

2019016

Court File No. 2746

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

SALMONID ASSOCIATION OF EASTERN NEWFOUNDLAND APPLICANT

FRESHWATER-ALEXANDER BAYS ECOSYSTEM CORPORATION SECOND APPLICANT

PORT AU PORT BAY FISHERY COMMITTEE THIRD APPLICANT

JOHN BAIRD FOURTH APPLICANT

ALAN PICKERSGILL, and FIFTH APPLICANT

WAYNE HOLLOWAY SIXTH APPLICANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, AS REPRESENTED BY THE HONOURABLE GRAHAM LETTO, MINISTER OF MUNICIPAL AFFAIRS AND THE ENVIRONMENT RESPONDENT

ORIGINATING APPLICATION
(Inter Partes)

TO THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR, GENERAL DIVISION, OR ONE OF THE JUDGES THEREOF

The Application of the Salmonid Association of Eastern Newfoundland, the Freshwater-Alexander Bays Ecosystem Corporation, the Port au Port Bay Fishery Committee, John Baird, Alan Pickersgill, and Wayne Holloway, the Applicants herein, says:

Purpose of the Application

1. The Applicants apply, in accordance with Rule 54 of the *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch. D, for:
 - a. an order in the nature of *certiorari* quashing the decision of the Respondent, the Minister of Municipal Affairs and the Environment (“**Minister**”) to dismiss an appeal submitted by the Applicants and others under section 107 of the *Environmental Protection Act*, SNL 2002, c E-14.2 (“**Section 107 Appeal**”) challenging the Minister’s decision to release the Indian Head Hatchery Expansion Project (“**IHH Expansion Project**” or “**Hatchery Expansion**”) from further environmental assessment;
 - b. an order in the nature of *certiorari* quashing the decision of the Minister to release the IHH Expansion Project from further environmental assessment; and
 - c. a declaration that the Minister’s decision to release the IHH Expansion Project from further environmental assessment is unlawful.

Parties to the Application

2. The Applicants are individuals and groups based in Newfoundland and Labrador (the “**Province**”) who are profoundly concerned about the dramatic expansion of open net pen salmon aquaculture in the Province.
3. The Salmonid Association of Eastern Newfoundland (“**SAEN**”) and the Freshwater-Alexander Bays Ecosystem Corporation (“**FABEC**”) are non-profit corporations incorporated under the laws of the Province of Newfoundland and Labrador.
4. The Port au Port Bay Fishery Committee is an informal coalition of fishers and other residents of the Port au Port and Bay St. George area who came together in late 2013 to address the collapse of the scallop fishery in Port au Port Bay.

5. John Baird, Alan Pickersgill, and Wayne Holloway are individual residents of the Province. John Baird resides in Glovertown South, and is President of the Applicant FABEC. Alan Pickersgill lives in Salvage and has a history of involvement in various conservation issues in the Province, including advocating for a Province-wide plastic bag ban. Wayne Holloway lives in Paradise and has extensive experience hunting and angling for wild salmon and trout in the Province.
6. The Respondent Minister is responsible for discharging the powers, functions, and duties relating to the administration of the *Environmental Protection Act*, SNL 2002, c E-14.2 (“*EPA*”).

The EPA’s environmental assessment scheme

7. The purpose of Part X of the *EPA*, as stated in s 46, is to “protect the environment and quality of life of the people of the province” and to “facilitate the wise management of the natural resource of the province” through the institution of environmental assessment procedures.
8. Section 48 of the *EPA* prohibits any person from proceeding with an undertaking unless that undertaking has been exempted or released from environmental assessment.
9. All undertakings must be registered under s 49 of the *EPA*, “[...] in the form and with the content prescribed by the minister [...]”. The Minister may refuse to register an undertaking if the proponent does not provide sufficient information.
10. Once an undertaking is fully and appropriately registered, s 51(1) of the *EPA* dictates that the Minister must determine whether (a) an environmental preview report is required; (b) an environmental impact statement is required; or (c) the undertaking may be released. As noted above, the Minister released the IHH Expansion Project from further environmental assessment under s 51(1)(c) of the *EPA* on September 4, 2018.

11. The *EPA*'s environmental assessment scheme is further detailed in the *Environmental Assessment Regulations, 2003*, NLR 54/03 ("**EA Regs**"). Among other things, the *EA Regs* contain numerous provisions (including ss 3(2) and (3), ss 7(2) and (3), and ss 11(2) and (3), among others) mandating meaningful public participation at various stages of the environmental assessment process.

The Indian Head Hatchery Expansion Project

12. The IHH Expansion Project was registered for environmental assessment under the *Environmental Protection Act ("EPA")* on July 17, 2018. The Minister released the Hatchery Expansion from further environmental assessment by decision dated September 4, 2018.
13. The proponent of the Hatchery Expansion is Northern Harvest Smolt ("**NHS**"). NHS is a wholly owned subsidiary of Northern Harvest Sea Farms ("**NHSF**"). Both companies are, in turn, owned by Mowi Canada East ("**Mowi**"). Mowi is also the owner of the Indian Head Hatchery, and is entirely financing the IHH Expansion Project.
14. The Indian Head Hatchery currently produces 4.5 million salmon smolt annually. Once these smolt reach an adequate size, they are transferred to open net pens owned and operated by NHSF.
15. The proposed IHH Expansion Project would increase the Hatchery's production capacity by almost 50%, to 6.7 million smolt per year. According to NHS's *Environmental Registration* document, "[t]he proposed Project is necessary to improve capacity and quality of Atlantic salmon smolt produced to fully utilize NHSF saltwater farms."

The Section 107 Appeal

16. On November 5, 2018, the Applicants submitted an appeal to the Minister under s 107 of the *EPA*. Section 107 provides as follows:

107(1) A person [...] who is aggrieved by a decision or an order made under this Act, may appeal that decision or order to the minister by notice in writing, within 60 days of receipt of that decision or order, stating the reasons for the appeal.

17. The Applicants argued that the Minister's September 4, 2018 decision to release the IHH Expansion Project from further environmental assessment was unlawful because the Hatchery Expansion was improperly registered under s 49(1) of the *EPA*. Specifically, the Minister did not require NHS to register the entire undertaking – which must include not only the land-based Hatchery Expansion itself, but also the associated increase in salmon transferred to open net pens and farmed in the Province's coastal waters.
18. The Minister dismissed the Section 107 Appeal by decision dated December 5, 2018.

Grounds for the Application

19. The Minister's decision to dismiss the Section 107 Appeal is unreasonable and must be set aside. The Minister cannot release the IHH Expansion Project from further environmental assessment in the absence of a properly scoped Environmental Registration document that includes an evaluation of the associated open net pen activities.
20. The Minister erred in not requiring the proponent to provide a lawfully scoped Registration document that evaluated the potential environmental effects of *adding* 2.2 million farmed salmon to open net pen sites in Newfoundland's coastal waters.

The Minister's Decision violates section 29 of the *Environmental Assessment Regulations*

21. Section 29 of the *EA Regs* mandates that the associated open net pen farming activities be registered along with the land-based component of the Indian Head Hatchery Expansion Project. That provision states as follows:

29. An undertaking that will be engaged in farm raising fish or shellfish where that undertaking will intervene in the rearing process to enhance production by keeping the animals in captivity, stocking and feeding the animals and protecting the animals from predators including

(a) fish or shellfish farming in salt or fresh water; and

(b) fish or shellfish breeding and propagating or hatchery services,

where the undertaking will include the construction of shore based facilities other than wharves or storage buildings [...] shall be registered.

22. Section 29 mandates the registration of all components of an undertaking described in that provision for environmental assessment. Section 29 draws a clear connection between the land-based and marine-based components of aquaculture projects. An undertaking involving both components shall be registered. There is no exemption from registration for infrastructure which may have already been licenced under Newfoundland and Labrador's *Aquaculture Act*, RSNL 1990, c A-13.

23. The Minister did not address this issue in his decision on the Section 107 Appeal.

The Minister's Decision is contrary to jurisprudence of this Court

24. The Minister's Decision contradicts basic principles adopted by the Supreme Court of Newfoundland and Labrador in *Atlantic Salmon Federation (Canada) v Newfoundland (Environment and Climate Change)*, 2017 NLTD(G) 137 ("**ASF**"). In that case, this Court held that four factors must be examined when determining whether two or more projects (or components of a project) must be registered together for the purpose of environmental assessment.

25. As confirmed by this Court in *ASF* and in keeping with fundamental principles of environmental assessment law, the threshold question is whether two or more projects constitute "connected actions." Projects that constitute "connected actions" should be scoped together for the purpose of environmental assessment, unless additional factors

allow the decision maker to split the “connected actions” and permit registration of only one component.

26. The three additional factors that must be taken into account following a determination that two projects constitute “connected actions” are as follows: (1) whether the projects share the same proponent; (2) whether the projects will be implemented contemporaneously; and (3) whether one of the projects would avoid environmental scrutiny if the projects are not considered together for the purposes of environmental assessment.

(a) The Hatchery Expansion and its associated open net pen farming activities are “connected actions”

27. Two projects will be considered connected actions when (1) one project is automatically triggered by the other; (2) one project cannot proceed without the other; or (3) both are part of a larger whole and have no independent utility if considered separately.

28. The IHH Expansion Project and its associated open net pen farming activities fit squarely into categories (1) and (3) and thus constitute “connected actions.” The production of an additional 2.2 million smolt in the Hatchery will automatically trigger the same increase in the number of salmon farmed in open net pens around Newfoundland’s coast. In addition, neither the Hatchery Expansion nor the associated increase in open net pen farming have any clear utility when considered independently of one another.

29. In his decision on the Section 107 Appeal, the Minister failed to consider category (1) of the “connected actions” test. In addition, he interpreted the Appellants’ position as suggesting that a properly scoped environmental assessment would include an evaluation of the potential impacts of all 33 of NHSF’s licensed saltwater farms, rather

than simply the additional 2.2 million salmon associated with the IHH Expansion Project. The Minister's decision on this point is demonstrably unreasonable.

30. Since the IHH Expansion Project and the associated increase in open net pen farming meet the "connected actions" threshold, the Court must consider whether the Minister had the discretion to split these components and allow registration of the Hatchery Expansion without any consideration of the impacts the massive introduction of new farmed salmon will have on the marine environment.

(b) The Hatchery Expansion and its associated open net pen farming activities have the same proponent

31. The *EPA* defines a "proponent" as "[...] a person who (i) carries out or proposes to carry out an undertaking, or (ii) is the owner or person having charge, control or management of an undertaking."

32. The IHH Expansion Project was registered by NHS. NHS is a wholly owned subsidiary of NHSF, which owns and operates the open net pens to which NHS claims its additional 2.2 million farmed salmon will be transferred. Both companies are, in turn, owned by Mowi.

33. Mowi owns the Indian Head Hatchery. The Hatchery Expansion is entirely financed by Mowi. When Mowi acquired Northern Harvest, it made public statements indicating its intention to significantly expand its farmed salmon production in the Province.

34. Mowi and/or the combination of NHSF and NHS should be treated as the same proponent for the purposes of the environmental assessment of the IHH Expansion Project.

35. In the alternative, given that they are closely related companies working jointly on one enterprise, the Court cannot conclude that they are independent operators whose

projects should be considered separately when determining the proper scope of the environmental assessment.

36. When addressing this factor in his decision on the Section 107 Appeal, the Minister stated only that “[t]he scoping of this undertaking was not influenced in any way by the corporate structure of the hatchery or the marine sea farms to be stocked by the hatchery.” It was a reviewable error for the Minister to disregard this relevant evidence in coming to his decision.

(c) The Hatchery Expansion and the associated open net pen farming activities are contemporaneous

37. As 2.2 million new smolt will be added to the proponent’s fish inventory, some or all of the existing NHSF open net pen sites will necessarily contain greater numbers of salmon as a result of the Hatchery Expansion. Although the open net pen sites may already be licensed to contain more farmed fish than are currently available, they will not, and cannot, receive this influx of fish until the Hatchery Expansion is operational.

38. The open net pen farming activities associated with the IHH Expansion Project will begin as soon as the Hatchery Expansion is operational and the additional salmon have reached the size at which they can be transferred to open net pens. This is as closely related as the timing can possibly get for projects of this nature.

39. The Minister erred by failing to address this factor in his decision on the Section 107 Appeal.

(d) Separating the Hatchery Expansion from its associated open net pen farming activities for the purposes of environmental assessment allows the marine farming component to avoid environmental scrutiny

40. The proponent’s failure to include the open net pen farming activities within the scope of the Environmental Registration document means that the addition of 2.2 million

farmed salmon to the Province's marine environment will receive little to no environmental scrutiny.

41. NHS's Environmental Registration suggests that the additional salmon will be transferred to NHSF's existing licensed open net pens. However, it fails to provide any additional information that would allow the Minister to properly assess the environmental impacts of adding those farmed salmon to the Province's coastal waters.
42. NHSF's 33 existing open net pen sites are licensed under the Province's *Aquaculture Act*, RSNL 1990, c A-13. The licensing process under the *Aquaculture Act* does not involve an environmental assessment, or some other substantive and thorough evaluation of the environmental impacts of each license, and does not provide for meaningful public consultation.
43. In his decision on the Section 107 Appeal, the Minister acknowledged that NHSF's 33 existing open net pen sites did not require environmental assessment. However, he asserted that existing provincial and federal regulation of the aquaculture industry provides adequate environmental protection. The Applicants are unaware of any existing legislative or regulatory requirement at the provincial or federal level that mandates a careful and precautionary evaluation of the environmental impacts of these open net pen sites with meaningful public participation.
44. The addition of 2.2 million farmed salmon to the Province's coastal waters is a significant increase in numbers. The decision to release the IHH Expansion Project from further environmental assessment without requiring the proponent to provide detailed information about the associated open net pen farming activities and their environmental impacts allows this crucial component of the project to escape environmental scrutiny simply because the salmon will be transferred to existing open net pens. The two fundamentally interconnected components of the IHH Expansion Project are separated artificially and in a manner directly contrary to Part X of the *EPA* and the *EA Regs*. The Minister's decision is therefore unreasonable and should be set aside.

Relief Sought:

45. In light of the above, the Applicants respectfully request:

- a. an order in the nature of *certiorari* quashing the Minister's decision to dismiss the Section 107 Appeal;
- b. an order in the nature of *certiorari* quashing the decision of the Minister to release the IHH Expansion Project from further environmental assessment;
- c. a declaration that the Minister's decision to release the IHH Expansion Project from further environmental assessment is unlawful;
- d. costs; and
- e. such other relief as this Honourable Court deems appropriate and just.

DATED at City of St. John's, Newfoundland and Labrador, this 8th day of April, 2019.



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ISSUED AT St. John's in the
Province of Newfoundland and Labrador.
this 10 day of Apr, A.D., 2019.

Sgt. Tina Crewe
court officer