Federal Court  Cour fédérale

**Date: 20121001**

**Docket: T-74-11**

**Citation: 2012 FC 1160**

**Ottawa, Ontario, October 1, 2012**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**K'ÓMOKS FIRST NATION**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA,**
**MINISTER OF FISHERIES AND OCEANS,**
**RAINCOAST SEA FARMS LTD.,**
**JOE TARNOWSKI, AND DOUG WRIGHT**

**Respondents**

## REASONS FOR ORDER AND ORDER

***"The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. […] For greater certainty […] "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired."***
*Constitution Act, 1982*, Part II, Rights of the Aboriginal Peoples of Canada, Section 35

[1] The K'omoks First Nation, a band within the meaning of the *Indian Act*, has applied for judicial review of a decision of the Minister of Fisheries and Oceans, rendered in December 2010, to issue four short-term shellfish aquaculture licences in what the Band considers its traditional

territory. These licences expired in February 2012, but were then renewed for another year. The application was amended to put that decision in review as well.

**OVERVIEW**

[2] The decisions of the Minister trace back to the ruling of the British Columbia Supreme Court in *Morton v British Columbia (Minister of Agriculture and Lands)*, 2009 BCSC 136, 92 BCLR (4th) 314, [2009] BCJ No 193 (QL). Until then, aquaculture licences to harvest shellfish and finfish in British Columbia had been issued by the provincial government. However, *Morton* held that such licencing, in constitutional terms, pertained to fisheries and was an exclusive federal matter. As a result, the British Columbia regulations and licences were found to be null and void. The effect of the decision was initially suspended for one year and then, at the request of the federal government, until 19 December 2010.

[3] The four federal licences under review here, and the one year renewals thereof, were issued to previous holders of British Columbia licences over the same territories.

[4] The lands and waters in question have not been subject to treaty, although negotiations have been underway for some years now. The Band asserts that as a result of the licencing, it is unable to harvest all the shellfish that its members require for food, social and ceremonial purposes, *i.e.* existing aboriginal rights.

[5] In the original application, the Band asserted that the Department had a constitutional duty to consult with it regarding both the issuance and the conditions of the licences. It failed in that regard. Such consultation as there was, was too little too late. It was limited to conditions pertaining to the proposed licences, rather than to the more fundamental issue, which was whether licences should be issued in the first place. Although well aware of the Band's asserted aboriginal rights and title, the Department did not make a preliminary assessment of the strength of those rights and of the negative impact of the licences. As a result, it offered no accommodation.

[6] The Band sought appropriate declarations. It did not seek an order quashing the issuance of the four licences, but rather an order prohibiting the Department from renewing them for more than six months until such time as the Band and the Department confirmed in writing they had concluded the consultation process, or the Court held that the Crown had discharged its obligation with respect to consultation and, if appropriate, accommodation.

[7] One particularly sore point, once it got into the hands of the lawyers, was that although there was some consultation, the Attorney General would not admit the Crown had a constitutional duty to do so.

[8] The judicial review came on for hearing 11 October 2011. After the Band had presented its case, and before the respondents made theirs (the licencees Raincoast Sea Farms Ltd. and Messrs Turnosky and Wright did not participate), the Crown, while still not admitting that it had a duty to consult with the Band, undertook to the Court that it would consult with respect to licence renewal.

[9] As a result, and over the Band's objection, I adjourned the application *sine die*, and put the matter under case management. Subsequently, I was, together with Prothonotary Lafrenière, appointed case manager.

[10] Although some consultation continued, the matter was not resolved. In February 2012, the four licences were renewed for another year. On consent, the application for judicial review was expanded to cover that decision. The Band still seeks declarations with respect to outstanding duties to consult, but now also asks that the Crown be prohibited from renewing the replacement licences until it has discharged its duties of meaningful consultation and reasonable accommodation.

## CONSTITUTIONAL BACKDROP

[11] Canadian courts, led by the Supreme Court, have had a great deal to say about section 35 of the *Constitution Act, 1982*, and the relationship between Aboriginal Peoples and European settlers. The leading case in the context of this judicial review is *Haida Nation v British Columbia (Minister of Forest)*, 2004 SCC 73, [2004] 3 SCR 511, [2004] SCJ No 70 (QL). Briefly put, what is at stake is reconciliation with Aboriginal Peoples and the honour of the Crown. The duty to consult arises when the Crown has knowledge of an asserted Aboriginal right or title and knows it may act in such a way that could adversely affect same. In cases in which treaty negotiations are under way, which may extend over decades, the Crown should make a preliminary assessment of the strength of the case asserted, and the adverse effect of the action contemplated. This may give rise to a duty to accommodate pending the completion of the treaty process. While the consultation must be in good faith, no agreement need be reached. A recent decision of Madam Justice Mactavish, of this Court,

in *Sambaa K'e Dene Band v Duncan*, 2012 FC 204, [2012] CNLR 369, [2012] FCJ No 216 (QL), fully reviews the law, and the cases post-*Haida*. Basing herself on *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, [2010] SCJ No 43 (QL), she pointed out at paragraph 95 that while it is essential that the Band establish the existence of a potential claim, proof that the claim will succeed is not required at the accommodation stage. Relying on *Haida*, she stated that on questions of law the decision maker must generally be correct, while a degree of deference may be owed on questions of fact or mixed fact and law.

[12] In this case, it is common ground that treaty negotiations involving the Band and the federal and provincial governments have been ongoing since 1991. There is no evidence before the Court as to what complaints the Band had made when aquaculture licencing was handled by the province of British Columbia. However, by February 2010, counsel for the Band wrote to the Minister setting out the essence of the case which is now under judicial review.

**TWO PROCEDURAL POINTS**

[13] Two procedural points are important. The first is that although both parties have filed in great detail correspondence that has passed between them, as well as minutes or transcripts of meetings they have had, the Band never made a formal request under rule 317 of the *Federal Courts Rules* for production of the documents that were in the hands of the Minister when he decided to issue the licences, and to renew them.

[14] The second, but related, procedural point is that a judicial review is based on the material available to the original decision maker when the decision was made. In both the records on the original application and the amended application, the parties have filed material which only came into existence after those decisions were made. The rationale of both parties is that the Band seeks an order that the Minister continue to consult and accommodate. These documents establish that there is an ongoing consultation, and discussion of possible accommodation. I accept that these documents are relevant in assessing the remedies sought.

[15] Rule 317 is in issue because the Crown provided its preliminary assessment and opened up the door to possible accommodation, subject to further consultation, in a letter dated 24 April 2012, signed by Diana Trager, current Director, Aquaculture Management Division, Aquaculture Management, of Fisheries and Oceans Canada. While accepting, as a preliminary assessment, that the K'omoks have a strong *prima facie* claim to harvest shellfish for food, social and ceremonial purposes, it was said there are at least eight other First Nations or Treaty Groups that have issued overlapping statements of intent, including claims by the Snaw-Naw-As First Nation (Nanoose). It is a matter of public record that the latter applied for judicial review 14 March 2011 under court docket number T-441-11. The application calls for a review of a great number of licences issued by the Minister, including the four licences in these proceedings! It beggars belief that the Minister was not aware of those proceedings when the four licences were renewed in February of this year, and that they had an impact on the delays in issuing a preliminary assessment.

**THE FOUR LICENCES**

[16] The licences are but four of 139 licences issued by the Federal Government over what the Band considers its territory. The four were issued to previous holders of British Columbia licences. In each case there is a corresponding provincial tenure, not affected by *Morton*. It is somewhat telling that the Band did not put all the licences in issue. The Band states it simply did not have the resources to challenge them all. While the Department obviously has more resources than the Band, this is nevertheless an indication of the amount of work *Morton* generated.

[17] Licence number AQSF AQ11 2010 (the K'omoks Harbour licence) authorizes Raincoast Sea Farms Ltd. to harvest the pacific oyster. The first licence with respect thereto was issued by the province to Ken Milnyk in 1985, and assigned to Raincoast in 1988. The provincial licence was to expire in 2024.

[18] Licence number AQSF AQ1001 2010 (the Baynes Sound Licence) authorizes Joe Tarnowski to harvest the manila clam. The first provincial licence had been issued in 1972. The last had been due to expire in 2024.

[19] Licences AQSF AQ204 2010 and AQSF AQ205 2010 (the Denman Island licences) authorize harvesting of the manila clam on the west coast of the island. They had been first issued by the province in 1963, and assigned from Gordon William Wright to Doug Wright in 2002. The provincial tenures were to expire in 2034 and 2022 respectively.

[20] There are four types of fishing licences for shellfish in British Columbia. The ones at issue in this case give the licencees harvesting rights to the exclusion of all others, including the Band. The historical rights of First Nations are recognized by communal licences to fish for food, social and ceremonial purposes. The K'omoks benefit from such licence or licences. The third type of licence is for commercial wild, *i.e.* non-cultivated fishing, and the fourth is for recreational fishing.

**ISSUES – GRANTING OF LICENCES 2010**

[21] With respect to the four licences issued in December 2010:

a. Did the Crown have a duty to consult with the Band?

b. If so, what was the required scope of that consultation? Was it reasonable to limit it to the conditions of the licences as opposed to whether or not they should be issued at all?

c. Did the Crown act reasonably in not assessing the strength of the Band's claim?

d. Was the honour of the Crown upheld?

**DISCUSSION - 2010 LICENCES**

[22] As a result of *Morton*, the federal government had to establish a new regulatory and licencing regime. As demonstrated through the evidence of Andrew Thomson, the then Director of Agriculture Management Division of Fisheries and Oceans Canada, the Department was obliged to negotiate a memorandum of understanding with the Government of British Columbia, which still has an involvement due to land title, and had to draft new aquaculture regulations for the province,

both for shellfish and finfish. This involved discussions with many First Nations, including K'omoks, the commercial fishing industry and the public at large.

[23] The Minister was faced with a gargantuan task. As a result of *Morton*, over 600 shellfish and finfish aquaculture licences were held to be null and void. In addition to consulting with various interests with respect to regulations which had to be enacted, a great many information sessions were held with parties at interest, including many First Nations. The K'omoks First Nation attended some of these meetings. The general meetings are referred to by Mr. Thomson, and by affiants on behalf of the applicant. There were consultations with First Nations in British Columbia on the regulatory framework. Among other things, the representatives of the Department of Fisheries and Oceans met with the First Nations Fisheries Council in May 2009, hosted meetings in Vancouver and Campbell River in June 2009, which 32 First Nations, Tribal Councils and First Nation organizations attended, including two representatives of the K'omoks First Nation. A discussion paper was issued, and meetings were held in December 2009 and January 2010 with British Columbia First Nations. The objective was to gather input and recommendations with respect to the development of a new regulatory regime for both shellfish and finfish aquaculture.

[24] A great many presentations and consultations took place throughout. Indeed, it is exhausting to simply read about the number of meetings which took place, and the National Aquaculture Strategic Action Plan Initiative, the Pacific Aquaculture Regulations, the creation of an aquaculture program and the development of licence conditions. Indeed, for the overall scheme of things I can do no better than to refer to the decision of Mr. Justice de Montigny in *Kwicksutaineuk Ah-Kwa-*

*Mish First Nation v Canada (Attorney General of Canada)*, 2012 FC 517, [2012] FCJ No 772 (QL), which was a judicial review of the issuance of finfish aquaculture licences post-*Morton*.

[25] Apart from these general meetings, there was dialogue with the K'omoks First Nation. It is most important to keep in mind that the dialogue was not limited to the four licences under judicial review. Of particular interest to the Band was the Department's Geoduck Aquaculture Policy, which does not relate to the four licences. A great deal of correspondence took place leading up to a meeting 8 November 2010. Emails were exchanged with respect to the new regulatory regime and, among other things, revenue sharing and accommodation.

[26] However, Mr. Thomson admitted, on cross-examination, that he did not, and had no mandate to, discuss whether the licences should be issued in the first place.

[27] Counsel for the Band had certainly put the Department on notice of the duty to consult. There was consultation. The Department, before the issuance of the licences, neither stated that it had a constitutional duty to consult, nor that it did not.

[28] During this time, the Department did not provide a preliminary assessment of the Band's claim, and what adverse impact, if any, would arise from the issuance of the four licences over territories which have been subject to aquaculture licences for decades.

[29] In my opinion, the Crown acted reasonably and honourably with respect to the Band. It is simply too much for the Band to expect that in such a short period of time the Department should

have issued a preliminary assessment of the strength of its claim. A preliminary assessment does not mean an off-the-cuff or slip-shot assessment. The Band's claim was based on history, which can often lead one down a slippery slope.

[30] The Department was not remiss in not focusing on the issue of whether federal licences should have been issued to existing British Columbia licencees. As pointed out in paragraph 45 of *Haida*, "pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims." The licence holders had been earning their livelihood from shellfish aquaculture for decades. The licences were only issued for a period of some fourteen months. While this gave rise to concern to those who, pre-*Morton*, had expectations which ran for another decade or two, it reflects that the Crown needed more time. It could not, in my opinion, simply refuse to issue any licences; "Time and tide wait for no man".

[31] To conclude with respect to the decision to issue licences in December 2010, the Crown had a duty to consult with the Band. It was reasonable to limit that consultation to the conditions of the licences, as opposed to their very issuance. The Crown acted reasonably and honourably, and could not have been expected to complete its assessment of the strength of the Band's claim before issuing the licences.

**ISSUES – THE 2012 RENEWALS**

[32] With respect to the renewal licences issued in February 2012:

a. Did the Crown have a duty to consult with the Band?

b. If so, what was the required scope of that consultation? Was it reasonable to limit it to the conditions of the licences as opposed to whether or not they should be issued at all?

c. Did the Crown act reasonably in not assessing the strength of the Band's claim?

d. Was the honour of the Crown upheld?

e. If remedies are appropriate:

i. Should it be declared that the Minister has an ongoing duty to consult, and accommodate?

ii. Should the Minister be prohibited from again renewing the same licences until the consultation process is complete?

iii. Should the Court assume a supervisory role?

**DISCUSSION – THE RENEWALS**

[33] Consultations of the same nature continued after the licences were issued in December 2010. There were a number of teleconferences with many First Nations, and correspondence with K'omoks with respect to potential renewal of licences in the traditional territory it claimed. It must be kept in mind, as stated above, that there are 139 licences in the claimed territory, not just the four subject to the present judicial review. However, it was only in September 2011 that the Department agreed to consider whether existing aquaculture licences should be renewed.

[34] A key meeting was held on 27 September 2011 at which various issues, including rights and titles, traditional use maps and aquaculture in the claimed traditional territory, were discussed.

[35] This led to the undertaking given to the Court on 11 October 2011 that although the Crown did not admit it had a duty to consult with respect to the renewal of the licences, it would do so. Further meetings ensued, both with the K'omoks First Nation and other First Nations.

[36] The discussions were not one way as the Band was also requested to provide further information. One complication is that many shellfish species are not native to British Columbia, but rather were introduced by European settlers, including the Pacific Oyster and the Manila Clam, the two species cultivated under the four licences under review.

[37] The net result was that the Department's assessment of the Band's strength-of-claim was not complete, and so the licences were renewed for one more year.

[38] My only criticism of the manner in which the consultations were handled was that by this time the Department should have admitted that it had a constitutional duty to consult. Consultation based on "noblesse oblige" creates quite a different atmosphere from consultation based on a constitutional imperative. In fact, it was only this year, following the decision of Mr. Justice de Montigny in *Kwicksutaineuk Ah-Kwa-Mish First Nation*, above, that a formal admission was made, an admission also made to this Court when the hearing resumed this 5-6 September 2012.

**THE CURRENT SITUATION**

[39] As stated above, I am only considering what happened after the licences were renewed in February 2012 in terms of possible remedies. The Department delivered its preliminary assessment this April, and has given the Band an opportunity to respond. There are serious discussions currently under way. Since these discussions are fluid, and as I do not wish that anything I might say prejudice them, I will simply say that the Department's preliminary assessment is that the K'omoks have a strong *prima facie* claim to a right to fish, including the harvest of shellfish for food, social and ceremonial purposes within the marine areas of Baynes Sound extending south to Deep Bay. After listing a number of factors which might adversely affect this right, the Department expressed the view that the adverse impact was low to moderate.

[40] Accommodation is being discussed. It need not necessarily result in the non-renewal of some or all of the four licences under consideration in this case. Some restriction on non-aboriginal commercial wild harvesting is but one possibility on the table.

[41] The asserted aboriginal title to submerged lands was also assessed. The Department is of the view that its issuance of aquaculture licences has a negligible impact on that asserted title. There are two issues:

a. Can title be asserted on submerged land?

b. Recent jurisprudence, the decision of the British Columbia Court of Appeal in *William v British Columbia*, 2012 BCCA 285, [2012] BCJ No 1302 (QL), indicates that title claims must be site-specific rather than over a general territory.

Although this judicial review is only limited to the territory covered by four licences, the Band had previously asserted a much broader title, and may do so again if the Supreme Court grants leave in *William* and the British Columbia Court of Appeal is reversed. The Band's assertion was over a broad swath of territory, rather than site specific. The Band admits it stated its case too broadly for *William* but does say it has a good claim over the territories covered by the four licences in question.

[42] The parties are not in agreement as to whether aboriginal title can be asserted on submerged land. The Department, basing itself upon *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2009 BCSC 1494, [2010] 1 CNLR 1, [2009] BCJ No 2155 (QL), expresses doubt that a claim of aboriginal title to submerged lands is legally tenable. In addition, there are overlapping First Nation claims in the area. The Band relies on *R v Marshall*; *R v Bernard*, 2005 SCC 43, 2005 SC, [2005] 2 SCR 220, [2005] SCJ No 44 (QL), to suggest this is an open question.

**REMEDIES**

[43] The Band submits that I should declare that the Department had, and continues to have, a constitutional duty to consult. The Attorney General points out declarations are discretionary and should only be made if they are helpful (*Solosky v Her Majesty the Queen*, [1980] 1 SCR 821). More recently, in *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535, [2011] SCJ No 56 (QL), Mr. Justice Binnie, speaking for the Court, said at paragraph 14:

> Finally, and somewhat belatedly, the Lax Kw'alaams brought to the forefront a claim to an Aboriginal right to a fishery for food, social

> and ceremonial purposes. The Lax Kw'alaams presently hold federal fisheries licences for these purposes. Their entitlement seems not to be a contentious issue. It was therefore not an issue of significance in the present litigation. Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation and it was certainly within the discretion of the trial judge to refuse to do so here.

[44] The Attorney General submits that there is no live dispute between the parties. The K'omoks First Nation's right to fish for food, social and ceremonial purposes is admitted. However, given that it took such a long time for this admission to be made, and considering that there are ongoing consultations, I shall declare, in my discretion, that there is a constitutional duty to consult, and to continue to consult, so that the parties know exactly where they stand.

[45] It was reasonable for the Minister not to put the issuance of licences, as opposed to their conditions, on the table before December 2010. Thereafter, an undertaking was made to consult with respect to the renewals in September 2011. That undertaking should have been made sooner.

[46] I consider that the Crown acted reasonably in not assessing the strength of the Band's claim before it did, and that, except as aforesaid, the honour of the Crown was upheld.

[47] I do not think it appropriate for the Court to assume any sort of control over the ongoing consultations, or as to what course they should take. Neither do I think I should issue an order prohibiting the Minister from again renewing the four licences until the consultation process is complete. There is no principle that the world comes to a standstill during that process; see *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*, 2012 BCCA 333, [2012] BCJ No 1661 (QL).

[48] Consultation is a two-way street and the Minister has legitimately sought particulars as to the specific needs of the Band, and its past harvesting history.

[49] This brings this judicial review to an end. It is open to the Band, if it considers it appropriate, to seek interlocutory injunctive or other relief, should decisions be made to renew the four licences.

**COSTS**

[50] Both parties sought costs, the Band on an enhanced basis. Although I think what was said with respect to the duty to consult should have coincided earlier with the consultation in fact taking place, I do not consider the Department's conduct reprehensible. The Attorney General submitted that if costs were to be granted, this is no more complicated than other duty to consult cases. That may be so, but as these cases are complex by their very nature. I shall award costs to the applicant at the low end of Column IV.

## ORDER

**FOR REASONS GIVEN;**

**THIS COURT ORDERS AND DECLARES that**:

1. The application for judicial review is granted in part.

2. The Crown acted reasonably and discharged its duty to consult, save and except that it should have admitted earlier it had a constitutional duty to consult.

3. The Crown acted reasonably in not assessing the strength of the Band's claim before it did.

4. The Crown is under an ongoing duty to continue consultations in good faith with the applicant and, if appropriate, offer accommodation.

5. The applicant shall be entitled to its costs, with fees assessed at the low-end of Tariff B, Column IV.

"Sean Harrington"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-74-11 |
| **STYLE OF CAUSE:** | K'OMOKS FIRST NATION v AGC ET AL |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATES OF HEARING:** | OCTOBER 11, 2011 AND<br>SEPTEMBER 5-6, 2012 |
| **REASONS FOR ORDER AND ORDER:** | HARRINGTON J. |
| **DATED:** | OCTOBER 1, 2012 |

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