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CONSTITUTIONAL LAW

ABORIGINAL AND TREATY RIGHTS

Related subjects: Indigenous Peoples, Crown, Fisheries, Practice

Rights Reconciliation Agreement on Fisheries — Motion brought by respondent Listuguj Mi'gmaq Government (LMG) to strike applicants' notice of application for judicial review seeking to invalidate Rights Reconciliation Agreement on Fisheries (RRA or the Agreement) signed between respondent First Nation, federal Crown — Second motion brought by applicants pursuant to *Federal Courts Rules,* SOR/98-106, rr. 317, 318, seeking further disclosure of documents from respondent ministers (Ministers), including financial annex to RRA, internal memoranda, emails relating to reconciliation efforts and fisheries management for particular lobster fishing zone — Underlying notice of application for judicial review raising four fundamental questions — Applicants submitted those questions deserving full hearing on merits — Extent to which Indigenous peoples in Atlantic Canada have access to fishery, on what terms, has been source of controversy, litigation for many years — Modern context for development of RRA begins with Supreme Court's *Marshall* decisions — In *Marshall* decisions, Supreme Court recognized that Mi'kmaq signatories to Treaties of Peace and Friendship signed in 1760-61 had certain treaty rights to fish guaranteed by *Constitution Act, 1982*, s. 35 — A series of events followed release of *Marshall* decisions — Developments most pertinent to this litigation include policy efforts by federal government to open space for First Nations to fish for food, cultural, ceremonial purposes, to integrate First Nations into existing commercial fisheries, and litigation launched by LMG seeking to clarify scope of their exercise of treaty rights — Framework Agreement signed in 2018 — Agreement confirming that Canada acknowledging that LMG having certain Aboriginal and Treaty rights concerning fisheries governance and fishing protected by section 35 — Significant focus of Agreement on mechanisms to seek to prevent, resolve disputes regarding LMG fisheries access, enforcement of federal laws, policies regarding fishery — Issues herein whether notice of application should be struck; whether further disclosure should be ordered — *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 leading decision on test for motions to strike notices of application for judicial review in Federal Court — Under *JP Morgan* framework, first task is to examine notice of application to gain realistic appreciation of its essential character — Applicants essentially challenging three primary things in notice of application: (1) government's rights recognition approach; (2) Ministers' authorities and alleged unlawful delegation/alleged restriction on Minister of Fisheries and Oceans' power to regulate fishery; (3) process by which RRA finalized — Applicants' ultimate goal was to obtain declaration invalidating Agreement — For its part, LMG submitted that entire claim essentially political rather than legal, that applicants' arguments all doomed to fail — Applicants' claim that Ministers exceeded their authority by entering into an agreement ignores that Ministers signed Agreement on behalf of federal Crown and is also based on misinterpretation of case law — Whatever specific authorities assigned by statute to respective Ministers, no question that Ministers were authorized to act on behalf of Crown in right of Canada, nor that federal Crown having authority to enter into an agreement with LMG regarding Aboriginal, treaty rights — Second major problem with applicants' claim on this point relating to scope of Crown's authority to acknowledge, give legal effect to Aboriginal and/or treaty rights — Text of section 35 itself stating that "existing aboriginal and

treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" — Constitution "recognizes", "affirms" such rights, rights recognition approach applicants challenged consistent with text of provision — Law abundantly clear that section 35 protecting rights not yet recognized or declared by court of law — Crown's obligation to seek negotiated solutions to Aboriginal or treaty rights disputes having constitutional dimension that invokes concept of honour of Crown — Imposing prior restraint on scope of Crown's authority to negotiate unless and until such rights formally established by court of law running counter to that idea — Delineation of reciprocal rights, obligations (before they have been formally established in any court of law) has been constant feature of agreements between Crown, Aboriginal peoples — Applicants did not demonstrate any reason why clock should be turned back now — Applicants' challenge to rights recognition approach running counter to many cases in which courts have called for negotiated approach rather than litigation — On face of Agreement, Framework Agreement, no ministerial powers or authorities delegated, either as between the two respondent ministers, or between either of them and LMG — Governance authorities recognized by Agreement limited to LMG's fisheries — As to applicants' process claims, applicants objected to fact they were not consulted about negotiations that resulted in Agreement, that Minister of Fisheries and Oceans required to publish terms of Agreement in *Canada Gazette* before it was finalized, then again once it was completed — No merit in argument about failure to publish draft Agreement in *Canada Gazette* — LMG's Aboriginal, treaty rights standing on completely different footing than interests asserted by applicants — Applicants' argument on this point not necessarily resting on any such false equivalency — Case law confirming that section 35 rights will be exercised in context of wider society, that there will often be competition for access to limited resource — Scope of rights recognized by *Marshall* decisions has been litigated, but not finally determined — Federal government aware of interests of people applicants represent in fishery, in respect of any decisions that might affect allocation of resource and/or increase access to resource for some particular users — Specific rights protected by section 35 rooted in history of particular group, often limited to specific locations, must be asserted, proven before a court will recognize, protect them — LMG's position misreading essential character of applicants' process claim — Essential nature of applicants' process claim is that law has not yet determined to what extent governments must consult or involve non-Indigenous people with interest in subject-matter before they enter into agreements that recognize, acknowledge or implement section 35 Aboriginal or treaty rights not yet determined by a court decision — Analysis set out in *Potlotek First Nation v. Canada (Attorney General)*, 2021 NSSC 283 having certain parallels with considerations relevant herein — Question open whether there are any procedural aspects to duty imposed on governments to consider interests of both Aboriginal rights holders, others who use or rely on resource in making regulatory allocation decisions — Question of whether there was any obligation on federal Crown to consult, involve or seek input from non-Aboriginal individuals or groups involved in fishery remaining open — Applicants' process claim not inevitably doomed to failure — Some elements of notice of application struck, including challenge to rights recognition approach, challenge based on unlawful delegation of authorities — However, applicants' process claim not struck at this stage — Rule 317 not applying, applicants not demonstrating that requested documents necessary for Court to conduct judicial review of their claim — Requests for background briefing materials, reports lacked specificity appropriate to rule 317 request, instead these requests appeared to be impermissible fishing expedition — None of this material necessary for determination of applicants' claim, going well beyond type of material that even generous reading of their pleadings would suggest necessary, relevant — In conclusion, while applicants have attempted to advance number of novel claims, only one will proceed to hearing — Applicants' process claim not plainly doomed to fail, therefore not struck — Motion to strike granted in part; motion for further disclosure dismissed.

REGROUPEMENT DES PÊCHEURS PROFESSIONNELS DU SUD DE LA GASPÉSIE V. LISTUGUJ MI'GMAQ FIRST NATIONS (T-1608-21, 2023 FC 1206, Pentney J., public reasons for order dated October 12, 2023, 75 pp.)