Federal Court Cour fédérale

Date: 20210910

Dockets: T-87-19
T-1076-20

Citation: 2021 FC 939

Vancouver, British Columbia, September 10, 2021

PRESENT: Case Management Judge Kathleen Ring

Docket: T-87-19

BETWEEN:

DZAWADA'ENUXW FIRST NATION

Plaintiff

and

HER MAJESTY THE QUEEN and CERMAQ CANADA LTD.

Defendants

and

MOWI CANADA WEST INC.

Intervener

Docket: T-1076-20

AND BETWEEN:

DZAWADA'ENUXW FIRST NATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA and CERMAQ CANADA LTD. and MOWI CANADA WEST

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion in writing pursuant to Rule 369 of the *Federal Courts Rules* [*Rules*] for an Order granting leave to the Plaintiff, Dzawada'enuxw First Nation [the Plaintiff], to file a Second Further Amended Statement of Claim [the "Proposed Amended Claim"] in the form included with the Plaintiff's motion record, pursuant to Rule 75(1) of the *Rules*.

[2] The Proposed Amended Claim seeks to remove all allegations relating to infringement of its asserted Aboriginal rights to harvest and exchange eulachon and manage eulachon fisheries [the "Disputed Amendments"]. The Plaintiff still seeks declarations concerning the existence of its Aboriginal rights in respect of eulachon, but it will no longer be asserting infringement of those rights if the amendments are granted.

[3] The Defendants oppose the Plaintiff's motion to amend. As described in greater detail below, either or both of the Defendants argue that the Proposed Amended Claim does not meet the threshold test of a reasonable prospect of success, and the proposed amendments are not in the interests of justice. They argue that there is no reasonable prospect of success for the declarations sought in respect of the eulachon, in the manner the Plaintiff proposes to amend them, because a declaration of an Aboriginal right without an infringement or threat to the Plaintiff's rights does not disclose a real dispute, fails to properly assess the scope of the right, and would not serve a useful purpose.

[4] The issue raised by this motion has been addressed by the Courts in several other jurisdictions, including the leading decision by the British Columbia Court of Appeal in *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, leave to appeal ref'd, [2000]

S.C.C.A. No. 625 [*Cheslatta*]. However, it appears from the submissions of the parties that this is the first time that the issue has come before this Court.

[5] Having reviewed the motion materials filed on behalf of the parties, and for the reasons that follow, I conclude that the Plaintiff's motion for leave to file the Proposed Amended Claim in the form attached to the Notice of Motion should be dismissed.

A. Background and Parties' Positions

[6] In its current pleadings, the Plaintiff seeks declaratory relief concerning the existence of certain Aboriginal rights in respect of eulachon and certain "Salmon Species" under section 35 of the *Constitution Act, 1982*, and concerning infringements of those rights.

[7] Specifically, the Plaintiff's current pleadings seek the following declaratory relief in respect of the existence of Aboriginal rights relating to eulachon and certain Salmon Species:

(a) for eulachon, the Plaintiff seeks declarations of (i) an Aboriginal right to harvest eulachon for food, social and ceremonial purposes ["FSC"] within the asserted "Rights Area"; (ii) an Aboriginal right to exchange eulachon for other goods on a limited basis and to harvest eulachon for that purpose within the Rights Area; and (iii) an Aboriginal right to manage the eulachon fisheries within the Rights Area; and

(b) for Salmon Species, the Plaintiff seeks declarations of (i) an Aboriginal right to harvest the Salmon Species for FSC within the Rights Area; (ii) a declaration of an Aboriginal to exchange the Salmon Species for money or other goods on a limited

basis and to harvest the Salmon Species for that purpose within the Rights Area; and (iii) an Aboriginal right to manage the Salmon Species fisheries within the Rights Area.

[8] The Plaintiff's current pleadings also seek the following declarations regarding the infringement of the aforesaid Aboriginal rights:

(a) the ten itemized Finfish aquaculture licences infringe the Plaintiff's Aboriginal rights in respect of eulachon;

(b) the ten itemized Finfish aquaculture licences infringe the Plaintiff's Aboriginal rights in respect of the Salmon Species; and

(c) section 22(1) of the *Fishery (General) Regulations*, SOR/93-53 and sections 3(1) and 4 of the *Pacific Aquaculture Regulations*, SOR/2010-270, insofar as they authorize the issuance of the Finfish licences, infringe its asserted Aboriginal rights in respect of eulachon and the Salmon Species.

[9] As earlier noted, the Disputed Amendments seek to remove all allegations relating to infringement of its Aboriginal rights in respect of eulachon. If the amendments are allowed, the Plaintiff would seek declarations concerning the existence of Aboriginal rights in respect of eulachon, but it will no longer be asserting infringement of those rights. The Proposed Amended Claim also seeks to re-attach the claim area map that was inadvertently left out of its current pleadings. The Plaintiff does not propose any amendments to its pleadings regarding the Salmon Species.

[10] In its initial written representations, the Plaintiff submits that it is in the interests of justice for the Court to allow it to amend its pleadings as proposed. The Plaintiff says that it has brought this motion in a timely fashion as examinations for discovery have not yet occurred and no expert reports have been tendered. According to the Plaintiff, the amendments will expedite the trial by reducing the evidence and claims that must be addressed and allow the Court to focus its time and attention on the remaining issues.

[11] The Defendant, Her Majesty the Queen [the "Defendant Canada"] opposes the motion on the basis that the jurisprudence does not contemplate bare declarations that address only the existence of an Aboriginal right under section 35 of the *Constitution Act, 1982*, such as is being proposed by the Plaintiff in its Proposed Amended Claim. The Defendant Canada also contends that the proposed bare declaration of an Aboriginal right to eulachon serves no useful purpose and would not resolve any actual or threatened dispute.

[12] The Defendant, Cermaq Canada Ltd. [the "Defendant Cermaq"], submits that the Plaintiff's motion should not be granted on three grounds. First, the Proposed Amended Claim, as drafted, contains a pleading that is directly contrary to appellate jurisprudence regarding section 35 of the *Constitution Act, 1982* proceedings and poses no reasonable prospect of success. Second, a bare declaration of an Aboriginal right fails to properly assess the scope of any Aboriginal right that may be established and would serve no useful purpose. Third, a pleading that serves no useful purpose is an inefficient use of judicial resources and contrary to the interests of justice.

[13] The Defendant Canada seeks an Order that the Plaintiff's motion be dismissed. The Defendant Cermaq takes a somewhat different position on the relief sought. It seeks an order that the Court grant leave to make the amendment sought by the Plaintiff on condition that such an

amendment also remove all declarations and allegations with respect to eulachon or, in the alternative, dismiss the Plaintiff's motion to amend.

[14] In its Reply, the Plaintiff submits that its request for a declaration of Aboriginal right without alleging infringement of that right has a reasonable prospect of success for two reasons. First, the question of whether the Federal Courts will issue declarations of Aboriginal right absent allegations of infringement has not been settled. Second, the Plaintiff's pleadings satisfy the minimum requirements for declaratory relief.

[15] The Defendant Cermaq has requested leave to file a sur-reply.

B. Issues

[16] While the Defendants oppose the Disputed Amendments, they do not appear to take any position on Plaintiff's proposed amendment to re-attach the claim area map that was inadvertently omitted from its current pleadings [the "Undisputed Amendment"]. Accordingly, the Plaintiff's Undisputed Amendment in the Proposed Amended Claim will be allowed.

[17] The remaining issues to be determined on this motion are:

(a) Whether the Defendant Cermaq should be granted leave to file a Sur Reply?

(b) Do the Disputed Amendments have a reasonable prospect of success?

(c) Would the Disputed Amendments serve the interests of justice?

C. Preliminary Issue – Admissibility of the Defendant Cermaq's Sur-Reply

[18] The Defendant Cermaq submitted a letter dated August 16, 2021 to the Court Registry, along with a book comprised of previously filed Court documents and case authorities, requesting that the letter and accompanying materials be accepted as a sur-reply to the Plaintiff's written representations in reply.

[19] The Court issued a Direction dated August 19, 2021 that the Court Registry should "receive" (not file) the sur-reply on the Court file, and that the admissibility of the sur-reply would be a matter within the discretion of the Case Management Judge when disposing of this motion.

[20] A review of the Defendant Cermaq's responding motion record indicates that it raised concerns at that stage that the Plaintiff had not addressed the threshold issue on a motion to amend in its initial motion record, and to allow the Plaintiff to advance arguments on that issue for the first time in reply would amount to case splitting. If the Plaintiff was permitted to make reply submissions on those issues, the Defendant Cermaq sought leave to file a sur-reply argument.

[21] In the Plaintiff's written representations in reply, the Plaintiff opposes the request by Defendant Cermaq to file a sur-reply. The Plaintiff submits that its case in chief on this motion was to justify the Disputed Amendments in accordance with the test for making such amendments, and that it did so in its initial motion record. According to the Plaintiff, the Defendant Cermaq then raised a defence to which the Plaintiff has a right of reply. The Plaintiff contends that the Defendant Cermaq was required to make out its defence fully in its responding motion record, and Cermaq's request for sur-reply would amount to an improper reply.

[22] Rule 369(3) of the *Rules* provides that a moving party in a motion in writing may reply to a responding motion record by filing writing representations in reply. The Rule does not allow for the filing of a sur-reply argument. A party must seek leave of the Court pursuant to Rule 55 to file a sur-reply on a motion in writing under Rule 369.

[23] While this Court has articulated the factors to consider in granting leave to file sur-reply evidence (see, for example, *Eli Lilly Canada Inc. v. Apotex Inc.*, 2006 FC 953), there is little jurisprudence regarding requests for leave to file sur-reply argument. In my view, sur-reply argument should only be permitted in special circumstances where considerations of procedural fairness and the need to make a proper determination require it. The Court should have regard to whether there is a demonstrated need to respond to a new matter that was raised for the first time in reply, that the sur-reply argument will assist the Court, and allowing the sur-reply argument will not cause substantial or serious prejudice to the opposing party.

[24] Based on the material before me, and taking into account the considerations set out above, I am satisfied that special circumstances exist that warrant a departure from the general rule prohibiting the filing of sur-reply argument. I reject the Plaintiff's argument that it fully addressed the test for making amendments to pleadings, and why it met that test, in its initial written representations. The Plaintiff's motion record states that the applicable test is whether it is in the interests of justice to allow the amendments, and the Plaintiff's submissions focus on how it satisfied the relevant factors to be considered in applying that test.

[25] The Plaintiff's initial 3-page written submissions are silent on the "threshold issue" which forms part of the test for making amendments to pleadings. The Plaintiff does not advance any arguments on *Cheslatta*, or otherwise demonstrate how the Disputed Amendments have a

reasonable prospect of success. This is perplexing in light of the fact that the Plaintiff bears the burden of establishing a reasonable prospect of success, and both Defendants put the Plaintiff on notice before the motion was brought that they intended to oppose the amendments based on *Cheslatta* and related jurisprudence.

[26] In the result, the Defendants were left in the position of trying to mount a responding argument on the "threshold issue" without knowing how the Plaintiff intended to address that issue. It was not until the Plaintiff filed its 7-page Reply that the Defendants had notice of the nature and scope of the Plaintiff's arguments on the threshold issue, including its position on *Cheslatta*. While it is true that both Defendants responded to the Plaintiff's motion in part by arguing that the Plaintiff's proposed amendments seeking a bare declaration of Aboriginal rights in respect of eulachon would lack utility, they did so without a full appreciation of the Plaintiff's intended arguments on that issue. In the circumstances, I find that considerations of procedural fairness require that the Defendant Cermaq be granted leave to file its proposed sur-reply.

[27] I am satisfied, based on my review of the motion materials, that the Plaintiff has raised new arguments in its reply on the threshold issue and the Defendant Cermaq has established a demonstrated need to respond to these new arguments. This is not a case of the responding party seeking leave to utilize a sur-reply to rehash its previous arguments. Moreover, the Plaintiff does not allege or demonstrate that allowing a sur-reply argument would cause substantial or serious prejudice to it.

[28] Additionally, it appears from the parties' submissions that this will be the first time that this Court is being asked to rule on the issue addressed in *Cheslatta*, it is particularly important in

that context for the Court to have the benefit of full argument from the parties to make a proper determination.

[29] Accordingly, the Defendant Cermaq's request for leave to file a sur-reply is granted.

D. Legal Principles Governing Amendment of Pleadings

[30] Rule 75 of the *Rules* provides that the Court may allow a party to amend a document on such terms as will protect the rights of all parties. The general rule is that "an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice": *Canderel Ltd. v. Canada*, 1993 CanLII 2990 (FCA), [1994] 1 FC 3 (CA) at p 10 [*Canderel*]; *Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215 at para 19.

[31] However, there is also a threshold requirement on a motion to amend pleadings that the proposed amendment must have a reasonable prospect of success: *Teva Canada Limited v. Gilead Sciences Inc*., 2016 FCA 176 at paras 29-32 [*Teva*]. Another way to put this is that a proposed amendment will be refused if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [2011] 3 S.C.R. 45 at para. 17 [*Imperial Tobacco]*; *McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4 at para 20 [*McCain*].

[32] In deciding whether an amendment has a reasonable prospect of success, its chances of success must be examined in the context of the law and the litigation process, and a realistic view must be taken: *McCain* at para 21; *Teva* at para. 30; *Imperial Tobacco* at para. 25.

[33] In determining whether an amendment should be allowed, it is helpful for the Court to ask itself whether the amendment, if it were already part of the proposed pleadings, would be a plea capable of being struck out. If the answer is yes, the amendment should not be allowed: *McCain* at para 22.

[34] The burden is on the amending party to demonstrate such a reasonable prospect of success: *Merck & Co., Inc. v. Apotex Inc*., 2003 FCA 488 at para 46.

[35] Once it has been established that the proposed amendment has a reasonable prospect of success, the other factors set out in *Canderel* must be considered. The criterion based on the interests of justice allows a Court to consider factors such as the timeliness of the motion to amend, the extent to which the proposed amendment would delay the proceedings, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter, and whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on its merits: *Canderel* at p 8; *Sanofi-Aventis Canada Inc. v. Teva Canada Limited*, 2014 FCA 65 at para 17; *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 242 at para 3.

[36] No single factor is determinative, and the list of factors to be considered is not exhaustive. A balancing exercise is required, on a case-by-case basis, to determine whether or not to allow the amendment sought by a party. As the Federal Court of Appeal stated in Canderel at page 9, citing

with approval from *Continental Bank Leasing Corp. v R.*, [1993] TCJ No 18, (1993) 93 DTC 298 at page 302, "[u]ltimately, it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done".

E. Do the Disputed Amendments have a Reasonable Prospect of Success?

[37] The Defendants argue, in part, that the Plaintiff should not be allowed to amend its pleadings to seek a bare declaration of Aboriginal rights to fish, exchange and manage the eulachon fisheries, without grounding such declarations of Aboriginal rights in allegations of infringement of those rights, because such amendments would be contrary to the existing jurisprudence. The Defendants rely heavily on the British Columbia Court of Appeal's decision in *Cheslatta* in their opposition to the motion. Accordingly, it is a useful starting point for the analysis on whether the Disputed Amendments have a reasonable prospect of success.

[38] In *Cheslatta*, the plaintiff sought a declaration that the Cheslatta Carrier Nation had an aboriginal right to fish in Cheslatta Lake. The plaintiff did not plead any infringement of or threat to the right asserted. The defendant Province of British Columbia and Attorney General of Canada brought a motion to strike out the statement of claim on the basis that it disclosed no reasonable action. Specifically, the Province and Canada argued that failure to plead actual or threatened infringement was fatal to a claim for declaratory relief.

[39] The British Columbia Supreme Court concluded that the motions to strike "would succeed" on existing state of the pleadings. Justice Lysyk agreed with the defendants' submission that a dispute will not attain the requisite "reality" to ground declaratory relief until one or both of the defendants to the action, through an enactment or governmental action, seeks to impose a

limitation on the aboriginal right asserted (para 36). However, since the plaintiff had sought leave to amend should it fail on the motion, the Court granted leave to the plaintiff to deliver an amended statement of claim to plead additional material facts to support its claim: *Cheslatta Carrier Nation v. British Columbia*, 1999 CanLII 5148 (BC SC).

[40] The British Columbia Court of Appeal dismissed the plaintiff's appeal from Justice Lysyk's decision: *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539. In reaching this conclusion, the appellate court examined the general principles governing declaratory actions, and stated at para 13 that:

> [13] Generally, modern courts have continued to adhere to the principle that declaratory actions should not be entertained where the declaration will serve little or no practical purpose or raises a matter of only hypothetical interest. Conversely, where the pleadings disclose a "real difficulty," present or threatened, the action will lie.

[41] Applying the general principles governing declaratory judgments to the case before it, the appellate court held that the pleadings did not allege any violation of or threat to the (assumed) right of the Cheslatta to fish in the specified lakes. The Court stated at para 17:

> [17] In short, the plaintiff has not pleaded a "dispute" which would be solved by the declaration sought. Once a dispute does arise — either with government or one or more private parties — it will be "attached to specific facts" and the right sought by the plaintiff may be determined and refined accordingly. Until then, however, the declaration would not serve a legal purpose in terms of resolving a real difficulty, present or threatened.

[42] The appellate court held that the rationale for following the usual rule against exercising jurisdiction in the absence of a "live controversy" apply with even greater force where the definition of Aboriginal rights is in issue. This is because Aboriginal rights do not exist in a vacuum. The exercise of any right involves a balancing with the rights of others. Accordingly,

such rights cannot be properly defined separately from the limitation of those rights. The Court held at para 19 that:

> [19] Applying these comments to the case at bar, it is clear that any aboriginal "right to fish" that might be the subject of a declaration would not be absolute. Like other rights, such a right may be subject to infringement or restriction by government where such infringement is justified. The point is that the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself.

[43] Accordingly, the appellate court upheld the lower court's ruling striking out the action, with leave to amend, on the ground that in the absence of any allegation of infringement or threatened infringement of a legal right, the action had not pleaded a dispute which would be resolved by the declaration sought. The plaintiff sought leave to appeal the decision to the Supreme Court of Canada, but leave was denied: [2000] S.C.C.A. No. 625.

[44] The Plaintiff argues that the Disputed Amendments satisfy the threshold issue on a motion to amend (i.e. they have a reasonable prospect of success) for two reasons. First, the question of whether the Federal Courts will issue declarations of Aboriginal rights absent allegations of infringement has not been settled. Second, the Plaintiff's pleadings satisfy the minimum requirements for declaratory relief. I will deal with each of these arguments in turn.

[45] As regards the first argument, the Plaintiff submits that the *Cheslatta* decision is not binding on the Federal Court. While *Cheslatta* is not binding on this Court, I find that it is persuasive appellate level authority on this motion. The Plaintiff has not endeavored to distinguish *Cheslatta* on its facts. This is not surprising since the proposed amendments in *Cheslatta* are very similar in form and content to the amendments requested on this motion. In both cases, the moving party pleads facts to support a claimed Aboriginal right to fish "protected" by section 35 of the

Constitution Act, 1982, without pleading any alleged violation of or threat to the right to fish in the claim area.

[46] The Plaintiff submits that this Court may not follow *Cheslatta*, but it does not advance any cogent arguments to explain why this Court should not follow it. The Plaintiff does not set out reasons why, in its view, *Cheslatta* was wrongly decided, nor any jurisprudence to support that position.

[47] As earlier noted, the Supreme Court dismissed the application for leave to appeal the *Cheslatta* decision. Paragraphs 11 to 16 of *Cheslatta* were also cited favourably by the Supreme Court in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para 143. Moreover, the superior courts in several other Canadian jurisdictions have cited *Cheslatta* with approval: for example, *Acadia First Nation v. Canada (Attorney General)*, 2013 NSSC 284 at para 71; *Ermineskin Cree Nation v. Canada*, 2004 ABQB 5 at paras 15, 16 and 25. The Plaintiff has not cited any jurisprudence in which the courts have rejected the principles set out in *Cheslatta*.

[48] Additionally, the Plaintiff has not referred the Court to any jurisprudence of the Federal Courts that would suggest that this Court may decide the issue in *Cheslatta* any differently. Indeed, the recent decision of the Federal Court of Appeal in *Alberta (Attorney General) v. British Columbia (Attorney General)*, 2021 FCA 84 [*Alberta (Attorney General)*] illustrates that the Federal Courts will strike out a pleading on the basis that the party whose pleading is challenged has not met the test for declaratory relief. The majority of the appellate court struck the Province of British Columbia's Statement of Claim, which sought a declaration on the constitutionality of the Province of Alberta's *Preserving Canada's Economic Prosperity Act*, SA 2018, c P-21.5, on the basis that BC's claim was premature. The majority found that a real

dispute had not yet arisen in the absence of Ministerial action restricting supply of crude oil to British Columbia and without regulations and an operational licensing scheme in place. Accordingly, the majority of the Court struck out British Columbia's statement of claim as it was plain and obvious that it had not met the element of the test for declaratory relief requiring a real (not theoretical) dispute between the parties.

[49] The Plaintiff also argues that its Proposed Amended Claim satisfies the minimum requirements for declaratory relief, and therefore it has satisfied the threshold issue of a reasonable prospect of success.

[50] The Supreme Court has articulated the four-part test on when a court may, in its discretion, grant declaratory relief as follows: (i) the court has jurisdiction over the subject matter; (ii) the dispute is real and not theoretical; (iii) the party raising the issue have a genuine interest in its resolution; and (iv) the responding party has an interest in opposing the declaration sought: *Ewert v. Canada*, 2018 SCC 30 at para 81 [*Ewert*].

[51] In its earlier decision in *Operation Dismantle v. the Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, the Supreme Court observed that while no "injury" or "wrong" needs to have been actually committed, "the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be cognizable threat to a legal interest before the courts will entertain the use of its process as a preventative measure" (at 457 S.C.R.).

[52] More recently, in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11, the Court stipulated that a declaration can "only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties".

[53] In this case, the Plaintiff asserts that it has pled adequate facts in the Proposed Amended Claim to support the requested declaratory relief. However, the Plaintiff has not demonstrated *how* its pleadings satisfy all of the elements of the test in *Ewert*. Having carefully considered the Proposed Amended Claim, I find that the Plaintiff has not pled a real "dispute" that is "attached to specific facts" as regards its asserted Aboriginal right to fish eulachon.

[54] Similar to *Cheslatta*, the Proposed Amended Claim before the Court on this motion does not allege any violation by the Defendants of, or threat to the Plaintiff's asserted Aboriginal fishing rights relating to eulachon. In other words, there are no facts alleged in the proposed amendments that support the existence of a live controversy between the parties on that issue.

[55] The absence of a "live controversy" on the face of the pleadings is particularly problematic in this case where the Plaintiff seeks a free-standing declaration of its aboriginal right to fish eulachon. The Supreme Court has frequently held that Aboriginal and treaty rights do not exist in a vacuum: See, for example, *R. v. Desautel*, 2021 SCC 17 at para 79, citing ***R. v. Nikal***, 1996 CanLII 245 (SCC), [1996] 1 S.C.R. 1013 [*Nikal*]. In *Nikal*, the Supreme Court held at para. 92:

> … It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in

> the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. …

[56] On this motion, the Plaintiff seeks leave of the Court to amend its pleadings to seek a bare declaration of its Aboriginal rights to fish eulachon, without grounding the declaration in any factual allegations pertaining to the alleged infringement of those rights. In effect, the Plaintiff seeks a declaration as to the existence of its Aboriginal rights regarding eulachon in a vacuum. However, the aforementioned Supreme Court of Canada decisions respecting section 35, which are binding on me, make it clear that Aboriginal rights claims must be adjudicated within a concrete factual context.

[57] The Plaintiff submits that the Disputed Amendments will have practical utility by delineating its Aboriginal rights to eulachon, providing the Plaintiff with certainty about those rights, and allowing it to exercise those rights with less fear of prosecution or other interference by the provincial and federal governments.

[58] Having carefully considered the submissions of the parties, I am not persuaded that the proposed bare declaration regarding the eulachon will serve a useful purpose in terms of establishing the extent to which the Plaintiff may harvest, exchange, and manage eulachon, or otherwise provide certainty to the Plaintiff about those rights. As already noted, Aboriginal rights do not exist in a vacuum, and the ability to exercise such rights is necessarily limited by the rights of others. The infringement analysis is needed to refine and ultimately define the scope of the Plaintiff's asserted rights in eulachon. As the British Columbia Court of Appeal stated in *Cheslatta* at para 19, "the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself" (see also para 18).

[59] Further, I am not convinced that the bare declaration sought by the Plaintiff regarding eulachon will allow it to exercise those rights with less fear of prosecution or other interference by the provincial and federal governments. I agree with the Defendant Canada that a bare declaration "would leave open the real possibility of further litigation arising from different interpretations and expectations of a bare declaration": See also *Cheslatta* at para 16.

[60] The Plaintiff argues that the Disputed Amendments will also have utility by simplifying negotiations and analyses of the duties to consult and accommodate by obviating the need to assess the strength of the claimed rights. According to the Plaintiff, it will also assist in its extra-judicial negotiations.

[61] I reject this argument. In *Pieters v. Canada (Attorney General)*, 2004 F.C. 27 at para 17, cited with approval in *Bonamy v. Canada (Attorney General)*, 2009 FCA 156 at para 12, this Court held that a proceeding seeking declaratory relief sought not be brought merely as a tool for negotiations.

[62] A similar argument was raised before Justice Lysyk in *Cheslatta*, and again in *Haida Nation v. British Columbia (Attorney General)*, 2018 BCCA 462 at para 34, and dismissed by the Court in each instance. Justice Lysyk dismissed the argument in these terms:

> [11] I have little doubt that having in hand a declaration of the kind sought here would give the plaintiff a distinct tactical advantage in any discussions that may be ongoing between the Cheslatta and the government or other parties who may have conflicting interests with those of the plaintiff. But that tactical advantage does not by itself decide the question of whether a court of law would or should entertain an action for a declaration of right in the general terms sought here.

[63] In summary, I conclude that the Disputed Amendments do not have a reasonable prospect of success because it is plain and obvious that the legal test for declaratory relief has not been met. In this respect, the Disputed Amendments do not disclose a real dispute between the parties (i.e. no "live controversy") regarding the Plaintiff's asserted Aboriginal rights regarding eulachon. The Plaintiff has not demonstrated that the Disputed Amendments seeking a bare declaration of Aboriginal rights regarding eulachon would serve a useful purpose. The Disputed Amendments impermissibly seek a declaration as to the existence of Aboriginal rights in a vacuum.

[64] Accordingly, I find that the Plaintiff's motion should be dismissed on the ground that the Disputed Amendments do not have a reasonable chance of success.

F. Would the Disputed Amendments Serve the Interests of Justice?

[65] If a proposed amendment has no reasonable prospect of success, the Court need not consider any other matter, such as the potential prejudice to the opposing party occasioned by the amendment: *Teva* at at para 31. As I have determined that the Disputed Amendments have no reasonable prospect of success, it is not necessary to consider the other factors set out in *Canderel*, and I decline to do so.

G. Conclusion

[66] For the forgoing reasons, I conclude that the Plaintiff shall be granted leave to make the Undisputed Amendment to its Statement of Claim. I further conclude that the Disputed Amendments do not have a reasonable prospect of success, and therefore the Plaintiff's motion for leave to make the Disputed Amendments to its Statement of Claim is dismissed.

[67] The Defendants seek their costs of the motion. I see no reason to deviate from the general rule that a successful party is entitled to his or her costs on a motion. In this case, the Defendants were successful in resisting the Plaintiff's motion to amend. Accordingly, the Plaintiff shall pay to the Defendants their costs of the motion, hereby fixed in the amount of $750.00 to each Defendant, inclusive of disbursements and costs.

H. Next Steps

[68] The Order of the Court dated May 19, 2021 provides that the Plaintiff's motions to strike portions of the Statements of the Defence of the Defendant Canada and the Defendant Cermaq shall be held in abeyance pending the disposition of this motion.

[69] Having regard to the May 19th Order, the Plaintiff shall, following consultation with the Defendants and by October 1, 2021, submit a status update regarding proposed next steps in the proceeding.

THIS COURT ORDERS that:

1. The Defendant Cermaq's request for leave to serve and file a sur-reply, comprised of a letter dated August 16, 2021 and accompanying materials, is granted. The Registry is directed to accept the sur-reply for filing effective the date on which it was submitted for filing.

2. The Plaintiff's motion for leave to make the Undisputed Amendment to its Statement of Claim is granted.

3. The Plaintiff's motion for leave to make the Disputed Amendments to its Statement of Claim is dismissed.

4. The Plaintiff shall pay to the Defendants their costs of the motion, hereby fixed in the amount of $750.00 to each Defendant, inclusive of disbursements and costs.

5. The Plaintiff shall, following consultation with the Defendants and by October 1, 2021, submit a joint status update regarding proposed next steps in the proceeding. In the event the parties cannot agree on proposed next steps, they shall forthwith requisition a case management teleconference and provide their dates and times of mutual availability for a teleconference.

"Kathleen Ring"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-87-19, T-1076-20
STYLE OF CAUSE:	DZAWADA'ENUXW FIRST NATION v. HER MAJESTY THE QUEEN AND CERMAQ CANADA LTD. AND MOWI CANADA WEST INC. DZAWADA'ENUXW FIRST NATION v. THE ATTORNEY GENERAL OF CANADA AND CERMAQ CANADA LTD. AND MOWI CANADA WEST
MOTION IN WRITING PURSUANT TO RULE 369	
REASONS FOR ORDER AND ORDER:	RING CMJ
DATED:	September 10, 2021

WRITTEN SUBMISSIONS BY:

Jack Woodward QC Ethan Krindle Dawn Nicolson Owen Stewart Morgan Blakley	FOR THE PLAINTIFF/APPLICANT DZAWADA'ENUXW FIRST NATION
Jennifer Chow	FOR THE DEFENDANT/RESPONDENT HER MAJESTY THE QUEEN/THE ATTORNEY GENERAL OF CANADA
Kevin O'Callaghan Dani Bryant	FOR THE DEFENDANT/RESPONDENT CERMAQ CANADA LTD.
Roy Millen Rochelle Collette	FOR THE INTERVENER/RESPONDENT MOWI CANADA WEST INC.

SOLICITORS OF RECORD:

EG Woodward Law Corp. Campbell River, British Columbia	FOR THE PLAINTIFF/APPLICANT DZAWADA'ENUXW FIRST NATION
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT/RESPONDENT HER MAJESTY THE QUEEN/THE ATTORNEY GENERAL OF CANADA
Fasken Martineau DuMoulin LLP Vancouver, British Columbia	FOR THE DEFENDANT/RESPONDENT CERMAQ CANADA LTD.
Blake Cassels & Graydon LLP Vancouver, British Columbia	FOR THE INTERVENER/RESPONDENT MOWI CANADA WEST INC.