kmaq aboriginal people have ATRA Passports, which allow them to fish for lobster in the off-season.

44 Thus, NCNS is alleging a duty to consult and accommodate for individuals who, on the basis of the record, do not possess the Mi'kmaq right to fish. There is a paucity of evidence to support an asserted aboriginal right to fish for food, social and ceremonial purposes for the non-Mi'kmaq ATRA passport holders. The respondent referred repeatedly to this deficiency in both written submissions and at the hearing. NCNS chose not to respond.

45 Additionally, NCNS withdrew its allegation of a "breach of an aboriginal right" from its notice of application. Consequently, no aboriginal right is asserted in the pleadings. An applicant must indicate in its originating document the irregularities which it alleges vitiate the impugned decision. The decision of the court will deal only with the grounds of review invoked by the applicant: *Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455, 180

2007 FC 45, [2007] 2 C.N.L.R. 233

N.R. 152 (Fed. C.A.); leave to appeal dismissed (1995), 198 N.R. 237 (note) (S.C.C.). To complicate matters further, there is absolutely no evidence indicating the genesis of any aboriginal right to fish in relation to the NCNS membership. NCNS turns to *Haida Nation* to support the proposition that infringement need not be proved in order to trigger the duty to consult. With respect, this position begs the question. The identified difficulty is the failure to assert an aboriginal right.

46 The NCNS response to the noted defect is to say that the aboriginal right at issue is asserted "by implication". It is noteworthy that, in its written submissions, NCNS claims that the right to fish for food, social and ceremonial purposes is "well-established". At the hearing, it retreated from its initial position and presented a more nuanced approach: the right to fish for food, social and ceremonial purposes was clearly asserted by NCNS and the Crown was well aware of the asserted right. Accordingly, the Crown's knowledge of this gave rise to the duty to consult. In support of its position that the Crown was aware of the asserted aboriginal right, NCNS argues:

- *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) (*Sparrow*) and *R. v. Denny* (1990), 94 N.S.R. (2d) 253 (N.S. C.A.) (*Denny*) demonstrate that the Mi'kmaq have a right to fish for food, social and ceremonial purposes;
- the various fishery agreements between NCNS and DFO over the last 10 to 15 years indicate that NCNS asserted a right to fish for its members;
- the 2005 ATRA Affirmation Registration Card specifically references *jakej* (lobster) at paragraph 12 and the Crown was aware of the existence of the document;
- NCNS had clearly asserted a right to fish in previous litigation. Paragraph 21 of the court's reasons in *Native Council of Nova Scotia v. Canada (Attorney General)*, 2002 FCT 6, [2002] F.C.J. No. 4 (Fed. T.D.) delineate the specific asserted rights.

47 Paragraph 79 of *Sparrow* cites *Denny* and states that it "addresses the constitutionality of the Nova Scotia Micmac Indians' right to fish in the waters of Indian Brook and the Afton River, and does so in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of the rights". The ruling in *Denny* held that the Nova Scotia Mi'kmaq Indians have an aboriginal right to fish in waters incidental and adjacent to reserve lands. Aside from the fact that the NCNS membership is not comprised exclusively of Mi'kmaq aboriginals, I have no idea whether LFA 33 and LFA 34 are waters "adjacent to a reserve" because no evidence has been offered in this regard. Further, there is no evidence of a treaty, or of practices, customs or traditions (integral to the pre-contact culture of an aboriginal people) in relation to the NCNS membership.

48 As for the fishery agreements, NCNS acknowledges that each agreement specifically provides that it "shall not serve to recognize, define, affect or limit aboriginal rights or to recognize, create, define, affect or limit treaty rights and that this arrangement and such subarrangements are not intended to be, and shall not be interpreted to be, arrangements or treaties within the meaning of section 35 of the *Constitution Act, 1982* ...". NCNS also acknowledges that it, as the representative of its membership, is a signatory to the agreement.

49 The reference to *jakej* (lobster) in the ATRA Affirmation Registration Card does little to advance the NCNS position. The evidence is to the effect that once the FSC Licence is granted to the NCNS, it is for NCNS to designate who, from within its membership, is granted a licence. DFO has no involvement in this respect. It stretches elasticity to the breaking point to conclude that because DFO is aware of the document's existence, it is aware that the NCNS membership has asserted a section 35 right.

50 I am of a similar view regarding paragraph 21 of *Native Council of Nova Scotia v. Canada (Attorney General)*, relied upon by NCNS. It is useful to set out the paragraph in its entirety. The emphasis is mine.

2007 FC 45, [2007] 2 C.N.L.R. 233

Paragraphs 27 and 28 of the statement of claim appear to allege that the fishing agreements infringe a right enjoyed by certain Mi'kmaq people by virtue of aboriginal or treaty rights, to engage in a food, social and ceremonial fishery for lobster. The claim appears to allege that lack of consultation makes this infringement unjustifiable. I am of the view that, in order for the defendants to be able to defend the action, the plaintiffs must set forth in an amended statement of claim the material facts that establish the bases for the right(s) claimed and how the right(s) is/are said to be infringed.

It seems to me that the terminology "appear(s) to allege" was carefully chosen. It is self evident that the paragraph does not establish an asserted right, by implication or otherwise.

51 Even if I were to ignore the noted problems, there is no evidence that the impugned conditions (20 lobsters per trap in LFAs 33 and 34) have negatively impacted the NCNS membership. How, in the absence of such evidence, is the court to determine the scope of the duty to consult? There is not a scintilla of evidence from a single NCNS lobster harvester as to how the new conditions have had a negative effect. Neither of Mr. Martin's affidavits provide enlightenment for they do not address the negative, or any, impact on the NCNS membership.

52 The only relevant evidence in this respect that I have been able to locate anywhere in the record is the cross-examination of Mr. Martin. In responding to a question regarding whether he found the conditions to be restrictive, Mr. Martin responded "[i]n certain circumstances it would be restrictive". When asked to be specific, he stated "[f]amily size, need, family needs, community needs, individual needs. It's a complete change in how our management system was managed since 1990 for us, and a complete change in how the lobster fishery was managed jointly between the Native Council and DFO since 1995". That is the extent of the evidence.

53 In the absence of further or better evidence from NCNS, the problem is that the imposition of the limit of 20 lobsters, per trap per day, was based upon and generated from the landing reports submitted by the NCNS to the DFO over a ten-year period. Mr. Martin acknowledged this, having prepared the landing reports. Using those reports, DFO established a limit exceeding the amounts reported by NCNS from past harvests. As for ceremonial occasions, which counsel argued (without evidence) would be negatively impacted, the FSC Licence authorizes the Commission to issue a "Community Harvest Certificate", which could be used in LFAs 33 and 34 as required. In submissions, NCNS counsel chose to ignore the existence of the "Community Harvest Certificate".

54 At the hearing, NCNS raised, for the first time, that the new licence conditions effectively "criminalized catch possession". Counsel proffered three hypothetical scenarios whereby previously lawful activity would now be "criminalized". First, there is no evidence upon which to found counsel's submissions. More importantly, I regard it as settled law that arguments not contained in the memorandum of fact and law will not be considered by the court because the opposing party has not had notice of them and cannot be expected to properly respond. I will say no more about the allegation of "criminalization".

55 The last of the NCNS arguments in support of its section 35 submissions is that the DFO decision was a "done deal" by November 2004. Mr. Martin's cross-examination belies any such suggestion. Mr. Martin's evidence was:

[a]t the April meeting it wasn't decided what DFO was going to do. They would review the situation again. They had discussions to go to with regards to the Indian Act bands, okay, that were going to supposedly (sic) brought into the realm of this issue. They had those discussions to occur with them. We were the first ones on the list, okay, with regards to meeting. And they said that they would get back to us. And as with the response, okay, that we got, what, the May response, okay, where they decided that that's what they were going to do is, "We're going to do this".

56 The evidence of Mr. Burke, Regional Director, Fisheries and Aquaculture Management, Maritimes Region,

2007 FC 45, [2007] 2 C.N.L.R. 233

was that the suggestions proposed by NCNS were considered before a final decision was made.

57 There are additional arguments that need not be reviewed at this point. Some of them will be addressed under the "procedural fairness" and "contractual" arguments. Suffice it to say that I agree with NCNS that *Haida Nation* stands for the proposition that the duty to consult goes hand in hand with a duty to accommodate. However, for the reasons I have given, it is evident that a duty to consult and accommodate, on the basis of section 35, is not sustained on the facts, as presented, in this case.

58 *Haida Nation* also stands for the proposition that "one cannot meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". Rights need not be proven and it is possible to formulate an idea of the asserted rights and their strength sufficient to trigger an obligation to consult and accommodate. "To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the aboriginal rights they assert and on the alleged infringements" (paragraph 36). That is not the situation here. NCNS has not demonstrated, on the record before me, that section 35 is adequately engaged.

59 Before leaving this issue, some additional comments are in order. It is obvious that NCNS is displeased with DFO's decision to impose the new conditions on its FSC Licence. It maintains that the licence regime is about access, not allocation. More input ought to have been sought and accommodation ought to have followed. The record establishes that DFO provided NCNS with a copy of its draft proposed conditions in November, 2004 and invited NCNS to respond in writing. NCNS did not respond. In February, DFO wrote to NCNS and included a copy of the proposed conditions in its correspondence. It requested a meeting with NCNS to further discuss the proposed conditions. At that meeting in April of 2005, NCNS recommended, as an alternative, one mechanism that was already in place. Another suggested NCNS alternative was to reinstate the protocol. Although the record is not entirely clear in this regard, it appears that the reinstatement of the protocol requires a tri-partite arrangement involving the Department of Justice, the DFO and the NCNS. Communications in that regard are ostensibly underway.

60 In conclusion, *Haida Nation* teaches that every case must be approached individually. The duty to consult and accommodate does not guarantee aboriginal groups the outcome they desire.

### **Breach of Procedural Fairness**

#### ***Overview of the NCNS Position***

61 NCNS argues that government decision-makers have a common law duty to act fairly where a decision may affect rights, privileges or interests. The degree of fairness to be afforded will depend on the circumstances. The factors for consideration are delineated in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) (*Baker*).

62 According to NCNS, there is considerable overlap between its procedural fairness argument and its section 35 argument because both arguments go to process. Although the duty to consult is advanced as an administrative law concept, in the aboriginal context, it has a "constitutional element". In the discretionary decision-making context, the law may limit the results and require certain procedures.

63 NCNS does not suggest that its position must govern. Nor has it attacked the DFO decision on its merits. Rather, NCNS objects to the procedure employed by the government in making its decision. *Baker* reminds us of the purpose behind the analysis of the procedural fairness factors, which is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully

2007 FC 45, [2007] 2 C.N.L.R. 233

and have them considered by the decision-maker.

64 NCNS asserts that when considering the legitimate expectations at play in this case, regard must be had to the history of the relationship between the parties. The record discloses "deep and fulsome consultation up to this point". Thus, the conduct of the DFO (with respect to the new licence conditions) constitutes a departure from its conduct in the past. The hearing afforded to NCNS did not meet the required level of natural justice in the circumstances. The required level of "fairness" should be established by reference to the importance of the decision to the affected persons. Here, the rights are of great importance to both the individuals and the community on a personal and a spiritual level. The issuance of a licence may require trial-type, high-end procedures.

65 The bottom line of the NCNS submissions on this issue is that the requisite duty of procedural fairness required proper consultation. This means that the alternatives to the new conditions ought to have been properly and openly analysed.

### *Analysis*

66 Questions of procedural fairness do not engage the pragmatic and functional analysis required for the determination of the applicable standard of review. Absent exceptional circumstances (which are not present here), a failure to observe procedural fairness will vitiate a decision.

67 In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), the Supreme Court of Canada identified three factors to consider in determining whether a duty of fairness is required. The court must consider:

- the nature of the decision;
- the relationship between the parties; and
- the effect of the decision on the individual.

68 Once the threshold question of "whether a duty of fairness is owed" has been positively determined, the content of the duty must be assessed.

69 It appears to be common ground that the threshold question is met and that a duty of fairness is owed in the present circumstances. While the debate centers on the content of the duty and whether the duty was breached, it is not disputed that the content of the duty of procedural fairness is flexible and variable.

70 It is important to recall that the objective of the duty of procedural fairness is to ensure that a party, in a given context, is provided a meaningful opportunity to present its case fully and fairly. This objective (rather than the means through which the objective is achieved) better describes the duty: *Baker* at para. 22.

71 The NCNS submissions regarding procedural fairness suffer from the same deficiency as its section 35 submissions, i.e. lack of evidence. From a jurisprudential standpoint, NCNS refers to the following *Baker* factors for consideration in determining the content of the duty:

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates";
- the importance of the decision to the individual(s) affected; and

2007 FC 45, [2007] 2 C.N.L.R. 233

- the legitimate expectations of the person(s) challenging the decision.

72 NCNS places particular emphasis on the importance of the decision to the individuals affected and the legitimate expectations of the persons challenging the decision. While there is argument, there is scant evidence with respect to either factor. For example, NCNS cites jurisprudence ostensibly for the purpose of illustrating the importance of the decision to the NCNS membership. However, no evidence is presented on this issue. Counsel's submissions that the "rights" are of great importance to both the individuals and the community "on a personal and spiritual level" lack an evidentiary foundation.

73 NCNS refers to *Everett v. Canada (Minister of Fisheries & Oceans)* (1994), 169 N.R. 100 (Fed. C.A.), a case involving the Minister's refusal to renew a commercial fishing licence, as authority for the proposition that the nature of the proceeding is serious. However, in *Everett*, the proceeding was deemed serious because it involved a means of gaining a livelihood. The FSC Licence does not deal with the livelihood of the NCNS membership. As its title suggests, the FSC Licence enables aboriginals to fish for food, social and ceremonial purposes. In any event, the appeal in *Everett* failed because the appellant had been provided a full opportunity to put his case before the Minister. The Appellant had been notified by DFO of its intention to refuse a renewal of the licence and had been given an opportunity to respond. The appellant had made written submissions, which the Minister had considered before refusing to renew the licence. The Federal Court of Appeal determined that the Minister was entitled to decide the matter as he did on the basis of the information that he had.

74 Reliance is placed on *Durant v. Canada (Minister of Fisheries & Oceans)* (2002), 218 F.T.R. 143 (Fed. T.D.) for the purpose of establishing that a decision regarding the issuance of a licence pursuant to the *Fisheries Act* may require a consultation process. In *Durant*, the applicant failed on this issue because the court determined that adequate notice and an opportunity to be heard had been provided.

75 The reference to *Duguay v. Canada (Department of Fisheries & Oceans)* (1996), 120 F.T.R. 227 (Fed. T.D.) is similarly unhelpful to the NCNS position. There, the court quashed a decision to issue a fishing licence that reduced the catch limit. However, the breach of procedural fairness occurred because the decrease in catch constituted the imposition of a penal sanction upon the applicant without the provision of an opportunity to "confront his accusers -- a right he would have been able to insist on in a court of criminal law".

76 Reliance on jurisprudence is not a substitute for evidence. Undoubtedly, the harvesting of lobster for food, social and ceremonial purposes is an important activity for the ATRA Passport Holders. Yet, there is no evidence before me indicating the significance of the impugned decision or how it affected the NCNS membership. The respondent's evidence is to the effect that every effort was made to ensure that the food, social and ceremonial needs of the NCNS membership would not be negatively impacted. Input and advice was sought from a DFO marine biologist whose affidavit forms part of the record. NCNS did not cross-examine on that affidavit. Instead, it chose to challenge the affidavit's contents through argument, in the absence of contradictory evidence.

77 Regarding the doctrine of legitimate expectations, NCNS submits that the doctrine applies here as an extension of the rules of natural justice and procedural fairness. It affords the party affected by a government decision a higher level of fairness where the conduct of public officials has led the affected party to believe that his or her rights would not be affected without consultation. NCNS asserts that because of the history of dealings between the parties, there was a legitimate expectation that a fuller consultation process would be pursued by DFO officials.

78 The evidence does support a history of consultation and discussion between the parties as to the merits of different management methods and approaches. Mr. Burke, on cross-examination, emphasized the importance of consultation with the stakeholders. Mr. Martin stated that NCNS and DFO have had a formal relationship since 1992 and that the relationship is ongoing. The NCNS has had access to and has been able to communicate with the

2007 FC 45, [2007] 2 C.N.L.R. 233

Minister and regional DFO officials regarding the various agreements, arrangements and protocols entered into between NCNS and the Minister. The NCNS meets with the Regional Director-General and other DFO officials at least once a year. Mr. Martin has had a long-standing relationship with the Regional Director-General who, in his words, "would listen to concerns even if he did not agree with them".

79 However, the record also indicates that the relationship has not always been rosy. The statement of claim issued April 23, 2001, wherein the NCNS is one of the plaintiffs and the Minister of Fisheries and Oceans is one of the defendants, reveals (specifically at paragraphs 27, 28, and 36-39) that the parties have previously locked horns.

80 The NCNS argument in this respect is not developed beyond what I have stated. NCNS cites *Baker* to support its argument that the doctrine applies. However, in *Baker*, the doctrine of legitimate expectations did not play an integral role and the Supreme Court determined that it was one of an indeterminate, non-exhaustive number of factors to consider. Its presence may affect the procedural protection to be afforded in that, if found to exist, the presence of legitimate expectations may increase the content of procedural fairness. I note the insufficiency of evidence with respect to a violation of the legitimate expectations of NCNS.

81 NCNS says nothing regarding the statutory scheme and the context in which the impugned decision was made. The respondent submits that the Minister has an absolute discretion under section 7 of the *Fisheries Act*, subject only to the requirements of natural justice, i.e. the decision must be based on relevant considerations, not be arbitrary and not be made in bad faith. I think that it is more accurate to say that the Minister's authority, in the present circumstances, is derived from section 7 of the Act, in conjunction with the *Aboriginal Communal Fishing Licences Regulations*. It is beyond dispute that subsection 5(1) of the noted Regulations affords broad powers to the Minister.

82 The context in which the decision was ultimately taken is described in detail in the affidavit of Mr. Burke. The climate surrounding the illegal poaching problem was such that it demanded DFO response. DFO undertook various initiatives and ultimately determined that they were time-consuming and expensive. It considered the possibility of imposing a numerical limit (with respect to the number of lobsters per trap per day for LFAs 33 and 34) that would not encroach on the family, social and ceremonial needs of NCNS members.

83 DFO presented its proposed draft conditions to the NCNS at a meeting in November 2004. In my view, nothing turns on the divergent positions in relation to the manner in which this introduction occurred. It is evident that the proposed conditions were presented and were the subject of discussion at the November meeting. I accept the evidence of Mr. Burke that the NCNS was invited to forward its comments regarding the proposed conditions. It is clear that NCNS did not respond.

84 In the meantime, in addition to NCNS, DFO was meeting and consulting with 16 First Nations communities in Nova Scotia, which also had been issued FSC Licences.

85 In February, DFO wrote to NCNS with respect to the proposed conditions and enclosed a copy of the conditions in its correspondence. It requested a meeting for further discussion. At the subsequent meeting in April of 2005, the primary suggestion advanced by NCNS was the reinstatement of the Protocol. As noted earlier, this appears to require a tri-partite agreement and is currently being explored. From a DFO perspective, it was not a viable option to deal with the immediacy of the poaching problem. Beyond reinstating the protocol, as nearly as I can gather from the record, NCNS did little other than voice its strong objection to the imposition of the conditions.

86 The record discloses that the input of the marine biologist was sought during April of 2005 and that DFO engaged in further internal discussions at that time. At the end of the day, it decided to implement the proposed conditions and it notified NCNS of its decision.

87 In all, NCNS was provided five months notice of the proposed conditions. After the conditions were imposed

2007 FC 45, [2007] 2 C.N.L.R. 233

in September of 2005, NCNS passed a resolution directing its Commission to impose severe sanctions, including long term suspensions or life-term expulsions with immediate revocation of the ATRA Passport, for those NCNS members who violated the Netukulimkew'e1 Commission Institution for Natural Life Management. Query why NCNS did not provide such a proposal to DFO in April.

88 At the end of the day, I disagree with NCNS that the requisite content of procedural fairness was higher than that accorded to it. NCNS concedes that consultation occurred, but maintains that the adequacy of the consultation was flawed. It argues that adequate consultation requires a proper assessment of the alternatives. It is not at all clear, from the record, what remedial alternatives (beyond reinstatement of the Protocol) NCNS wanted DFO to consider.

89 NCNS participated in the process. It had the opportunity to express its views. The evidence demonstrates that its views were considered. A decision was taken, albeit not the decision that NCNS desired. The question is whether the hearing accorded to NCNS was fair, reasonable and appropriate in the circumstances. What is required is fairness, not perfection: *Canadian Pacific Railway v. Vancouver (City)*, [2006] 1 S.C.R. 227 (S.C.C.) at para.46. In my view, NCNS had a fair and reasonable hearing that was appropriate in the circumstances.

## **Breach of Contract**

### *Overview of the NCNS Position*

90 The NCNS argument in this respect is skeletal. I reproduce it, in its entirety, below:

Finally, the Applicant submits that the process by which the Licence Condition was adopted breached the consultation provisions in the 2004 AFA, and that the decision to impose the Licence Condition is therefore reviewable on that basis.

91 NCNS did not expand on this submission at the hearing except to refer to the factual portion of its memorandum of fact and law, which I address below. To summarize its position, NCNS claimed that the failure to consult constituted a "fettering of discretion" and that irrespective of the identity of the parties, the contract was breached.

92 The factual portion at page 5 of the NCNS memorandum of fact and law, to which I was referred, references specific clauses from the 2004-2005 AFA. Those clauses are reproduced in the analysis portion of my reasons in relation to this argument.

### *Analysis*

93 The pertinent clauses of the 2004-2005 AFA relied upon by NCNS are:

#### **Clause 2.(5): "Management of the Aboriginal fishery"**

The Commission, Netukulimk Prefects, DFO and the DFO Fishery officers will work together to attempt to find a mutually acceptable solution to any matters and issues that may arise from the monitoring, catch reporting under the Aboriginal Fisheries Arrangement and the Aboriginal Communal Fishing Licence.

#### **Clause 10.(8): "Duration and Termination"**

The parties may, after good faith consultation, agree to amend the provisions of the Schedules and when agreement cannot be reached either Party may terminate a Schedule or this Arrangement upon notice in

2007 FC 45, [2007] 2 C.N.L.R. 233

writing to that effect given to the other Party as set out in subsections 10.(2) and 10.(4) of this Arrangement.

**Clause 13.(13): "General"**

DFO and the Commission must consult from time to time at the request of each other on all matters arising out of this Arrangement and will work together to attempt to find a mutually acceptable solution to any issue that may arise out of this Arrangement.

94 The respondent presents a compelling and forceful argument in response to the NCNS submission. I do not intend to summarize the respondent's position. The NCNS argument was neither seriously developed nor seriously advanced. Moreover, it cannot succeed. Therefore, I need not comment on the respondent's arguments.

95 The best-case scenario for NCNS is the reference in clause 13.(13) of the AFA that requires, at the request of either party, the two *must* consult. This requirement to consult does not oblige the parties to arrive at a negotiated solution. Rather, it mandates that the two will "work together to *attempt* to find a mutually acceptable solution to any issue that may arise out of this Arrangement". The same language -- attempting to find a mutually acceptable solution -- is contained in clause 2.(5). The Agreement does not impose a requirement that the parties arrive at a mutually acceptable resolution. Rather, it expresses the parties' intent to work together. In short, it does not mandate that the outcome of the consultation will necessarily be a negotiated resolution.

96 Clause 10.(8) discusses "good faith consultation" within the context of the amending provisions of the Schedules. NCNS concedes that consultation did occur in this case. There is no allegation of bad faith. On the contrary, NCNS specifically acknowledged that DFO "did not intend to limit" the NCNS members' food, social and ceremonial fishing rights.

97 This disposes of the NCNS submissions on this issue. The breach of contract argument fails.

**Mootness**

98 For completeness, I should state that the respondent argued that the issues raised in the notice of application were moot because the impugned FSC Licence no longer exists. Thus, granting the requested relief could have no practical effect. NCNS concedes that the licence in issue expired on March 31, 2006. I maintains that the same disputed conditions have been attached to the new 2006-2007 Communal FSC Licence and that the court should exercise its discretion to hear and determine the issues raised by this matter.

99 The respondent is correct that the expiration of the 2004-2005 licence renders the application moot. The general practice of the courts is to decline to determine cases that are moot. However, it is common ground that the court may exercise its discretion to depart from the general practice in appropriate cases. The criteria for consideration by the court, in determining whether to exercise discretion, are delineated in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.). In *Dorsey v. Millhaven Penitentiary* (2002), 224 F.T.R. 309 (Fed. T.D.), I summarized the *Borowski* criteria at paragraphs 6, 7, 9, 10 and 11 as follows:

6 The two-part analysis, outlined in *Borowski*, involves consideration of: (i) whether the required tangible and concrete dispute has disappeared, and (ii) if the dispute has disappeared, whether the Court should exercise discretion to hear the case. If the answer to the first question is affirmative, then the issue is moot and regard must be had to the second part of the analysis.

7 Under the second stage of the *Borowski* analysis, the Court may, notwithstanding that an issue is moot, elect to address the issue if the circumstances warrant it. The discretion is to be judicially exercised with

2007 FC 45, [2007] 2 C.N.L.R. 233

due regard for established principles. The three-fold rationale behind the mootness doctrine is concerned with the requirement of an adversarial context, the concern for judicial economy and the necessity of judicial awareness of its proper law making function.

9 The first principle of the second stage of the analysis deals with the requirement of an adversarial context that is described, in *Borowski*, as a fundamental tenet of our legal system. There may, however, be instances where, despite the fact that a live controversy no longer exists, the adversarial relationship will continue to prevail such as in cases where there are collateral consequences of the outcome. [...]

10 The second principle deals with the concern for judicial economy. In *Borowski*, Justice Sopinka described this principle as a need to ration scarce judicial resources among competing claimants. He determined that the concern may be alleviated if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it. The mere fact, however, that a case raising the same point is likely to recur, even frequently, should not by itself be a reason for hearing a moot issue. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved. [...]

11 Finally, the third principle of the rationale is the deployment of judicial resources in cases raising an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. [...]

100 Because the matter is moot, only the second stage of the *Borowski* analysis is relevant. The respondent agrees that an adversarial relationship exists between the parties. With respect to judicial economy, it is fair to say, given the time lines associated with judicial review, that the dispute between these parties will, in all likelihood, have always disappeared before it can ultimately be resolved. The practical effect would be to immunize DFO from any and all decisions relating to NCNS Communal FSC Licences. Additionally, the 2005-2006 licence contains identical conditions to those that prompted the dispute in the previous licence. Therefore, future conditions are not strictly "hypothetical" in the present circumstances. Finally, it appears to me that there is a public interest element involved in this matter. The current conflict is not conducive to future negotiations and co-operation between the parties. There is much to be gained from ongoing co-operation and negotiation in this area. I am told that the 2005-2006 AFA is but a mirror image of the previous agreement. Thus, the consultative process contained in the former AFA is presumably provided for in the current AFA. Further consultation and negotiation regarding the conditions remains open. It is to the benefit of all concerned that this matter be determined.

101 Accordingly, I conclude that I ought to exercise my discretion to hear the matter. In fairness to the respondent, the argument with respect to mootness, appropriately in my view, was not forcefully advanced at the hearing.

102 The application for judicial review will be dismissed and judgment will go accordingly. The respondent has requested costs. Costs normally follow the event and no reason has been advanced to suggest that it should be otherwise. The respondent will have costs, to be paid by the applicant to the respondent, such costs to be assessed at the mid-range of Column 3 of Tariff B.

*Application dismissed.*

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