Federal Court Cour fédérale

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Citation: 2023 FC 1259

Edmonton, Alberta, September 19, 2023

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

WE WAI KAI NATION AND WEI WAI KUM FIRST NATION, MOWI CANADA WEST INC., CERMAQ CANADA LTD., AND GRIEG SEAFOOD B.C. LTD.

Applicants

and

THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD

Respondent

and

HOMALCO FIRST NATION

Proposed Intervener

ORDER AND REASONS

I. Overview

[1] This is a motion by Homalco First Nation ("Homalco"), for an order to be added as a respondent, pursuant to Rules 104(1)(b) and 303(1) of the *Federal Courts Rules*, SOR/98-106 ("*Rules*") with full rights of participation in four consolidated applications for judicial review. In the alternative, Homalco seeks broad intervener status in the applications with the right to file affidavit evidence, the right to make arguments of fact and law in the applications and any interlocutory motions, and the right to appeal.

[2] By way of correspondence, the Respondent confirmed its support of Homalco's motion for joinder or intervener status but did not file written representations or otherwise advance submissions at the hearing of the motion.

[3] The Applicants resist the motion in its entirety. They assert that Homalco has not met the stringent test for joinder because it is not directly affected by the order sought in the applications and its presence is not necessary to ensure that all matters in dispute may be effectually and completely determined.

[4] Further, the Applicants argue that Homalco advanced virtually the same arguments in 2021 in an unsuccessful motion seeking the same relief in respect of an earlier application for judicial review by the same parties: *Mowi Canada West Inc v Canada (Fisheries, Oceans and Coast Guard)* Court Docket No. T-129-21 (unreported) ("*Mowi #1*"). On that motion, Justice

Aylen (then Prothonotary Aylen) dismissed the motion for joinder or intervener status; her decision was confirmed on appeal: *Mowi Canada West Inc v Canada (Fisheries, Oceans and Coast Guard*), 2021 FC 548 ("*Mowi #2*"). No further appeal was taken from that decision. The Applicants argue that the same result should obtain in this motion.

[5] For the reasons that follow, I conclude that the motion should be dismissed.

II. Background

[6] The underlying consolidated applications for judicial review challenge the February 17, 2023, decision ("the 2023 Decision") of the Minister of Fisheries, Oceans and the Canadian Coast Guard ("the Minister") refusing to reissue finfish aquaculture licences for 15 sites in the Discovery Islands in British Columbia.

A. *The Parties*

[7] The Applicant operators are the former finfish aquaculture licence holders: Cermaq Canada Ltd. ("Cermaq") operates 3 aquaculture sites in the Discovery Islands. Mowi Canada West Inc. ("Mowi"), is based in Campbell River and has operated salmon aquaculture sites, including 11 sites in or near the Discovery Islands for over 30 years. Grieg Seafood B.C. Ltd. ("Grieg") is an aquaculture producer with an aquaculture site located at Barnes Bay in the Discovery Islands. All three operators held licences issued by the Minister pursuant to section 7 of the *Fisheries Act*, RSC, 1985 c. F-14 and associated regulations for each of their aquaculture sites in the Discovery Islands.

[8] The Applicants, Wei Wai Kum First Nation (Campbell River Indian Band) and We Wai Kai First Nation (Cape Mudge Indian Band) are historically known and collectively referred to as Laich-kwil-tach Nation. Laich-kwil-tach Nation asserts Aboriginal title over an area that includes the region in British Columbia known as Johnstone Strait, the Discovery Islands and Shaw Point at the entrance to Topaze Harbour. That claim includes seven aquaculture sites at issue in the underlying consolidated applications.

[9] Laich-kwil-tach's asserted claim to Aboriginal title has not been established in court. Moreover, according to the Laich-kwil-tach's written representations in support of this motion, they acknowledge that other First Nations, including the moving party, Homalco, have asserted potentially conflicting claims to the same area.

[10] Indeed, Homalco, claims unceded Aboriginal rights and title interest throughout its territory as recognized by section 35 of the *Constitution Act*, 1982. That right includes the rights of hunting, fishing, gathering and stewardship. Homalco claims that its Aboriginal title territory covers large portions of the Discovery Islands and beyond.

B. *The Dispute*

[11] The Applicants collectively challenge the Minister's 2023 Decision in respect of seven aquaculture sites, four of which were formerly held by Mowi, two formerly held by Cermaq and one formerly held by Grieg. In 2022, Laich-kwil-tach entered into agreements with the three operators in respect of co-managing the seven aquaculture sites that are at the heart of its application.

[12] In addition to the seven sites that engage Laich-kwil-tach, the three operators also challenge the 2023 Decision in respect of eight additional sites in the Discovery Islands.

[13] As noted earlier, the consolidated applications for judicial review were preceded by an earlier application brought in 2021. That application has considerable bearing on the motion before the Court and some background is necessary to appropriately contextualize Homalco's current motion for joinder or intervener status.

(1) 2021 Application

[14] In her 2021 decision, Justice Aylen sets out in some detail the factual circumstances that lead to the 2021 Application for judicial review. The genesis of that application was a 2009 decision by the federal government to investigate the record low sockeye salmon run by establishing a Commission of Inquiry: the Cohen Commission. The Commission published its findings and recommendations in October 2012. Among its 75 recommendations, the Commission recommended that the Department of Fisheries and Oceans prohibit net-pen fish farming in the Discovery Islands unless it could be shown there was minimal risk of serious harm to the health of migrating wild salmon.

[15] In 2020, the then Minister, Bernadette Jordan, began consultations with seven First Nations which included Homalco and Laich-kwil-tach.

[16] On December 17, 2020, Minister Jordan, publicly announced her decision ("2020 Decision") to phase out existing salmon farming facilities in the Discovery Islands. To that

end, she issued licences to aquaculture sites for a period of 18 months to permit the operators to finish and harvest their salmon stocks. However, the 2020 Decision stipulated that no new fish could be introduced into the Discovery Islands. Further, the decision mandated that all fish farms would be free of fish by June 30, 2022.

[17] On January 18, 2021, four operators including the three applicant operators, challenged the 2020 Decision on the basis that it was unreasonable and made in a procedurally unfair manner. On April 22, 2022, Madam Justice Heneghan quashed the 2020 Decision, finding it was unreasonable and breached the applicants' rights to procedural fairness. Justice Heneghan remitted the matter back to the Minister for reconsideration. No appeal was taken from that decision.

[18] When the aquaculture licenses were coming up for renewal in June of 2022, the new Minister, Joyce Murray, again refused to issue the renewals but committed to conducting consultations with First Nations and licence holders on whether to reissue licences in the Discovery Islands area. This process was to offer both First Nations and industry the opportunity to be heard and respond to each other's concerns as well as the Minister's concerns. It is uncontroversial that Homalco was one of several First Nations that participated in the consultations with the Minister.

(2) 2023 Application

[19] On February 17, 2023, Minister Murray announced her decision not to reissue aquaculture licences in the Discovery Islands. On March 20, 2023, the Applicants commenced the underlying consolidated applications for judicial review.

[20] In their Notices of Application, the Applicants seek the following relief:

(a) a declaration that the Decision was unreasonable in light of the statutory scheme and the lack of pertinent supporting information in the record before the Minister;

(b) a declaration that the Decision was made in a procedurally unfair manner;

(c) a declaration that the Decision was otherwise invalid or unlawful; and

(d) an order quashing the Decision and referring the matter back to the Minister for re-determination on the merits.

[21] This relief essentially mirrors the relief sought in the 2021 Applications. Laich-kwil-tach, who was not an applicant in 2021, also seeks a declaration that the decision is inconsistent with the honour of the Crown and constitutes a breach of Canada's duty to consult and accommodate the Aboriginal rights and title of the Laich-kwil-tach.

[22] At the hearing of the motion, both Cermaq and Laich-kwil-tach provided the Court, on consent, with amended Notices of Application. Counsel for those parties argued that the amendments make it clear that the controlling idea of the Notices of Application do not engage issues of Aboriginal title or who has the stronger claim as suggested by Homalco.

(3) 2021 Motion

[23] As noted earlier, in the 2021 Application, Homalco together with Tla'amin Nation (collectively referred to as "Sister Nations") brought a motion seeking the identical relief sought in this motion, i.e. joinder as respondents or alternatively intervener status. With respect to the intervener status, the Sister Nations sought leave to intervene with the right to file evidence. As with the current motion, the operators opposed that motion.

[24] Having thoroughly reviewed the legal principles informing a motion for joinder, Justice Aylen concluded that the Sister Nations had not met the test. She explains thusly:

> Turning to that issue, I am not satisfied that the relief sought by the Applicants affects the Sister Nations in a direct way. The decision to be reviewed by the Court is a denial of an aquaculture license to the Applicants on the terms sought and a pronouncement as to the future of the Applicants' operations. The decision under review limits the rights of the Applicants and, as is evident from the decision itself and the accompanying press release, cannot be properly characterized as a grant of accommodation or a promise to the Sister Nations. Unlike the case of *Ontario Federation of Anglers and Hunters v. Ontario*, 2015 ONSC 7969, the decision at issue does not expressly grant a right to the Sister Nations. None of the relief sought by the Applicants would alter, affect or derogate from any duties owed by the Crown to the Sister Nations or any existing rights of the Sister Nations. Moreover, none of the Applicants have based their challenge to the decision on either the assertion or denial of Aboriginal title and rights or the Crown's duty to consult (emphasis in original).

[25] Further, Justice Aylen commented that if the Court quashed the decision, it would be remitted back to the Minister for a redetermination in accordance with any reasons provided by the Court. She concluded that to the extent the Sister Nations' rights or interests could be affected by the relief sought in the application, any effect was speculative and/or consequential and indirect, and does not meet the test for joinder: *Mowi #1* at para 41.

[26] Justice Aylen further concluded that the Sister Nations failed to point to a question that was actually raised in the consolidated applications that could not be effectually and completely settled unless the Sister Nations were made parties: *Mowi #1* at para 43.

[27] She noted that the fact that the Sister Nations participated in the consultation process leading to the 2020 Decision and the relief sought may have had an adverse indirect effect on their rights and interests did not render the Sister Nations necessary parties to the consolidated applications.

[28] Finally, she noted that the evidence the Sister Nations sought to adduce was irrelevant to the issues raised on the consolidated applications. Moreover, to the extent the Sister Nations had relevant evidence about the consultation process that evidence could be presented by the Minister.

[29] The Sister Nations appealed Justice Aylen's decision which was dismissed by Mr. Justice Phelan. In confirming her decision, Justice Phelan noted that the Sister Nations' rights are constitutionally protected and therefore the 2020 Decision neither purports to nor can it affect those rights: *Mowi #2* at para 39. Further, he noted that none of the grounds of relief pleaded by the applicants were directed at the Aboriginal rights, titles or interests of the Sister Nations: *Mowi #2* at para 24.

[30] With respect to the motion to intervene, Justice Phelan acknowledged the highly discretionary nature of that request and found that Justice Aylen did not err when she concluded

that the Sister Nations failed to explain why they wished to intervene and how and in what way they could bring a further, different and valuable insight and perspective to the proceedings.

[31] I have taken some time to recount the history of the 2021 Application and motion for joinder because in my view, the 2023 Application and the present motion for joinder are inextricably linked to the earlier proceedings. That obvious connection aside, and despite having filed a 3500-page motion record, Homalco makes no reference whatsoever to the previous unsuccessful motion for joinder or intervener status. In my view, that omission is troubling on two levels: First, it is incumbent on a party to disclose to the Court decisions adverse in interest. Second, Homalco's failure to distinguish an adverse decision directly on point, is fatal to their motion.

III. Legal Principles

A. *Joinder under Rule 104(1)(b)*

[32] Rule 104(1)(b) of the *Rules*, provides that the Court may, at any time, order that a person be added as a respondent where: (i) they should have been a respondent in the first place; or (ii) their presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined. As noted by the Federal Court of Appeal, satisfaction of either of these requirements is sufficient to succeed on a Rule 104(1)(b) motion [see *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 ("*Forest Ethics*") at para 11].

[33] In an application for judicial review, Rule 303(1)(a) of the *Rules* requires an applicant to name as a respondent every person "directly affected" by the order sought in the application (emphasis added). As explained in *Forest Ethics*, the words "directly affected" in Rule 303(1)(a) mirrors the language of section 18.1(1) of the *Federal Courts Act*, RSC 1985, c. F-7 ("Act"), which provides that only the Attorney General or anyone directly affected by the matter in respect of which relief is sought may bring an application for judicial review. Rule 303(1)(a) restricts the category of parties who must be added as respondents to those who, if the tribunal's decision was different, could have brought an application for judicial review: *Forest Ethics*, *supra* at para 18.

[34] A party has a direct interest under subsection 18.1(1) of the Act when its legal rights are affected, legal obligations are imposed upon it, or it is prejudicially affected in some direct way: *Forest Ethics* at para 19. Thus, where a proposed respondent will be prejudicially affected in a direct way, the party should be added as a respondent under Rule 104(1)(b): *Forest Ethics*, *supra* at para 21.

[35] As to the second consideration, the only reason necessary to make a person a party to a proceeding is to bind that person to the result of the proceeding and the question to be settled must be a question in the proceeding that cannot be effectually and completely settled unless the person is a party: *Canada (Minister of Fisheries and Oceans) v Shubenacadie Indian Band*, 2002 FCA 509 at para 8 ("*Shubenacadie*"); *Laboratories Servier v Apotex Inc*, 2007 FC 1210 ("*Laboratories Servier*").

[36] In *Laboratories Servier*, at para 17, the Court identified the following additional principles that apply when determining whether a person is a necessary party within the meaning of Rule 104(1)(b):

- The fact a person has evidence relevant to the plaintiff's statement of claim is not sufficient to make them a necessary defendant (*Shubenacadie*, at para. 7).

- The fact that a person may be adversely affected by the outcome of the litigation is not sufficient to make them a necessary defendant (*Shubenacadie*, at para. 7).

- A mere commercial interest rather than a legal interest is not sufficient to make a person a necessary party (*Ferguson v. Arctic Transportation Ltd.*, 1995 CanLII 3564 (FC), [1996] 1 F.C. 771 at 784-785; *Apotex Inc. v. Canada (Attorney General) (1986)*, 1986 CanLII 6874 (FC), 9 C.P.R. (3d) 193 at 201 (F.C.T.D.)); and,

- Absent a specific legislative provision…when the [proceeding] seeks no relief against a person and makes no allegations against them, the person will not be considered a necessary party (*Shubenacadie*, above at para. 6; *Hall v. Dakota Tipi Indian Band*, [2000] F.C.J. No. 207 at paras. 5, 8 (T.D.) (QL); *Stevens v. Canada Commissioner, Commission of Inquiry)*, 1998 CanLII 9074 (FCA), [1998] 4 F.C. 125 at para. 21 (C.A)).

[37] Thus, the questions to be asked on this motion are:

a. Does the relief sought in the consolidated applications for judicial review directly affect Homalco's rights, impose legal obligations upon them or prejudicially affect them in some direct way; and

b. Is Homalco's participation as a respondent necessary to ensure that all matters in dispute in the proceeding may be effectively and completely determined.

B. *Position of the Parties*

(1) Homalco

[38] Homalco concedes that any decision made on the judicial review application will not impose any legal obligations on them. Nevertheless, they assert they may be prejudicially affected by the decision. This potential prejudice, they say, is sufficient basis to satisfy the first branch of the test.

[39] Indeed, Homalco advances three arguments supporting its assertion that it is directly affected. First, they assert that the court hearing the application and determining the reasonableness of the decision, will be required to address Laich-kwil-tach's claim for Aboriginal title or that it has a stronger claim to Aboriginal title than Homalco. This determination or finding of Aboriginal title would unfairly disentitle Homalco from protecting its Aboriginal title.

[40] Second, they assert that a finding by the court on prioritization of certain First Nation's views over others would prejudice Homalco in future negotiations.

[41] Third, they argue that a finding by the court on Laich-kwil-tach's rights under the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), would unfairly disentitle Homalco from protecting its inherent rights.

[42] Homalco relies on the decisions of the British Columbia Supreme Court in *The Nuchatlah v British Columbia,* 2023 BCSC 804 ("*Nuchatlah*") and the decision of the Ontario Superior Court

in *Ontario Federation of Anglers and Hunters v Ontario,* 2015 ONSC 7969 ("*Ontario Federation*") in support of its position. In *Nuchatlah* a declaration was sought that would directly affect the rights of some First Nations such that they were required to be before the Court. In *Ontario Federation*, the First Nations had an express right of participation. Homalco suggests the same result must obtain in the present motion.

[43] Further, Homalco argues that its situation is akin to that of Enbridge in *Forest Ethics*. In that case, Mr. Justice Stratas found that Enbridge, the proponent of the project which was the subject of the judicial review, would be directly prejudiced by any decision and was thus entitled to be added as a respondent. In coming to that conclusion, Justice Stratas made plain that Enbridge was required to show that they would be prejudiced in a direct way. To illustrate, he contrasted Enbridge's position with that of another proposed respondent, Valero. He determined that as Valero was not a proponent of the project, its financial interest in the project was merely consequential or indirect and did not entitle it to be added as a respondent.

(2) Applicants

[44] Although the Applicants each filed significant motion records and directed the Court to a vast amount of jurisprudence, they were aligned in their opposition to Homalco's assertion of being directly affected by the relief sought in the consolidated applications. The Applicants argue that much of Homalco's concerns arise from speculation about what the Court might decide without proper regard to the remedies actually sought in the Notices of Application. They argue that it is the relief sought that informs whether a party may be directly affected.

[45] In any case, , the Applicants assert Homalco mischaracterizes the actual issues before the Court to include Aboriginal title, strength of title and the application of UNDRIP so as to gain joinder and convert the consolidated applications into something they are not.

[46] Finally, the Applicants say that Homalco has failed to address or even refer to the decisions in *Mowi #1* and *Mowi #2* as well as Associate Judge Ring's decision in *Gitxaala Nation v Prince Rupert Port Authority*, 2020 CanLII 382 (FC). With respect to the Mowi decisions, the Applicants say they are determinative of this motion.

IV. **Analysis**

[47] I am not satisfied that Homalco has met its burden to show that the relief sought by the Applicants will directly affect their rights or prejudicially affect them in a direct way. Like the 2020 Decision, the 2023 Decision concerns a review of a section 7 *Fisheries Act*, RSC, 1985 c. F-14 licensing decision. Apart from the declarations sought by Laich-kwil-tach, the relief sought by the Applicants is the same. As noted earlier, Homalco has failed to distinguish *Mowi #1* or *Mowi #2*.

[48] Further, the fact that Laich-kwil-tach seeks declaratory relief that the Minister had a duty to consult with them does not detract from or affect Homalco's rights. I agree with the Applicants that to the extent that Homalco's rights or interests may be affected by the relief sought by them, it is speculative and/or consequential and indirect and does not meet the test for joinder: *Gitxaala; Kwicksutaineuk/Ah-kwa-mish Tribes v Canada (Minister of Fisheries and Oceans)*, 2003 FCT 30.

[49] In any case, I am satisfied that Homalco's arguments fundamentally misunderstand the Court's role on a reasonableness review. On such a review, the Court is required to assess the reasonableness of the decision made—nothing more. The suggestion that the reviewing court might make comments or determinations about Aboriginal title or strength of tile go well beyond the proper role of a reviewing court*: Ka'a' Gee Tu First Nation v Canada (Attorney General*), 2007 FC 763 at para 107; *Ka'A' Gee Tu First Nation v Canada (Attorney General)*, 2012 FC 297 at para 118; *Gitga'at First Nation v British Columbia (Environment)*, 2015 BCSC 1703 at paras 32-33.

[50] With respect to the second branch of the test for joinder, I adopt the reasoning of Justice Aylen at paragraphs 43-45 of her decision. There, she notes that the moving party has not satisfied the demanding test set out in *Shubenacadie* and *Laboratories Servier*. As in 2021, Homalco has not pointed to a question that is actually raised in the consolidated applications that cannot be effectually and completely settled unless Homalco is a party.

[51] Although duty to consult is raised by Laich-kwil-tach, in its Notice of Application, that duty relates to the assertion that the Minister, in making her decision failed to consult with Laich-kwil-tach. The reviewing court can consider that argument but cannot determine issues of relative strength of claims or Aboriginal title. Moreover, such a pleading cannot be viewed as an attack on Homalco's claim for Aboriginal title and rights.

[52] As correctly noted by counsel for Grieg in its written representations, the decision to join a party as a respondent is a discretionary one that engages the dictates of the interests of justice:

Merck & Co v Canada (Attorney General), [1993] FCJ No 245 (FCTD) at para 14. In the present motion, I am satisfied that the interests of justice are not well served by permitting joinder.

[53] The issues Homalco seeks to raise as set out in paragraphs 38-40 above, together with the extensive evidence sought to be adduced, would transform a straight-forward application for judicial review into an expansive hearing on Aboriginal rights and title interest. Such an expansion is entirely antithetical to the notion of judicial review as an expeditious proceeding that is limited to the record before the decision-maker.

A. *Leave to intervene under Rule 109(1)*

[54] In the event that Homalco is not added as a respondent party, it seeks leave to intervene in the consolidated applications with the right to file evidence, the right to cross-examine on affidavits, the right to make arguments of fact and law in the application or any interlocutory motion, and the right to appeal.

[55] Rule 109 provides as follows:

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109 (1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	**(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	**(a)** précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	**(b)** explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
(3) In granting a motion under subsection (1), the Court shall give directions regarding	**(3)** La Cour assortit l'autorisation d'intervenir de directives concernant :
(a) the service of documents; and	**(a)** la signification de documents;
(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	**(b)** le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[56] The Federal Court of Appeal recently reviewed the test and jurisprudence applicable on a motion to intervene under Rule 109 in *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 ("*Le-Vel*") as follows:

> [19] Overall, what is the test for intervention in this Court? As mentioned above, it consists of three elements, usefulness, genuine interest, and consistency with the interests of justice (emphasis added):
>
>> I. Will the proposed intervener make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues? To determine usefulness, four questions need to be asked:
>>
>>> What issues have the parties raised?
>>>
>>> What does the proposed intervener intend to submit concerning those issues?

> Are the proposed intervener's submissions doomed to fail?
>
> Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?
>
> II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills, and resources and will dedicate them to the matter before the Court?
>
> III. Is it in the interests of justice that intervention be permitted? A flexible approach is called for. The list of considerations is not closed but includes at least the following questions:
>
> - Is the intervention consistent with the imperative in Rule 3 that the proceeding be conducted "so as to secure the just, most expeditious and least expensive outcome"? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?
> - Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?
> - Has the first-instance court in this matter admitted the party as an intervener?
> - Will the addition of multiple interveners create the reality or an appearance of an "inequality of arms" or imbalance on one side?

(Right to Life Association of Toronto and Area v. Canada (Employment, Workforce and Labour), 2022 FCA 67 at para. 10; see also *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 13, 481 C.R.R. (2d) 234, *Alliance for Equality of Blind Canadians v. Canada (Attorney General)*, 2022 FCA 131 and *Canada (Environment and Climate Change) v. Ermineskin Cree Nation*, 2022 FCA 36.)

(1) Usefulness

[57] Not all of the factors need to be present and the test is to be applied in a flexible manner. However, Rule 109 requires a proposed intervener to show "how [its] participation will assist the determination of a factual or legal issue related to the proceeding": *Le-Vel* at para 15. Put differently, the proposed intervener must show how it will be useful. If a proposed intervener cannot persuade the Court that its participation is useful, the Court must dismiss the motion for leave to intervene. As noted by Justice Stratas in *Le-Vel*, "[u]sefulness is set out in Rule 109 of the *Federal Courts Rules*, S.O.R/98-106. Rule 109 is not a practice advisory or an optional extra. It is part of a binding regulation. It is law on the books. It is to be followed": at para 14.

[58] An assessment of usefulness requires a consideration of what the actual, real issues in the proceeding are: *Le-Vel* at para 16.

[59] Here, Homalco argues that it will assist the Court to determine the consolidated applications controlling idea: that Laich-kwil-tach has Aboriginal title to the areas occupied by the operators former feedlots and the Minister's lack of proper consideration of the consent of those supposed title-holding First Nations rendered the 2023 Decision unreasonable, procedurally unfair, in breach of the Crown's duty to consult, and contrary to UNDRIP. Further, Homalco says that its participation is necessary to help the Court determine the following factual and legal issues on which the consolidated applications turn:

a. which First Nation has Aboriginal title to the area, including how Indigenous perspectives inform that determination;

b. which First Nation should have been prioritized in consultation; and

c. the consideration the Minister should have given the rights protected by UNDRIP, including the exercise or withholding of free, prior and informed consent.

[60] In my view, these are not the issues before the Court on this judicial review. As I have noted earlier, the applications concern a challenge to the Minister's decision not to issue licences to the Applicants under section 7 of the *Fisheries Act*, RSC, 1985 c. F-14. Homalco has failed to show how it can be useful in the context of the issues actually before the Court; not those issues that Homalco seeks to have determined.

[61] I am satisfied that Homalco has not met its burden to show that it can be useful to the Court. Rather, it seems to me that Homalco has restated the issues before the Court with the sole intention of impermissibly transforming the proceeding into something it is not. That is not the proper role of an intervener who is bound to work within the existing evidentiary record: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102 at para 48.

(2) Genuine Interest

[62] There is no doubt that Homalco has an interest in these proceedings. That interest however is not akin to a direct interest in the outcome and indeed, Homalco has conceded the consolidated applications will not impose any legal obligations on it. To the extent that Homalco believes that its interests are directly affected, I disagree.

(3) Interests of Justice

[63] As the Supreme Court of Canada has counseled, “[i]nterveners who stray beyond their proper role cause prejudice to the parties by usurping control of the litigation”: *R v McGregor*, 2023 SCC 4 at page 13. I agree with the written representations of Mowi that this is precisely what Homalco proposes to do if granted intervener status. Indeed, Homalco seeks a very expansive role as an intervener which is very much akin to full party status. They seek to file evidence, make arguments of fact and law, and participate in any interlocutory motions and any appeals.

[64] With respect to the evidence they intend to file, the affidavit of Chief Darren Blaney is already before the Court; it is roughly 1100 pages and addresses the following issues:

- his personal background;
- background pertaining to the 2023 Decision;
- Homalco and the territory to which it holds Aboriginal title;
- Homalco's Aboriginal title and rights;
- the role of wild Pacific salmon and other marine resources in exercising Homalco’s Aboriginal title and rights;
- Homalco's stewardship efforts to conserve and restore wild Pacific salmon;
- Canada’s knowledge of Homalco’s Aboriginal title and rights;
- the decline of wild Pacific salmon in Homalco’s territory;
- the risk of extinction faced by fish populations Homalco relies on to exercise its Aboriginal rights; and
- adverse impacts on Homalco’s Aboriginal title and rights from open net-pen feedlots in Homalco's territory over which it exercises Aboriginal title.

[65] Having reviewed the affidavit, I am satisfied that much of it lies outside the narrow issue before the Court. Permitting Homalco to file this evidence would effectively transform this proceeding into something that it is not and would be contrary to Rule 3; that is, obtaining the just, most expeditious and least expensive determination of the consolidated applications. In any case, Homalco's submissions to the Minister are already part of the Certified Tribunal Record before the Court.

[66] Moreover, Homalco has not justified why it is entitled to such a broad role in a proceeding that it acknowledges will not impose any legal obligations on it. Once again, I am driven to conclude that Homalco simply attempts to usurp the role of the parties to convert this judicial review into an inquiry concerning Aboriginal rights and title interest.

[67] In all of those circumstances, the interests of justice do not weigh in favour of granting intervener status.

[68] For the reasons stated, I am dismissing Homalco's motion in its entirety.

V. <u>Costs</u>

[69] Several of the parties sought their costs in this matter. As the issue of costs was not canvassed at the hearing of the motion, the parties may, if they are unable to resolve the issue among themselves, provide brief submissions, not to exceed five pages addressing the issue. The Applicants shall provide their submissions within 14 days of this Order. Homalco may provide

responding submissions within 10 days of the Applicants' submissions. The Applicant's may, if they choose, file reply submissions within 4 days of Homalco's responding submissions.

ORDER in T-554-23, T-556-23, T-552-23, T-555-23

THIS COURT ORDERS that:

1. The motion is dismissed.

2. Costs shall be addressed separately.

"Catherine A. Coughlan"

Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-554-23, T-556-23, T-552-23, T-555-23
STYLE OF CAUSE:	WE WAI KAI NATION AND WEI WAI KUM FIRST NATION, MOWI CANADA WEST INC., CERMAQ CANADA LTD., AND GRIEG SEAFOOD B.C. LTD. v THE MINISTER OF FISHERIES, OCEANS, AND THE CANADIAN COAST GUARD AND HOMALCO FIRST NATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	AUGUST 16, 2023
ORDER AND REASONS:	COUGHLAN A.J.
DATED:	SEPTEMBER 19, 2023

APPEARANCES:

Mark Underhill Alexander Kirby	FOR THE APPLICANTS WEI WAI KAI NATION AND WEI WAI KUM FIRST NATION
Roy Millen Bradley Gordon	FOR THE APPLICANT MOWI CANADA WEST INC.
Dani Bryant Kevin O’Callaghan Madison Grist	FOR THE APPLICANT CERMAQ CANADA LTD.
Michelle Casey	FOR THE APPLICANT GRIEG SEAFOOD B.C. LTD.
Michelle Charles Megan Griffiths Heidi Lee	FOR THE RESPONDENT
Sean Jones Katherine Bellett	FOR THE PROPOSED INTERVENER

SOLICITORS OF RECORD:

Arvay Finlay LLP Vancouver, British Columbia	FOR THE APPLICANTS WEI WAI KAI NATION AND WEI WAI KUM FIRST NATION
Blake, Cassels & Graydon LLP Vancouver, British Columbia	FOR THE APPLICANT MOWI CANADA WEST INC.
Fasken Martineau Dumoulin LLP Vancouver, British Columbia	FOR THE APPLICANT CERMAQ CANADA LTD.
Lawson Lundell LLP Vancouver, British Columbia	FOR THE APPLICANT GRIEG SEAFOOD B.C. LTD.
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT
MacKenzie Fujisawa LLP Vancouver, British Columbia	FOR THE PROPOSED INTERVENER