Federal Court of Appeal  Cour d'appel fédérale

Date: 20161021

Docket: A-37-16

Citation: 2016 FCA 258

CORAM: **NADON J.A.**
DAWSON J.A.
WOODS J.A.

BETWEEN:

ECOLOGY ACTION CENTRE and
LIVING OCEANS SOCIETY

Appellants

and

MINISTER OF THE ENVIRONMENT AND
CLIMATE CHANGE,
MINISTER OF HEALTH and
AQUABOUNTY CANADA INC.

Respondents

Heard at Ottawa, Ontario, on October 18, 2016.

Judgment delivered at Ottawa, Ontario, on October 21, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] For reasons cited as 2015 FC 1412, a judge of the Federal Court dismissed an application for judicial review of two Ministerial decisions. On this appeal from the judgment of the Federal Court, the appellants put in issue one decision only: the decision of the then Minister of the

Environment and Climate Change to publish in the *Canada Gazette*, a Significant New Activity Notice pursuant to the *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33 in respect of a genetically modified Atlantic salmon known as the AquAdvantage Salmon. On this appeal the appellants argue that the Federal Court erred in its application of the reasonableness standard of review to the Minister's decision.

[2] Notwithstanding the able submissions of Mr. McAnsh, I would dismiss this appeal for the following reasons.

[3] The relevant facts are fully developed in the reasons of the Federal Court. For the purpose of this appeal it is sufficient to note that:

1. A biotechnology company submitted a notification to Environment Canada and Health Canada under subsection 106(1) of the *Canadian Environmental Protection Act* (Act) with respect to the manufacture of triploid, or sterile, eyed-eggs at a facility in Prince Edward Island for the commercial production, or grow-out, of sterile, all-female AquAdvantage Salmon (AAS) at a facility located in Panama. The respondent AquaBounty Canada Inc. will be the manufacturer-seller of the AAS eggs in Canada.

2. After a toxicity assessment was conducted, the respondent Ministers determined that the AAS is not toxic, as defined under the Act, nor capable of becoming toxic if the proposed activities are carried out in a properly contained facility.

3. The Ministers also determined that new activities with the AAS conducted outside of contained facilities may result in the living organism becoming toxic.

4. In order to mitigate this risk, the Minister of the Environment (Minister) exercised her discretion and caused the Significant New Activity Notice (SNAc Notice) to be published under section 110 of the Act in order to restrict the use of the AAS by AquaBounty and others. Should an entity wish to conduct an activity with the AAS outside of the parameters set out in the SNAc Notice, a new notification must be submitted.

5. The SNAc Notice permitted a broader range of uses of the AAS than those conferred on AquaBounty in two respects.

6. First, while the AAS notification had not contemplated or referenced the commercial grow-out of the AAS in Canada, the SNAc Notice permits the commercial grow-out of female triploid AAS within a contained facility, provided the female triploids are euthanized before leaving the facility.

7. Second, the Minister states, and the Federal Court agreed, that subsection 106(10) of the Act restricts AquaBounty to using the AAS at its facility in Prince Edward Island. However, the SNAc Notice permits persons to use the AAS at any contained facility in Canada that meets the containment criteria set out in the Notice.

[4] On this appeal, the appellants argue that:

1. The Minister's decision to permit the commercial grow-out of the AAS in Canada was unreasonable.

2. The Minister's decision to permit the AAS to be used at any contained facility as defined in the SNAc Notice was unreasonable.

3. The finding of the Federal Court that the manufacture, import and use of the AAS by AquaBounty is limited to its facility in Prince Edward Island is incompatible with its finding that the SNAc Notice is reasonable.

4. The Federal Court breached the duty of procedural fairness when it interpreted Part 6 of the Act in a manner not argued by the parties.

[5] The Federal Court rejected the argument that the SNAc Notice was unreasonable insofar as it permits the use of the AAS at any contained facility. I see no error in the analysis of the Federal Court that warrants intervention by this Court. Specifically, section 104 of the Act defines a significant new activity to include, in respect of a living organism, any activity that results, or may result in:

(a) the entry or release of the living organism into the environment in a quantity or concentration that, in the Ministers' opinion, is significantly greater than the quantity or concentration of the living organism that previously entered or was released	a) soit à la pénétration ou au rejet d'un organisme vivant dans l'environnement en une quantité ou concentration qui, de l'avis des ministres, est sensiblement plus grande qu'antérieurement;

into the environment; or	
(b) the entry or release of the living organism into the environment or the exposure or potential exposure of the environment to the living organism in a manner and circumstances that, in the Ministers' opinion, are significantly different from the manner and circumstances in which the living organism previously entered or was released into the environment or of any previous exposure or potential exposure of the environment to the living organism. (nouvelle activité)	b) soit à la pénétration ou au rejet d'un organisme vivant dans l'environnement ou à l'exposition réelle ou potentielle de celui-ci à un tel organisme, dans des circonstances et d'une manière qui, de l'avis des ministres, sont sensiblement différentes. (significant new activity)
(emphasis added)	(soulignement ajouté)

[6] The Ministers may issue a notice with respect to significant new activity when "they suspect that a significant new activity in relation to that living organism may result in the living organism becoming toxic" (subsection 110(1)). The legislation thus confers significant discretion on the Ministers. The exercise of that discretion is informed by their appreciation of the facts and by policy. Their decision is therefore entitled to deference.

[7] The appellants have not shown it was unreasonable for the Minister to conclude that given adequate physical and biological containment in a land-based facility the potential for exposure to the environment could be prevented. It is to be remembered that a risk assessment prepared by the Department of Fisheries and Oceans and subjected to an independent peer review process concluded that "the risks to the Canadian environment associated with the manufacture and production of AAS is concluded to be low with reasonable certainty under the

proposed use scenario specified in the notification by AquaBounty." The containment measures specified in the SNAc Notice and enhanced those specified by AquaBounty.

[8] With respect to the permitted commercial grow-out, at paragraph 81 of its reasons, the Federal Court wrote:

> … when the Certified Tribunal Record is read as a whole, it is clear that the Minister of the Environment's functional approach to the SNAc Notice led her to conclude that "the containment measures required by the AAS SNAc Notice will work equally well regardless of whether the AAS are being grown out for research, reproduction or commercial grow-out." Adult AAS leaving the contained facility in Canada are required to have been euthanized. There is no evidence in the record that euthanized AAS are a danger to the environment. Moreover, they cannot be used for human consumption unless approved by Health Canada, which, if called upon to issue an approval, would examine risk to human health. Accordingly, I am not persuaded that the scope of the SNAc Notice was overly broad and unreasonable.

The appellants have not demonstrated any error in this analysis.

[9] Next, the appellants assert that the SNAc Notice is absurd because it permits a wider range of uses for persons other than AquaBounty.

[10] The Federal Court noted that Part 6 of the Act refers to three ways in which living organisms may be dealt with: manufacture, importation and use. At paragraphs 75 through 77 of the reasons, the Federal Court interpreted the relevant legislative provisions and concluded that "even though a SNAc Notice was issued that permits use at a contained facility, any person seeking to manufacture or import AAS must still file a Notification under subsection 106(1). This includes even AquaBounty who, because it received a waiver under paragraph 106(8)(b), is

limited by subsection 106(10) to using and manufacturing AAS at its PEI Facility, and so cannot manufacture elsewhere without undergoing further assessment".

[11] The Federal Court went on to reason that:

> [79] The impact of Part 6 of CEPA on persons other than AquaBounty is that they must file a Notification under subsection 106(1) in order to be permitted to manufacture or import AAS and, if they are proposing a use that is a significant new activity, they must file a Notification under subsection 106(4).
>
> [80] What impact does this interpretation have on the alleged absurdity outlined above? It causes it to disappear. In particular, it demonstrates that AquaBounty is not placed in an unequal position by the operation of subsection 106(10). Like AquaBounty, all persons are required to submit a Notification if they wish to manufacture or import AAS. As part of their Notification, they can request a waiver. If, like AquaBounty, they request a waiver pursuant to subsection 106(8)(b), then their use, manufacture, and import of AAS will be limited to the location specified in their request for a waiver, pursuant to subsection 106(10). If, on the other hand, they do not request a waiver, then their use will only be constrained by the scope of the SNAc Notice. In this way, AquaBounty is placed on equal footing with everyone else. There is therefore no absurdity, nor any unreasonableness, in the Minister issuing a SNAc Notice that permits a wider range of uses of AAS than that permitted by subsection 106(10). The applicants' objection dissolves.

[12] The appellants accept the correctness of the Federal Court's interpretation of the legislative scheme. The restriction on use in relation to SNAc Notices, contained in subsection 106(4), and the restriction in relation to waiver, contained in subsection 106(10), were shown to apply rationally to AquaBounty, in a manner consistent with the presumption of overlap. This presumption applies when two legislative principles apply equally without conflict to the same set of facts. It follows there was no absurdity which rendered the SNAc Notice unreasonable.

[13] Finally, the Federal Court did not breach the duty of procedural fairness by arriving at its own interpretation of the legislation. While procedural fairness requires that parties be able to

make submissions about the issues of statutory interpretation, the Court's ability to decide those issues correctly is not constrained by the submissions of the parties.

[14] For these reasons I would dismiss the appeal, with the appellants paying one set of costs in this Court to the respondent Ministers and one set of costs in this Court to AquaBounty Canada Inc.

"Eleanor R. Dawson"
J.A.

"I agree.
Nadon J.A."

"I agree.
Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-37-16
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DATED:	OCTOBER 21, 2016

APPEARANCES:

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