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Case Name:

Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands)

Between
Chief Robert Chamberlin Chief of the Kwicksutaineuk/Ah-Kwa-Mish First Nation on his own behalf and on behalf of all members of the Kwicksutaineuk/Ah-Kwa-Mish First Nation, Respondent (Plaintiff), and
Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Agriculture and Lands and Attorney General of Canada, Appellants (Defendants)

[2011] B.C.J. No. 1184

2011 BCCA 294

Docket: CA038707

British Columbia Court of Appeal
Vancouver, British Columbia

C.E. Hinkson J.A.
(In Chambers)

Heard: June 16, 2011.
Judgment: June 28, 2011.

(24 paras.)

Civil litigation -- Civil procedure -- Parties -- Intervenors -- Class or representative actions -- Certification -- Common interests and issues -- Application by British Columbia Salmon Farmers Association for leave to intervene in appeal from order certifying present action as class action allowed -- First Nation plaintiffs alleged that province's licensing of fish farms and exercise of regulatory authority over their operation had resulted in sea lice infestations in wild salmon stocks and infringed their fishing rights -- Applicant could intervene on issue as to which common issues class members' claims could properly raise -- Applicant's experience in aquaculture and salmon farming had provided it with a special interest and concern allowing it to make a valuable contribution to this issue of appeal.

Natural resources law -- Fishing -- Licensing and registration -- Application by British Columbia Salmon Farmers Association for leave to intervene in appeal from order certifying present action as class action allowed -- First Nation

plaintiffs alleged that province's licensing of fish farms and exercise of regulatory authority over their operation had resulted in sea lice infestations in wild salmon stocks and infringed their fishing rights -- Applicant could intervene on issue as to which common issues class members' claims could properly raise -- Applicant's experience in aquaculture and salmon farming had provided it with a special interest and concern allowing it to make a valuable contribution to this issue of appeal.

Application by the British Columbia Salmon Farmers Association for leave to intervene in an appeal from an order certifying the present action as a class action. The First Nation plaintiffs alleged that the province's licensing of fish farms and exercise of regulatory authority over their operation had resulted in sea lice infestations in wild salmon stocks, and that this constituted an infringement of the fishing rights of proposed members of the class. The applicant was a provincial industry organization that represented the interests of the companies that worked on salmon farms and that provided services and supplies to salmon farms in the province. The applicant argued that the certification decision had caused significant concern and uncertainty amongst its membership regarding how it might affect their operations and relationships with First Nations and that the interests of its members and their perspective would not be adequately represented by the government appellants. The applicant sought intervenor status on the appeal to provide its perspective on the issues of whether there was an identifiable class and whether the claims of the class members raised common issues.

HELD: Application allowed. The applicant could intervene on the issue of which common issues the class members' claims could properly raise. The applicant could not be said to have had a direct interest in the limited appeal unless the action remained certified. The outcome of the appeal had, however, a dimension that might legitimately engage the interests of the applicant and its members. The court could fully determine the question of an identifiable class without the need for any assistance from the applicant. As to whether the claims of the class members raised common issues, the applicant's experience in aquaculture in general and salmon farming in particular, had provided it with a special interest and concern, in respect of which it was in a position, by reason of the long and full consideration which it had given to the issues related to those pursuits, to make a valuable contribution with respect to the common issues that the class members' claims could properly raise.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, RSBC 1996, CHAPTER 50, s. 4

Society Act, RSBC 1996, CHAPTER 433,

Appeal From:

On appeal from: Supreme Court of British Columbia, December 1, 2010, (*Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2010 BCSC 1699, Vancouver Docket No. S090848)

Counsel:

Counsel for the Appellant, B.C.: J. Sullivan and H. Gwillim.

Counsel for the Intervenor applicant, B.C. Salmon Farmers' Association: K.G. O'Callaghan and K. Grist.

Counsel for the Respondent: R. Mogerman, J. Winstanley.

Reasons for Judgment

C.E. HINKSON J.A.:--

Introduction

1 On December 1, 2010 this action was certified as a class action by a judge of the Supreme Court of British Columbia, in chambers, pursuant to the provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. His reasons for judgment are indexed as 2010 BCSC 1699.

2 The British Columbia Salmon Farmers Association ("BCSFA") is a not-for-profit association registered under the British Columbia *Society Act*, R.S.B.C. 1996, c. 433. It asserts that it represents all of the Atlantic salmon producers in British Columbia, including all of the aquaculture companies with operations in the Broughton Archipelago, the area within which the class action is based.

3 The BCSFA did not participate in the certification application in the Supreme Court, but the certification of the action as a class action has been appealed by both of the defendants, and the BCSFA now applies for intervenor status with respect only to that appeal. If that status is granted, the BCSFA seeks leave to file a factum not in excess of twenty pages, and for leave to make oral submissions at the hearing of the appeal.

Background

4 The chambers judge described the circumstances that gave rise to the action at paras. 1-9 of his reasons:

> [1] ... The proposed representative plaintiff, Chief Robert Chamberlin, is the elected chief of an **aboriginal** collective known as the Kwicksutaineuk/Ah-Kwa-Mish First Nation ("KAFN"). Members of this community, like their ancestors, are said to be sustained by their access to the fishery in an area known as the Broughton Archipelago.
>
> [2] Numerous other **aboriginal** collectives, constituted as Bands under the Indian Act, and generally known as "First Nations" are sustained by the marine resources of the Broughton Archipelago.
>
> [3] The KAFN and the other First Nations which assert **aboriginal** fishing rights in the Broughton Archipelago and rivers that drain into the Archipelago, constitute the proposed class.
>
> [4] The plaintiff alleges that the Province's licensing of fish farms and exercise of regulatory authority over their operation has resulted in sea lice infestations in wild salmon stocks, and that this constitutes an infringement of the fishing rights of proposed members of the class.
>
> [5] The threshold issue sought to be determined, as one of the common issues, is whether wild salmon stocks returning to the Broughton Archipelago are adversely affected by sea lice infestation attributable to the many open pen fish farms operating there.
>
> [6] The defendants raise many arguments in opposition to certification.
>
> [7] The Province challenges Chief Chamberlain's standing to serve as a representative plaintiff. It contends that First Nations are generally barred by s. 41 of the Class Proceedings Act from class

action proceedings. It contends that a class action is not the preferable procedure, and that the challenges the First Nations would face in establishing the fishing rights said to have been infringed would overwhelm the litigation. The challenges include the existence of territorial overlaps among the proposed members of the class.

[8] Canada raises similar objections to those raised by the Province. It also contends that the evidence on this application fails to establish a colourable claim to adverse impacts on wild salmon stocks attributable to sea lice contamination from fish farms.

[9] The defendants say, in addition, that a finding on the common issues in favour of the plaintiff would not materially advance the litigation, as every member of the class would then be required to prove the existence of an **aboriginal** fishing right. This, they say, would involve independent determinations of the fishing rights, if any, of each member of the class. As the process for determination of **aboriginal** rights involves findings on issues of infringement and justification, and in the present matter, overlapping claims of territory, the damages phase would be almost endless.

5 Despite the submissions of the defendants, the chambers judge certified the action as a class action. He adopted, as the common issues, those stated by the plaintiff as follows, with the exception of (c) and (h):

(a) To what extent are the Wild Salmon populations in the Broughton Archipelago in decline?
(b) To what extent has the Province of British Columbia (the "Province") purported to authorize and regulate the Salmon Farms under the *Land Act*, R.S.B.C. 1996, c. 245 and the *Fisheries Act*, R.S.B.C. 1996, c. 149?
(c) To what extent, if at all, did the Province have the constitutional authority to authorize and/or regulate the Salmon Farms in the manner that it did?
(d) Has the manner in which the Province purported to authorize and regulate the Salmon Farms:

(i) failed to prevent or adequately manage the concentration of parasites, including sea lice, at the Salmon Farms and the transmission of these parasites from the Salmon Farms to the Wild Salmon;
(ii) failed to prevent or adequately manage the concentration of infectious diseases at the Salmon Farms and the transmission of these infectious diseases from the Salmon Farms to the Wild Salmon;
(iii) allowed the farming of non-indigenous Atlantic salmon species at the Salmon Farms and failed to prevent or adequately manage escapes of Atlantic salmon from the Salmon Farms that compete with the Wild Salmon for habitat and food;
(iv) permitted the Salmon Farms to be located in areas that encounter significant runs of Wild Salmon, particularly as vulnerable juvenile Wild Salmon;
(v) permitted Salmon Farms to operate without requiring fallowing in a manner that effectively protects Wild Salmon during critical periods when Wild Salmon stocks, particularly juvenile Wild Salmon, are known to be passing in close proximity to Salmon Farms;
(vi) permitted Salmon Farms that allow the transmission of parasites and disease to Wild Salmon by the use of permeable cages causing free flow of contaminated water and waste between the Salmon Farms and the marine environment; and
(vii) made other decisions about, among other things, the location of the farms, size of the farms, concentration of the non-indigenous salmon permitted in the farms, the application

> of pest and disease treatments and the timing of harvesting operations, which have significant negative impacts on the populations of Wild Salmon?
>
> (e) To what extent have the actions or omissions of the Province caused or materially contributed to the decline of the Wild Salmon populations in the Broughton Archipelago?
> (f) Did the Province have knowledge, real or constructive, of the existence or potential existence of any Fishing Rights within the Broughton Archipelago?
> (g) Did the Province contemplate, or ought the Province have contemplated, that any Fishing Rights within the Broughton Archipelago could be affected by the manner in which the Province authorized and regulated the Salmon Farms?
> (h) Are Section 11(2) of the *Land Act* and Sections 13(5) and 14(2) of the *Fisheries Act* of no force and effect because they purport to confer on the Minister of Land and Agriculture the discretion to authorize salmon aquaculture and this discretion is not structured to accommodate any Fishing Rights?
> (i) Are the Class Members entitled to an award of aggregate damages and, if so, in what amount?

6 In his consideration of the issues before him, the chambers judge addressed the issue of fairness to members of First Nations who engaged in fish farming. Those who do so in the Broughton Archipelago are members of the BCSFA. At paras. 240-242 the chambers judge commented:

> [240] Canada submits that even if the opt-out provisions are workable in this case, this litigation is "totally unfair" to those **aboriginal** collectives who benefit from aquaculture in the Broughton Archipelago, as:
>
> 65. ... Obviously, they are not going to opt out of a class proceeding in order to conduct the action on their own, because they are fundamentally opposed to the relief sought. The only options open to these **Aboriginal** Collectives, should this action be certified, would be to opt out (however such a decision would be made) and then sit and watch these proceedings that are contrary to their interests proceed or to seek to be added as intervenors or parties in order to oppose the relief sought by the plaintiff. This would be totally unfair to those **Aboriginal** Collectives.
>
> ...
>
> 69. Given that there is no way to protect the interests of any proposed class members that do not support this proceeding or are contrary in interest to this proceeding, it would be manifestly unjust for it to be certified ... Contrary to the plaintiff's assertions, there is a principled reason why this case cannot proceed to certification and that is because of the inherent injustice and trampling on the rights of the other **Aboriginal** collectives and its members that results from them being unable to exercise their opt out right in a meaningful way.
>
> ...
>
> 71. ... The fairer approach is for this Court to dismiss the certification application and allow

the plaintiff to proceed with a representative action.

72. [The plaintiff's submission that a class proceeding fosters access to justice by spreading the costs of litigation amongst class members] ... demonstrates once again the sheer injustice that is being caused to the majority of the **Aboriginal** Collectives who not only do not want to proceed with this litigation but would be asked to pay for the costs of the litigation that is contrary to their very interests. Nothing could be more unfair than that.

[241] To begin with, a declaration against the Province granted in a representative action brought by two people is no different than a declaration granted in a class proceeding where there are thousands of plaintiffs. If the plaintiff wants to "shut down fish farming" (which in any event misconstrues the common issues), this detriment to the other collectives would occur regardless of the form of proceeding utilized.

[242] Secondly, the class members are not being asked to pay for this litigation: Schedule B to the Notice of Motion clearly provides that counsel fees and disbursements will come out of any ultimate settlement or award of damages on a contingent basis, unless class members enter into individual arrangements with counsel. If class members opt-out, they will have no share in the award, so nothing will be ventured or lost.

The Proposed Intervenor

7 The BCSFA describes itself as a provincial industry organization that represents the interests of the companies that work on salmon farms and that provide services and supplies to salmon farms in British Columbia. Its Executive Director, Mary Ellen Walling swore that the British Columbia salmon farming industry contributed to 2,800 jobs in the province and to product values of over $520 million for fin fish in 2008.

8 The applicant's Executive Director also swore that its salmon farm members have confidential agreements with British Columbia First Nations, including some in the Broughton Archipelago. These relationships were discussed by the chambers judge at paras. 93-99:

[93] One of the First Nations listed in Chief Chamberlin's affidavit, the Mamalilikulla, operates twelve fish farms in the Broughton Archipelago. Mamalilikulla is associated with Marine Harvest Canada Inc., a corporation engaged in the business of selling farmed salmon grown at various marine net pen sites located on the British Columbia coast between Klemtu and Duncan. In an affidavit filed by the Province, Clare Backman, Director of Environmental Relations for Marine Harvest Canada Inc., deposes that:

1. he is "aware that some or all of the Da'naxda'xw, Kwakiutl, Mamalilikulla, and Tlowistsis First Nations are in fact supporting of salmon farming operations in their territories ...";
2. Marine Harvest has an agreement with the Kwakiutl First Nation that provides for the support of the latter for salmon farming in the Kwakiutl First Nation's traditional territory. This agreement provides the Kwakiutl with employment and business opportunities;
3. Marine Harvest has a contract for service agreement with a corporate entity called Qwe'Qwa'Sot'Em Faith Aquaculture Ltd. under which the latter provides services, including those provided by the owner of the vessel "MV Atlantic Harvester", owned and operated by the Chief of the Mamalilikulla-Qwe'Qwa'Sot'Em band;
4. Marine Harvest "has support of the following other First Nations through current written agreements: i) Kitasoo Eai'xais First Nation (BC central coast); ii) Quatsino First Nation

(Northwest Vancouver Island) iii) Gwa'Sala-Nakwaxda'xw First Nation (Northeast Van. Island); iv) Homalco (Xwemalhkwu) First Nation (Lower Johnstone Strait/ Campbell River)" [the latter two First Nations are listed in Chief Chamberlin's affidavit];

5. Marine Harvest is "actively developing agreements with the following First Nations: v) We Wai Kai Indian Band (Johnstone Strait/Quadra Island); vi) Wei Wai Kum Indian Band (Johnstone Strait/Campbell River); vii) Kwiakah Indian Band (Johnstone Strait/Phillips Arm); viii) Tlatlasikwala First Nation (Queen Charlotte Strait/Port Hardy); ix) K'omoks Nation (Vancouver Island/Northern Georgia Strait)" [the above, except the Tlatlasikwala First Nation, are listed in the Walker affidavits as First Nations that claim **aboriginal** rights in the Broughton Archipelago].

[94] In an affidavit filed by Canada, Chief John Smith of the Tlowistsis tribe, and Chief of the Band Council of the Tlowistsis Indian Band, deposes that:

1. the Tlowistsis traditional territory includes the Broughton Archipelago;
2. the Broughton Archipelago forms a fundamental part and is a core area within the tribe's claimed territory;
3. the tribe has an economic interest in the aquaculture industry within the Broughton Archipelago, and supports salmon aquaculture.

[95] It is apparent that some of the First Nations which claim **aboriginal** fishing rights in the Broughton Archipelago, and now have economic interests in fish farming, have not always been unqualified supporters of the industry. In an affidavit filed by Canada, George Bates, a Treaty Negotiator with the Department of Fisheries and Oceans, deposes that:

4. The Kwakiutl Territorial Fisheries Commission (the "KTFC"), was formed in 1994 with 15 member First Nations/Bands. The member First Nations/Bands were: Gwa'sala-Nakwaxda'xw, Da'naxda'xw/Awaetlala, Mamlilikulla, Quatsino, Tlatlasikwala, Namgis, Kwakiutl, Gwawaenuk, Tsawataineuk, Kwicksutaineuk-Ak-kwaw-Ah-Mish, Tlowitsis, Kwiakah, Wei Wai Kum. We Wai Kai and the K'omoks First Nation.
5. The role of the KTFC was to represent the member First Nations in Fisheries related matters including the management of their food, social and ceremonial fisheries within their territory.
6. The Mamalilikulla left the KTFC in 2003 because of the KTFC's "zero tolerance policy" regarding aquaculture. ...

[96] The affidavit of Gavin Last sworn December 24, 2009, and filed by the Province, includes material that indicates a qualified support for fin fish aquaculture by some of the above-named First Nations, for example:

1. letter from the Mamalilikulla-Qwe'Qwa'Sot'Em band to the Provincial Ministry of Land and Water, dated July 8, 2005, approving a document of that ministry entitled "Amendment to Fin Fish Facility" subject to the condition "that no environmental damage is done to the area and that all cultural areas be respected";
2. letter from the Mamalilikulla- Qwe'Qwa'Sot'Em band to the Province's Ministry of

Agriculture and Lands dated August 18, 2008 stating that "we have no concerns regarding the five year fin fish aquaculture reissues" for numerous sites operated by Marine Harvest Canada Inc., reserving "the right to raise objections ... if we discover impacts on our rights or interests that we had not foreseen";

3. reasons for the decision of the British Columbia Supreme Court in *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283, in which the second respondent was Marine Harvest Canada, which reveal, in para. 30, the concern of the Homalco over potential adverse impacts on wild salmon arising from the introduction of Atlantic salmon, including "[t]he potential spread of sea lice from farmed Atlantic salmon to migrating wild Pacific salmon smolts causing significant declines in those stocks". This concern as indicated in para. 60 of the reasons, relates to "concerns about sea lice infestation in the Broughton Archipelago in June 2001".

[97] Exhibits to the affidavit of Shelley Meadows, Aquaculture Referral Officer, Department of Fisheries and Oceans, sworn January 5, 2010, include:

1. letter dated May 8, 2000 from Chief Robert Sewid, on behalf of the "Wiumasgum-Qwe'Qwa'Sot'Em First Nation" confirming their consent to relocation of an aquaculture site operated by Stolt Sea Farm Inc., on condition that "your company will take all measures that are necessary in order to protect natural fish species";
2. letter dated April 27, 2001 from Chief Robert Sewid from the Mamalilikulla-Qwe'Qwa'Sot'Em band to Stolt Sea Farm Inc., stating that the band has no objection to the relocation of its fish farm operations. It is apparent that this reference to the Mamalilikulla-Qwe'Qwa'Sot'Em band is to the same **aboriginal** collective as the Wiumasgum-Qwe'Qwa'Sot'Em First Nation mentioned in Chief Sewid's May 8, 2000 letter.

[98] The affidavit of Shelley Jepps, Shellfish Aquaculture Officer, Department of Fisheries and Oceans, sets out the following:

1. letter from Tlowistsis First Nation to Grieg Seafood B.C. Ltd. dated March 11, 2005 expressing its wish to pursue opportunities in fin fish aquaculture, containing an assertion that "they have also assured us that the work being undertaken by them or their consultants will not harm our territory in any way ...";
2. letter from Gwa'Sala-Nakwaxda'xw council dated June 30, 2009 approving of four applications from Marine Harvest Canada for a "commercial fin fish amendment", in which the right to raise objections "if we discover impacts on our rights or interests that we had not foreseen" is reserved.

[99] The qualified engagement of these First Nations in fish farming is explicitly on terms that reserved to the participants their grounds to object if the fish farm industry results in an infringement of their common law **aboriginal** rights. There is, in my view, no inconsistency with their taking advantage of economic opportunities that are not rights-based, and preserving their ability, if the scheme in which they participate is proven to infringe upon traditional rights, to object.

9 Ms. Walling also deposed that the applicant and its members have participated in various research projects in over twenty years of its existence.

10 The applicant contends that the decision of the chambers judge, under appeal, has caused significant concern and uncertainty amongst its membership regarding how it may affect their operations and relationships with First Nations both within and outside the Broughton Archipelago and that the interests of its members and their perspective will not be adequately represented by the government appellants.

11 The applicant seeks intervenor status on the appeal to provide its perspective on two of the questions raised in the factums of both appellants:

a) whether there is an identifiable class; and
b) whether the claims of the class members raise common issues.

12 On the first question, the applicant advises that it will support the position of both appellants, but maintains that it will assist the Court in the interpretation of s. 4 of the *Class Proceedings Act* by approaching the analysis from a different perspective, arguing that **aboriginal** rights are collective and held by the collective "**aboriginal** peoples" and not by an individual person. Thus, it proposes to argue, class actions designed as a method for individuals to collectively advance their claims do not lend themselves to the pursuit of collective claims.

13 On the second question, the applicant will also support the appellants, but maintains that it will assist the Court with its membership's perspective concerning the utility of the inquiry framed by the common questions to be answered if the class proceeding is to proceed.

Discussion

14 The applicant's motion is supported by Her Majesty the Queen in Right of British Columbia, but opposed by the plaintiff. The plaintiff's opposition is stated to be because the certification order was a matter of procedure only, the applicant does not have an interest in the decision under appeal, and any interest that it may have in the case itself can be addressed once the case is underway.

15 In addition, the plaintiff contends that because the defendants have undertaken such an extensive attack on each element of the certification granted, any interests of the applicant will be well represented by the defendants.

16 To obtain intervenor status, an applicant must generally have a direct interest in the outcome of the appeal, or be able to make useful contribution or bring a perspective on the issues that differ from the parties: *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396 at para. 7.

17 In *R. v. N.T.C. Smokehouse*, [1991] B.C.J. No. 2082 (C.A. chambers), Proudfoot J.A. described a direct interest as "arising when legal rights of the proposed intervenor will be affected or when any additional legal obligations would be imposed on the proposed intervenor resulting in a direct prejudicial effect".

18 I am not satisfied that the applicant can be said to have a direct interest in the limited appeal. The appeal will either cause the action to be decertified, certified as it presently is, or certified based upon a different class and/or to answer different common questions. None of these outcomes will directly affect the applicant or its members. It is only if the action remains certified that it may directly affect the interests of the applicant and its members.

19 Where an applicant does not have a direct interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a public law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or "perspective" that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark*, 2001 BCCA 264 at para. 6, the proposed intervenor is likely to "take

the litigation away from those directly affected by it": see *R. v. Watson*, 2006 BCCA 234 at para. 3.

20 I am satisfied that the outcome of the appeal has a dimension that may legitimately engage the interests of the applicant and its members, and will therefore consider whether the applicant's perspective on the two questions that it wishes to address may be of assistance to the Court.

21 In *MacMillan Bloedel Ltd. v. Mullin* (1985), 66 B.C.L.R. 207 (C.A. chambers), Mr. Justice Esson described a circumstance where the application for intervenor status was not really opposed. He granted the application observing at para. 8 that the litigation was "one in respect of which the applicants have a special interest and concern and in respect of which they are in a position, by reason of the long and full consideration which they have given to the issue, to make a valuable contribution".

22 I do not consider that the applicant has a special interest and concern in respect of which, by reason of the long and full consideration which they have given to the issue, they are in a position to assist on the question of an identifiable class, nor that their assistance on that issue will make a valuable contribution to the resolution of that issue. I conclude that the Court can fully determine that matter without the need for any assistance from the applicants.

23 I view the ability of the applicants to assist on the second question of whether the claims of the class members raise common issues quite differently. I am satisfied that with respect to this question, the applicant's experience in aquaculture in general and salmon farming in particular, has provided it with a special interest and concern, in respect of which it is in a position, by reason of the long and full consideration which it has given to the issues related to those pursuits, to make a valuable contribution with respect to the common issues that the class members' claims can properly raise.

24 I would therefore grant leave to the applicants to intervene on the issue of which common issues that the class members' claims can properly raise. The intervenors will be at liberty to deliver a factum which is to be filed and served by 4 p.m. on July 29, 2011. Given their limited participation, the factum shall not exceed 15 pages in length. Whether the intervenors will be permitted to make oral submissions on the appeal will be determined by the division of the Court that will hear the appeal.

C.E. HINKSON J.A.

cp/e/qlrds/qljxr