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Appeal Court finds fresh duty to consult triggered by evolving science identifying novel adverse impacts

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Notwithstanding extensive original consultation, the Federal Court of Appeal in *'Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)* determined that rapidly evolving science identifying novel adverse impacts triggered a fresh duty to consult regarding a fish transfer licence. However, the Court ultimately denied a remedy because the licence had expired and the Applicant failed to seek timely injunctive relief.

The facts underlying the Court's finding of inadequate consultation are unique and distinguishable from a typical project authorization process. Nevertheless, the decision underscores the importance of dialogue on a wide range of potential adverse impacts at the outset of policy or project development and incorporation of adaptive management into long-term planning to avoid further court-ordered consultation to address evolving science.

In this Update

- The Federal Court of Appeal's decision in *'Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)* (the Decision), issued July 17, 2020, found a novel adverse impact triggering a fresh duty to consult
- The Court's discretionary decision to deny a remedy
- Distinguishing the facts underlying the Decision from a typical project authorization process

Background

The Minister of Fisheries and Oceans (the Minister) issued a Salmonid Introductions and Transfer Licence (the Transfer Licence) to Mowi Canada West Ltd. (Mowi Canada) in 2018. The Transfer Licence authorized Mowi Canada to transfer salmon smolts to its aquaculture facility located on Namgis First Nation's (NFN) asserted territory.

NFN opposed the Transfer Licence, arguing that it exposed wild salmon stocks in its territory to Piscine Orthoreovirus (an infectious virus already found in farmed and wild salmon in B.C.) and Heart and Skeletal Muscle Inflammation (HSMI, an infectious disease found in farmed Atlantic salmon).

The Minister did not consult with NFN regarding the Transfer Licence, taking the position that consultation on the aquaculture regime and the licensing of the aquaculture facility was adequate to discharge any transfer licence-specific consultation obligations. Further, the Minister argued that the Transfer Licence was consistent with federal aquaculture policy that,

among other things, allowed transfer licences to be issued without testing the fish to be transferred for PRV and HSMI (the Policy).

An individual biologist (Alexandra Morton) and NFN applied for judicial review of the Policy. Additionally, NFN applied for judicial review of the Transfer Licence. The Federal Court granted both applications for judicial review of the Policy on the basis that, among other things:

- the Minister's delegate failed to consider current wild Pacific salmon health and status, in the context of the prevailing scientific uncertainties surrounding PRV and HSMI; and
- the Crown did not respond to NFN's request for consultation in light of new science that suggested that PRV causes HSMI and therefore gives rise to novel adverse impacts on its rights.

The Minister did not appeal these decisions.

In contrast, the Federal Court dismissed the application for judicial review of the Transfer Licence, finding that fresh consultation is not required with respect to decisions on individual licences issued pursuant to an overall strategy or policy that has already been the subject of consultation. NFN appealed.

The Decision

The Federal Court of Appeal granted the appeal, finding that the Transfer Licence triggered a fresh duty to consult as a result of an "evolution of science" that suggested an increased risk of harm from PRV and HSMI compared to the information available when consultation on the aquaculture regime and aquaculture licences occurred. Specifically, a 2017 study diagnosed sampled farmed Atlantic salmon from a fish farm in British Columbia as having HSMI. This is contrary to prior Department of Fisheries and Ocean (DFO) science that concluded that the B.C. strain of PRV did not result in the development of disease in the species tested. The new science raised the possibility of different impacts on wild Pacific salmon than farmed salmon.

The Court of Appeal reasoned that the Minister's failure to appeal the Federal Court's finding of inadequate consultation on the Policy precluded it from revisiting the record to determine if there was in fact a novel adverse impact triggering the duty to consult. To do so would be an impermissible collateral attack. In reliance on the Federal Court's finding on the Policy, the Court of Appeal found that the same novel adverse impact must trigger a duty to consult regarding the Transfer Licence, which operationalizes the Policy.

Notwithstanding these findings, the Court declined to quash the Transfer Licence, for two reasons. First, the Transfer Licence had already expired, so quashing it would serve no practical purpose. Second, NFN failed to avail itself of an adequate alternate remedy to judicial review; namely, a *timely* application for an injunction preventing the Minister from issuing the Transfer Licence. Instead, as summarized in our earlier Osler Update, NFN delayed its application until a few days before the fish transfer was scheduled to begin, putting Mowi Canada (then known as Marine Harvest Canada Inc.) at risk of a $2.1 million loss that could not be mitigated.

Implications for industry

At first blush, it may seem that the Court's reliance on "evolving science" to trigger a novel duty to consult increases the risks of consultation-related delay to proposed projects and ongoing operations. However, the unique facts underlying the Decision and the Federal

Court's decision on the Policy make it of limited application outside of the present context.

In this case, DFO failed to demonstrate that the Policy on which the Transfer Licence relied was in fact consistent with DFO's overall aquaculture strategy on which it had consulted NFN. Further, DFO revisited and reconsidered its Policy in response to novel science on several occasions, but failed to respond to NFN's concerns (even on a general level) or address the fact that it had not previously considered wild salmon health and status. This was inconsistent with DFO's practice of ongoing consultations concerning aquaculture licences and management.

These facts contrast with a typical project authorization process where decision-makers consult on each individual permit or licence, providing an opportunity for accommodation by way of conditions on the activity that is subject to that permit or licence, based on available scientific data. Further, most projects explicitly incorporate the principle of adaptive management whereby environmental management practices and mitigation are continually improved throughout the life of the project as scientific understanding or technology evolves. Indeed, good project planning provides context on when, how and where adaptive management may be used to address unforeseen impacts.

Nevertheless, to mitigate risks of additional, court-ordered consultation, project proponents and operators should engage early and often with potentially affected Indigenous groups based on a range of scientific conclusions. To the extent that worst-case risk assessments are accounted for in consultation and accommodation at the outset (including through adaptive management proposals), it will be difficult for project opponents to argue that there is a novel adverse impact triggering a fresh duty to consult as a result of evolving science.

On the remedial point, the Decision is an important reminder that quashing a licence or authorization will be refused if an applicant has not availed itself of earlier, alternative remedies that would have avoided prejudice to the licence-holder. This is a positive finding for project proponents because it reinforces the need to avoid prejudice to innocent parties as a result of delayed court actions.