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NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation: ***Qikiqtani Inuit Association. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12**

Date of Judgment (YMD): 20100808
Docket Number: 08-10-42-CVC
Registry: Iqaluit

Plaintiff: **Qikiqtani Inuit Association**

-and-

Defendant: **Canada (Minister Of Natural Resources), Attorney General Of Canada, Nunavut (Minister Responsible For The Arctic College), The Commissioner Of Nunavut**

Before: The Honourable Madame Justice S. Cooper

Counsel (Plaintiff): Peter Jervis, Jonathan Davis-Sydor and David Crocker
Counsel (Defendant): Duncan Fraser, Norman Tarnow, Kenneth Landa & Stephen Mansell

Location Heard: Iqaluit, Nunavut
Date Heard: August, 04-05, 2010
Matters: Application for an interlocutory injunction against seismic testing in waters of North Baffin Island

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REASONS FOR JUDGMENT

(NOTE: This document may have been edited for publication)

I. INTRODUCTION

[1] Natural Resources Canada (NRCan) has entered into an agreement with the German Federal Institute of Geoscience to carry out geological seismic testing in Lancaster Sound, Jones Sound and North Baffin Bay. The project is called the Eastern Canadian Arctic Seismic Experiment (ECASE) and is scheduled to commence on August 9th, 2010. The testing will take place over approximately 65 days.

[2] There has been considerable controversy over the project. It is fair to say that the communities most likely to be affected by the activity, Arctic Bay, Grise Fiord, Resolute Bay, Pond Inlet and Clyde River, are opposed to the testing.

[3] The areas where the seismic testing is to be carried out are plentiful with marine mammals, including seals, walrus, narwhal, beluga whales and polar bears. They are traditional hunting areas for Inuit in the five affected communities. Inuit state that the seismic testing will impact on migration routes and will drive marine mammals away from these areas for a significant time. Canada takes the position that the seismic testing will have little or no impact on marine mammals.

II. Application

[4] This is an application by the Qikiqtani Inuit Association (QIA) for:

- an interlocutory injunction to stop Canada from conducting seismic testing in waters of North Baffin Island;
- in the alternative, a suspension or quashing of the Research License issued by the Commissioner of Nunavut that permits seismic testing in waters of North Baffin Island.

[5] This application was filed with the court late on August 3rd, 2010 and the court heard submissions on August 4th and 5th. Given the urgency of the matter this decision may not be as fulsome as one might want on an issue of such importance, but clearly there is a pressing need for the parties to have a decision in a timely manner.

III. Background

[6] Nunavut covers a vast area in Northern Canada. It is sparsely populated. The overwhelming majority of the population are Inuit. In 1993, after years of negotiations, the Inuit of the Nunavut Settlement Area settled a land claim, the *Nunavut Land Claims Agreement* (NLCA) with the Government of Canada. The NLCA called for the creation of a new territory with its own public government, which was accomplished with the creation of Nunavut on April 1, 1999. The NLCA is a land claims agreement within the meaning of section 35 of the *Constitution Act*, 1982.

[7] The QIA represents Inuit of the Qikiqtalik region, is a designated Inuit organization for the purposes of the NLCA and has the authority to commence actions on behalf of beneficiaries of the NLCA.

[8] The preamble to the NLCA provides:

> the Parties have negotiated this land claims Agreement based on and reflecting the following objectives:
>
> to provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore;
>
> to provide Inuit with wildlife harvesting rights and rights to participate in decision-making concerning wildlife harvesting;

[9] There are lengthy provisions in the NLCA that address wildlife management and harvesting rights. The provisions are intended to maintain and protect traditional harvesting rights and to ensure that Inuit are significantly involved in wildlife management.

[10] Article 12 of the NLCA addresses development projects. It establishes the Nunavut Impact Review Board (NIRB) which consists of nine members, four of whom are selected by Inuit organizations.

[11] NIRB is tasked with the responsibility of reviewing project proposals to determine ecosystemic and socio-economic impacts and to make recommendations to the appropriate Minister as to whether a project; should proceed, with or without conditions, should be furthered reviewed, should be returned to the proponent for further information, or should not proceed.

[12] If NIRB indicates that a project may proceed without further review the Minister still has the discretion to refer the project for a review.

III. **Chronology of ECASE Proposal**

April – September, 2009	letters sent to Arctic Bay, Grise Fiord and Pond Inlet advising of the project meetings held in Grise Fiord and Pond Inlet
November 30, 2009	application submitted to Nunavut Research Institute for a research licence. The application states that NRCan will incorporate local knowledge of the movement and locations of marine wildlife into the research plans to minimize impact on the environment.
April 4, 2010	QIA became aware of application and sent it to the 5 affected communities for review

April 26, 2010	QIA provided written submissions to NIRB, recommending the application be returned to NRCan. QIA expressed concerns about the lack of consultation and the potential impact on marine mammals
May 4, 2010	Triton report (dated March 25th, 2010) provided to NIRB
May 21, 2010	NIRB issues screening report indicating the project can proceed, with terms and conditions, and no review is required. One of the terms and condition is that NRCan conduct meaningful consultations in the 5 affected communities by providing clear, non-technical information and an opportunity for additional measures to be developed to address public concerns prior to the commencement of the project.
May 31- June 23, 2010	NRCan holds public meetings in the 5 affected communities: May 31: Clyde River June 2: Arctic Bay June 4: Resolute Bay June 8: Pond Inlet June 23: Grise Fiord

June 11, 2010	Representatives from QIA meet with Representative of NRCan. Assurances are made that changes are being made to the project proposal.
June 23, 2010	CBC report announces that the project will be modified in response to Inuit concerns (the accuracy of this reporting is admitted by Canada)
	representative from NRCan emails QIA and others indicating that the modifications are almost complete
June 29, 2010	QIA writes to the Territorial Minister expressing concerns about the project
July 16, 2010	Territorial Minister approves but does not send letter to QIA in which he states he has concerns with the consultation process
July 19, 2010	NRCan forwards report to Territorial Minister which sets out the community consultations done May 31 – June 23
July 21, 2010	The July 16th letter from the Territorial Minister to QIA gets sent to QIA in error
July 22, 2010	QIA writes to Federal Minister

	expressing concerns with the project
July 22, 2010	research licence issued to NRCan. License incorporates the terms and conditions in the NIRB screening report
July 23, 2010	QIA announces it is considering legal action

IV. POSITIONS OF THE PARTIES

A. QIA

[13] QIA alleges that the Government of Canada and the Nunavut Government failed to meet their common-law and constitutional duties to conduct meaningful consultations with Inuit and, if appropriate, accommodate Inuit interests. It further alleges that the terms and conditions of the NIRB report and the licence were not complied with, in that the consultations that took place between May 31 and June 23 were not meaningful.

B. Government of Canada and Government of Nunavut

[14] The Government of Canada and the Government of Nunavut take the position that the consultations satisfied their common-law and constitutional duties to consult and accommodate. They further submit that the NLCA sets out a comprehensive consultative process and that compliance with that process amounts to compliance with their common law and constitutional duties.

V. ANALYSIS

A. Legal Test For An Injunction

[15] The test for injunctive relief is set out in the Supreme Court of Canada case in *RJR MacDonald Inc.* v. *Canada* [1994] 1 S.C.R. 311. The legal test for granting an injunction is:

a. Is there a serious issue to be tried?

b. Would the party seeking the injunction suffer irreparable harm if the injunction is not granted?

c. Which of the parties would suffer the greater harm from the granting or refusal of an injunction (commonly referred to as the "balance of convenience" test)

B. IS THERE A SERIOUS ISSUE TO BE TRIED?

[16] The Government of Canada argues that QIA must establish a prima facie case in order to meet this branch of the test. I do not agree that the standard is quite so high. In *RJR MacDonald* the court acknowledged that while at one time an applicant had been required to demonstrate a "strong prima facie case", that was no longer the law (paragraph 49). The test that must be met is that there is a serious issue to be tried – that the action is not frivolous or vexatious. This is particularly so when the court is dealing with Charter challenges, as the court was in *RJR MacDonald*, as the issues relate to fundamental freedoms. The issues in this matter also relate to constitutionally protected rights. Accordingly, the "serious question" standard is the appropriate standard to be applied.

[17] The issues that the court will have to determine at the trial of this action are:

1. What is the scope of the government duty to consult with and accommodate Inuit in the circumstances of this project;

2. Has that duty been met?

[18] The court is required at this stage to undertake a preliminary assessment of the merits of the case.

C. The Scope of the Duty to Consult and Accommodate:

[19] The parties are in agreement that the government had a duty to consult with Inuit regarding the ECASE project. The duty to consult will arise when the Crown has knowledge of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it (*Haida Nation* v. *British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, [2005] 1 C.N.L.R. 72). The government's duty to consult and accommodate arises from its obligation to deal honourably with Aboriginal people. The duty extends not only to the process of treaty making, but also of treaty interpretation. The duty to consult and accommodate does not come to an end when a treaty is settled (*Haida Nation*, supra; *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388, [2006] 1 C.N.L.R. 78).

[20] Canada argues that the NIRB screening process set out in the NLCA is the consultative process that the parties to the NLCA agreed to. They argue that as long as that process is followed the government has discharged its duty to consult.

[21] The law is not clear to what extent a consultation process that is set out in a treaty will be seen to encompass the duty to consult. In the *Mikisew* case the court was dealing with a historical treaty that did not provide any process for consultation and the court applied the common law principles to determine the scope of consultation necessary. In a more recent case the Yukon Court of Appeal was dealing with a treaty which provided consultative processes for some matters but not others (*Little Salmon/Carmacks First Nation* v. *Yukon (Director, Agriculture Branch, Department of Energy, Mines and Resources)* 2008 YKCA 13, [2008] 4 C.N.L.R. 25). The issue before the court was whether, by drafting the treaty in that manner, no consultative duties existed except as expressed in the treaty. The Court found that consultative duties beyond those expressed in the treaty existed. That decision is under appeal to the Supreme Court of Canada. Argument was heard on November 12, 2009 and the court reserved. Clearly the law in this area is complex and evolving.

[22] Further, it is not clear that the NIRB screening process is a consultative process in the meaning of the common law duty to consult. The NIRB is not tasked with the responsibility of consulting; it is tasked with the responsibility of reviewing applications. A successful NIRB screening may be evidence that the consultation was considered sufficient by NIRB and this may well be a factor that the court would consider in determining the sufficiency of the consultative process. But this does not necessarily mean that the NIRB process is itself a consultative process.

[23] The scope of the duty to consult and accommodate will be a significant issue at the trial of this matter.

[24] For the purposes of this application it is worthwhile to consider the scope of the duty to consult in the context of the common law principles. The scope of the duty to consult and accommodate will vary with the circumstances, depending upon the nature of the infringement and the nature of the aboriginal right being impacted.

[25] The Inuit right which is of concern in this matter is the right to harvest marine mammals. Many Inuit in Nunavut rely on country food for the majority of their diet. Food costs are very high and many would be unable to purchase food to replace country food if country food were unavailable. Country food is recognized as being of higher nutritional value than purchased food. But the

inability to harvest marine mammals would impact more than the just the diet of Inuit. The cultural tradition of sharing country food with others in the community would be lost. The opportunity to make traditional clothing would be impacted. The opportunity to participate in the hunt, an activity which is fundamental to being Inuk, would be lost. The Inuit right which is at stake is of high significance. This suggests a significant level of consultation and accommodation is required.

D. The Nature of the Public Consultations

[26] There is disagreement between the parties as to the value of the consultations that did take place. Canada takes the position that the public meetings were meaningful consultations and points to two changes to the project after the meetings, the addition of a second marine mammal observer and a relocation of the line near Coburg Island, as evidence of accommodations having been made. QIA takes the position that the public meetings were simply opportunities for the government to provide information about the project but that they did not provide an opportunity for Inuit to truly be consulted.

[27] The notes of the public meetings disclose a clear dissatisfaction with the process on the part of the communities. The public meetings were held in May and June, a time when most Inuit are on the land, with the project scheduled to commence in early August. It is clear that community members felt decisions had

already been made and that they could have little or no impact on those decisions. Community members did speak about past experiences with seismic testing and the impact on animals. They offered information about the migration routes of marine mammals. It is not clear if anything was done to document this information or what was done with it.

[28] I am unable, nor is it necessary for me, to determine at this stage the true nature or the value of the consultations that did take place. That will be an issue for the trial judge.

[29] The court is cognizant that the government's duty to consult and accommodate does not mean there is a duty to reach agreement. There may be times when the parties, despite extensive consultation, cannot agree on a final resolution. There is no aboriginal veto on government decisions. There may be times when the parties disagree on whether the government has met its obligation to consult and accommodate and the government will be found to have discharged its obligation. The court must ensure that allegations of a failure to consult are not used to simply derail government projects that the Aboriginal group opposes. I am satisfied that this is not such a case.

[30] It is clear from this preliminary review of the matter that there are significant factual and legal issues to be determined at trial. Accordingly, I find that there are serious issues to be tried.

E. WILL QIA SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED?

[31] QIA must establish that the Inuit of North Baffin will suffer irreparable harm if an injunction is not granted. "Irreparable" refers to the nature of the harm suffered, not the magnitude (*RJR MacDonald*, supra.)

[32] The court has been presented with conflicting evidence on the impact of seismic testing on marine mammals. The court has received an Environmental Impact Statement prepared by Triton Consultants Limited (the "Triton" report) and the submissions provided to NIRB by Oceans North. Each of these documents reference scientific reports and studies in support of their conclusions.

[33] There is also evidence from Inuit hunters that describe the migratory routes of various marine mammals, the nature of the proposed test areas, and recounts experiences with similar types of testing in the past.

[34] Materials which have been provided that express general concern and opposition to the testing, while they may reflect community sentiment, are of no assistance in answering the questions before the court.

[35] The Government states that the seismic testing will have little or no impact on marine mammals. They rely upon the Triton report

for their position that the testing will have little or no impact on marine mammals.

[36] The Triton report is a comprehensive review of the relevant scientific literature. It is written in scientific language and its conclusions are qualified by such language as “not anticipated to measurably impact”. This is quite proper and by no means diminishes the value of the information or the conclusions reached.

[37] While the court must be cautious not to take isolated paragraphs out of context, particularly when they form part of a lengthy technical paper, the interpretation of which would benefit from the assistance of expert evidence, there are some aspects of the report which cause concern.

[38] The report refers to and has included as Appendix, protocols for acceptable practices to mitigate the impact of seismic activity on marine animals. The fact that such protocols exist support the conclusion that there are impacts; the issue is one of degree.

[39] The report, at page 61, states:

> Nevertheless, there is documented evidence of behavioural responses. There are cases of whale displacement and migratory diversion in some whale species exposed to sound, changes in dive patterns and possibly changes in social behaviour, although the latter has not been confirmed. Overall, the ecological significance of these behavioural responses is considered low but requires more definitive study (see Wartzok et al 2003).

[40] The Canadian Statement of Practice on Mitigation of Seismic Noise in the Marine Environment states:

> "for marine mammals, the biological and ecological effects of marine seismic sounds are expected to be low or are unknown or not fully understood, but may be higher if there were to be behavioural consequences that would:
>
> i. displace feeding marine mammals from areas where there are no alternate areas;
> ii. displace marine mammals from breeding or nursery areas; or
> iii. divert migrating marine mammals from routes or corridors for which alternate routes or corridors either do not exist or would incur substantially greater physical costs to traverse.

[41] This is of concern because there is evidence before the court that the proposed testing areas are both calving areas and migration routes for marine mammals (affidavit of Sam Omik, statement of Jaypetee Akeeagok, Oceans North Canada NIRB Submission, page 17). There is also evidence that the channel between Colberg Island and Devon Island is narrow and a disruption of migratory patterns would divert marine mammals from their usual migratory route into Jones Sound (statement of Jaypetee Akeeagok).

[42] The Triton report states at page 70:

> No long term effects are foreseen for any VEC (valued ecosystem components). There have been seismic studies in this area of the Canadian Arctic in the past and during this time no measurable impact, residual or otherwise to any marine resource has been identified to our knowledge.

[43] This finding is in direct contrast to the evidence from Inuit that previous seismic testing in the area affected migration routes and the populations of marine mammals in the affected areas for a very long time (affidavit of Sam Omik, paragraph 10, letter from Jayko Alooloo).

[44] The Oceans North submission references scientific literature which documents significant impacts on marine mammals from seismic testing, including permanent hearing loss, disruption of feeding and migration patterns, and impacts on social bonding, reproductive success and predator avoidance (page 18).

[45] The Triton report also comments on the nature of the public hearings that were held in the affected communities and concludes that “no significant environmental or other concerns were voiced”. There is an issue as to whether this is an accurate characterization of the community meetings. It certainly does not take into account the concerns raised by QIA in correspondence to both levels of government.

[46] The Government takes the position that the QIA has only established a potential for harm, not an assurance or guarantee of harm. An assurance or guarantee of harm may be a standard which can be met in circumstances where a forest is to be logged or a building demolished. The thing which the applicant seeks to preserve will no longer exist if an injunction is not granted. However, in many injunction applications the court will be required to assess harm on the basis of evidence that assists in predicting the likely outcome of granting or not granting an injunction. This is such a case.

[47] On the whole of the evidence presented, I am satisfied that Inuit in the five affected communities will suffer irreparable harm if an injunction is not granted.

F. WHICH OF THE PARTIES WOULD SUFFER THE GREATER HARM FROM THE GRANTING OR REFUSAL OF AN INJUNCTION

[48] If the testing proceeds as planned and marine mammals are impacted as Inuit say they will be, the harm to Inuit in the affected communities will be significant and irreversible. The loss extends not just to the loss of a food source, but to a loss of culture. No amount of money can compensate for such a loss.

[49] The proposed testing is part of a larger geological survey. There is no compelling reason why the testing must proceed this year. While there is considerable effort in planning such a project, there is nothing to suggest that the testing could not proceed at a future date. Any loss that Canada might suffer if the testing does not proceed as scheduled is largely a financial loss which is quantifiable and compensable.

[50] Accordingly, I find that the Inuit of North Baffin would suffer the greater harm if injunctive relief were not granted.

VI. Conclusion

[51] An Interlocutory Order will be issued restraining Natural Resources Canada from proceeding to conduct seismic testing pursuant to the Eastern Canadian Arctic Seismic Experiment.

[52] The QIA will be required to provide an undertaking to compensate for damages.

Dated at the City of Iqaluit this 8th day of August, 2010

_____

Justice S. Cooper
Nunavut Court of Justice