

Federal Court



Cour fédérale

Date: 20090827

Docket: T-1309-09

Citation: 2009 FC 848

Ottawa, Ontario, August 27, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

**LIVING OCEANS SOCIETY and
THE CANADIAN PARKS
AND WILDERNESS SOCIETY**

Applicants

and

**MINISTER OF FISHERIES AND OCEANS,
MINISTER OF FOREIGN AFFAIRS and
COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK**

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an urgent motion by the applicants for an interim order under section 18.2 of the *Federal Courts Act*, R.S.C.1990, c. 8, s. 5 as am. by S.C. 2002, c. 8, s. 28, and under rule 373 of the Federal Rules of Court, staying the Foreign Vessel Clearance dated August 21, 2009 issued by the Respondent Minister of Foreign Affairs to the United States Department of State with respect to the U.S. Marine Scientific Research Vessel R V Marcus G. Langseth to conduct a seismic survey in an area approximately 250 kilometres southwest of Vancouver Island between August 17 and September 22, 2009. This seismic survey will be conducted by the Respondent Columbia

University with funds provided by the U.S. Government. The purpose of the study is to obtain data which will be useful in the understanding and prediction of earthquakes which emanate from the area where the seismic study is being conducted, and to do other scientific research with respect to the species living in the “Endeavour Hydrothermal Vents Marine Protected Area”.

[2] The applicant’s motion was originally filed on August 19th for an injunction against the two respondent Ministers to prevent the issuance of a Foreign Vessel Clearance under s. 3(2)(c) of the *Coasting Trade Act*, S.C. 1992, c. 31. The evidence now before the Court shows that following the filing of this motion by the applicants for an injunction, the Department of Fisheries and Oceans required the Respondent Columbia University to substantially increase the mitigation measures to protect marine mammals in the Endeavour Marine Protected Area. The increased mitigation measures included a reduction in the 180-decible level of the airguns to 160-decibles, an increase in the marine mammal observers, including DFO appointed and approved observers on the ship, dedicated to maintaining constant observations for marine mammals, a substantially increased “exclusion zone” to over 7 kilometres whereby no testing will take place if a whale is in that exclusion zone, an increase in the pre-operations monitoring to be sure there are no marine mammals sighted within the zone where the testing will be taking place, and other mitigation measures.

[3] On August 24, 2009 the Respondent Ministers filed an Affidavit from Rebecca Reid, the Regional Director of the Oceans, Habitat and Enhancement Branch for the Pacific Region of the Department of Fisheries and Oceans (DFO). Ms. Reid deposed that these new mitigation measures

required by DFO led her to determine that the proposed research would not be expected to result in a contravention of the marine statutes and regulations. Her affidavit deposed at paragraphs 17 to 22 as follows:

17. On August 14, 2009, DFO's Pacific Region received from Lamont an "Application for a Species at Risk Permit". After DFO requested several clarifications from Lamont, they provided an amended Application for a Species at Risk Permit on August 20, 2009 (the "SARA Permit Application"). Attached as Exhibit "B" and "C" to this Affidavit is a copy of the August 14 and August 20m 2009, SARA Permit Applications.

18. The August 20, 2009 SARA Application was forwarded to DFO's Marine Mammal Unit for review. The Marine Mammal Unit determined that based on the mitigation measures proposed by Lamont, their Research would not violate the *Marine Mammal Regulations*.

19. The SARA Application was forwarded to Dr. John Ford, head of the Cetacean Research Program at DFO's Pacific Biological Station in Nanaimo.

20. In order to inform myself, on August 23, 2009 I spoke with Dr. Ford and he advised me of the following with regard to his role at DFO, his expertise in marine mammals and how he reviewed the SARA application:

a. The Cetacean Research Program undertakes research in support of recovery of whales, dolphins and porpoises considered Endangered or Threatened under Canada's SARA.

b. Dr. Ford is an expert in whale behaviour and acoustics, having undertaken field studies in this discipline for over 30 years. Attached as Exhibit "D" to this Affidavit is a copy of Dr. Ford's curriculum vitae outlining his expertise and experience with respect to marine mammals.

c. Dr. Ford reviewed the SARA Permit Application as well as the information provided in the "Environmental Assessment of a Marine Geophysical Survey by the R/V Marcus G. Langseth in the Northeast Pacific Ocean, August-

September 2009” and in the August 14, 2009 SARA Application.

21. Dr. Ford advised me that he considered the sound pressure levels estimated to be emitted from the 6600 in³ seismic airgun array and whether this may cause acoustical disturbance to marine mammals. It was his opinion that the project as proposed in the August 20, 2009 SARA Permit Application was unlikely to cause either injury or behavioural disturbance of any significance to cetaceans or other marine mammals provided the mitigation actions described by Lamont in the SARA Permit Application were employed.

22. In particular, Dr. Ford further advised the mitigation actions included in Lamont’s SARA Application are similar to, and in some respects, more precautionary than mitigation protocols employed in most worldwide jurisdictions.

[4] On August 21st, 2009 Ms. Reid, as the Regional Director of DFO wrote to the Respondent Columbia University and stated:

... DFO has determined that the mitigation measures outlined in the application are sufficient to prevent harm and disturbance of marine mammals. As such, a SARA permit is not required for the conduct of your proposed works...

[5] Also on August 21st, 2009, after this determination, the Respondent Minister of Foreign Affairs issued the Foreign Vessel Clearance. As a result, the ship set sail the next morning to begin the seismic survey.

[6] The Court finds that both of these events happened after the motion for the injunction was filed, but before the motion could be heard. As a result, the parties appearing before the Court

scrambled to adjust to the new fact situation, and the applicants filed an amended motion for an order staying the Foreign Vessel Clearance, as opposed to enjoining its issuance.

[7] The Court is satisfied that the DFO expert, Dr. John Ford, Ph.D has provided his opinion to DFO that the new mitigation measures proposed by the Respondent Columbia University means that this proposed seismic survey is “unlikely to cause either injury or behavioural disturbance of any significance to cetaceans or other marine mammals provided the mitigation actions agreed to by Columbia University are followed”. The Court has reviewed the 12-page curriculum vitae of Dr. Ford which is attached as Exhibit “D” to the Affidavit of Ms. Reid. Dr. Ford has been the research scientist and head of the Cetacean Research Program for the Pacific region with DFO since 2001. He has extensive prior experience with marine mammals dating back to 1973. The Court expressed regret that Dr. Ford had not sworn an affidavit himself with respect to this motion. Counsel explained that the short timeline between the filing of the motion and the hearing of this motion made this impracticable. The Court accepts counsel’s explanation and declines to draw an adverse inference from the failure to provide evidence of persons having personal knowledge of material facts (see: *Federal Court Rules*, r. 81(2)). This Court does accept affidavit evidence on information and belief on interlocutory matters and will accept Ms. Reid’s Affidavit with respect to the opinion provided by Dr. Ford. Ms. Reid is the Regional Director of DFO responsible for this issue (see: *Federal Court Rules*, r. 81(1)).

[8] The applicants submitted that the U.S. evidence about the impact of the proposed seismic testing supports their claim that there will possibly be incidental harassment to marine mammals

incidental to the marine seismic survey. The Court cannot find this evidence as sufficient evidence of probable irreparable harm to the mammals for two reasons. First, this conclusion was based on different acoustic levels and other conditions which have been mitigated by Columbia University at the request of the Department of Fisheries and Oceans. Second, the evidence of Dr. Ford, which is up-to-date and from a Canadian expert dealing specifically with the issue, is unequivocal that the project as now proposed, is unlikely to cause either injury or behavioural disturbance to whales and other marine mammals because of the new mitigation action agreed to by Columbia University.

[9] The granting of an interim stay is an exceptional remedy. An applicant must demonstrate urgency, in addition to a serious issue, irreparable harm and that the balance of convenience lies with the applicant (See: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311). In this case, based on the evidence, the Court has concluded that the applicants have not established a probability of irreparable harm to the marine mammals for the reasons outlined above.

[10] In view of the Court's finding with respect to irreparable harm, it is not necessary, and it is not in the interest of expeditiously deciding this urgent motion, for the Court to deal with the rest of the tri-partite test for an interim stay. It is also unnecessary for the court to decide several other issues raised by the parties including whether to allow the applicants to amend their notice of motion to seek an interim stay instead of an injunction; whether the motion should be allowed to proceed because a number of alleged interested parties have not been named as respondents; whether the applicants ought to be required to file an undertaking with respect to damages; whether the *Species at Risk Act*, S.C. 2002, c. 39 and the *Marine Mammal Regulations*, S.O.R./93-56 will be

contravened by the proposed seismic testing; what is the standard of review applicable in this case; and whether the applicants have standing to bring an action to prevent another private party from breaching a statute.

[11] For these reasons, this motion for a stay will be dismissed.

[12] With respect to costs, the Court recognizes that after this motion was filed the DFO required the Respondent Columbia University to substantially increase its mitigation measures to protect the marine mammals and it was only after that, that the Foreign Vessel Clearance was issued. When the applicants appeared before the Court on the return of the motion, these facts had changed without their knowledge. Moreover, the application by the U.S. Department of State for a Foreign Vessel Clearance was filed with the Department of Foreign Affairs on February 26, 2009. The evidence showed that the application had been misplaced by the Department of Foreign Affairs until July 14, 2009. This error prejudiced the parties by substantially reducing the lead time which the parties would have to address the issues raised in this litigation. In these circumstances, the Court is of the preliminary view that there ought not to be any cost awards against the applicants because the applicants could not have known about the changed measures to mitigate possible interference with the marine mammals by the seismic testing, and in fact, their imminent legal action may have precipitated the requirement for increased mitigation measures.

ORDER

THIS COURT ORDERS that:

This motion against the Respondent Ministers for an interim order staying the Foreign Vessel Clearance dated August 21, 2009 is dismissed.

“Michael A. Kelen”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1309-09

STYLE OF CAUSE: LIVING OCEANS SOCIETY ET AL. v. MINISTER OF FISHERIES AND OCEANS ET AL.

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: August 25, 2009

REASONS FOR ORDER AND ORDER: KELEN J.

DATED: August 27, 2009

APPEARANCES:

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