

CANADA / JUDGMENT

Canada Mink Breeders Association v. HMTQ

2022 BCSC 579

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2022 BCSC 579 Canada Mink Breeders Association v. HMTQ

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Canada Mink Breeders Association v. HMTQ,

2022 BCSC 579

Date: 20220304

Docket: S221188

Registry: Vancouver

In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Between:

Canada Mink Breeders Association,

British Columbia Mink Producers Association, C&A Mink Ranch Ltd.,

Dargatz Mink Ranch Ltd., Dogwood Fur Farms Ltd.,

Engebretson Fur Farm Ltd., Rippin Fur Farm Ltd.,

and Williams Fur Farm Ltd.

Petitioners

And

Her Majesty the Queen in Right of the Province of British Columbia, and Minister of Agriculture,
Food and Fisheries

Respondents

Before: The Honourable Madam Justice C. Ross

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners appearing by videoconference:

S. Nelligan

M. Power

Counsel for the Respondents appearing by videoconference:

G. Morley

C. Bant

Place and Date of Hearing:

Vancouver, B.C.

March 4, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 4, 2022

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[1] THE COURT: I am prepared to give reasons with respect to the application for interim relief.

Introduction

- [2] The present application seeks interim relief from compliance with certain regulations, ancillary to a larger challenge to the regulatory amendments at issue.
- [3] The petitioners seek judicial review pursuant to the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA] of regulations enacted against the background of public health measures undertaken to respond to COVID-19. The regulations at issue were directed in particular to mink farming.

Background

- [4] By way of overview, as Dr. Brian Emerson, the Deputy Provincial Health Officer, with the Office of the Provincial Health Officer, Ministry of Health, deposed, COVID-19 is a serious viral disease that is currently a global pandemic. The infectious agent is SARS-CoV-2, which is a coronavirus. COVID-19 became a human epidemic in December 2019. The COVID-19 pandemic was declared a public health emergency in British Columbia on March 17, 2020.
- [5] Viruses evolve through mutation. When mutations make a virus more transmissible, virulent, or less amenable to medical intervention, they are called "variants of concern". Two such variants of concern are the Delta variant and the Omicron variant, both of which are more transmissible than previous variants. Whenever there is sustained viral transmission, there is a risk that a variant of concern will emerge.
- [6] Viruses spread through host populations, which include human, farmed, and wild animal populations. There is a risk of transmission from humans to farmed animals, from farmed to wild animals, and from animals to humans.
- [7] Farmed mink is very susceptible to SARS-CoV-2. Transmissions from humans to mink and from mink to humans are relatively easy and have been documented repeatedly in British Columbia and elsewhere. The risks associated with this susceptibility include the following:
 - a) infected mink could result in infection of workers at the mink farms, which could lead to further transmission in human populations;
 - b) mink escapes could result in infection in wild animals, which could pose a risk of potential transmission from wild animals to humans; and
 - c) a subsequent mutation could create a variant of concern that would pose a threat to public health and could undermine the efficacy of vaccination and other medical interventions.
- [8] The B.C. Centre for Disease Control has worked with provincial and federal partners to assess the risk of the COVID-19 virus in farmed mink. This work both preceded and followed an outbreak in mink on three mink farms in the Fraser Health Region. Throughout the course of the epidemic, mink farmers have worked cooperatively with the provincial health officials to protect the health, safety, and well being of their employees, their animals, and the members of the community. To this end, strict biosecurity measures have been adopted

by the mink farmers in the province.

- [9] To date, no highly concerning mutations from evolution in mink hosts have been documented in British Columbia. A risk assessment conducted in 2021 concluded that the risk of the emergence and circulation of a variant of interest in the community due to virus evolution in mink was minor to moderate at the local and regional level. However, there was a high degree of uncertainty around the final risk estimates.
- [10] The risk of such a development remains. Meanwhile, there have been developments since that risk assessment was conducted. Notably, the Omicron variant has emerged and become the dominant strain in the province. Because even fully vaccinated humans can become infected with that strain and can pass the disease on, fully vaccinated workers are a potential source of viral transmission to mink.
- [11] On November 26, 2021, by Order in Council No. 639, the Province amended provisions of the Fur Farm Regulation, B.C. Reg. 8/2015, and the Violation Ticket Administration and Fines Regulation, B.C. Reg. 89/97. In particular:
- a) section 4.1(2) of the Fur Farm Regulation was amended to limit the maximum number of mink to the number of breeding mink stock reported as being kept on the farm on July 26, 2021;
 - b) section 11.6 of the Fur Farm Regulation was added to prohibit mink farmers from breeding mink kept on the farm or acquiring new mink to the farm, and requires the farmers to slaughter any kits born on the mink farm;
 - c) subsections (b.1) and (h.3) were added to s. 19 of the Fur Farm Regulation, creating offences with respect to the amended s. 4.1(2); and
 - d) Schedule 2 of the Violation Ticket Administration and Fines Regulation was amended to include the penalties for the offences related to ss. 4.1(2) and 11.6 of the Fur Farm Regulation.

(Collectively, the "Regulation Amendments").

- [12] One aspect of the Regulation Amendments that is of particular consequence in relation to the present application is the prohibition against breeding of mink.

This Proceeding

- [13] The petitioners are:

- a) the Canadian Mink Breeders Association (CMBA), which is a non-profit organization of Canadian mink farmers whose mandate is to provide leadership in research, best farming practices, marketing, and promotion of the fur farming sector, both nationally and internationally;

- b) the British Columbia Mink Producers Association (BCMPA), which is an association of mink producers in the province; and
- c) the C&A Mink Ranch Ltd., Dargatz Mink Ranch Ltd., Dogwood Fur Farms Ltd., Engebretson Fur Farm Ltd., Rippin Fur Farm Ltd., and Williams Fur Farm Ltd., who are collectively referred to as the "Farm Petitioners", are all corporate entities incorporated pursuant to the laws of British Columbia, and are members of the BCMPA. The Farm Petitioners are all engaged in the business of mink farming and are all holders of valid fur farm licences issued pursuant to the Animal Health Act, S.B.C. 2014, c. 16 [AHA].

[14] In these proceedings, the petitioners are seeking a declaration that the Regulation Amendments at issue are of no force and effect. They advance the following grounds:

- The Regulation Amendments are ultra vires the province, in that they improperly tread on the exclusive federal jurisdiction to regulate trade and commerce under s. 91(2) of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, and, further, that they are beyond the scope of the authority granted under the AHA;
- The Regulation Amendments are unreasonable for being based on an internally incoherent and irrational chain of analysis, and unjustified in light of the facts. The Province chose to permanently shut down an industry without having a clear understanding of the risks to public health actually posed by mink farming now and in the future, yet permitted mink farmers to retain live mink on the farms despite the "alleged" risk;
- The Regulation Amendments are unreasonable as they permanently shut down the mink farming industry before the Province had a clear understanding of the risk that mink farming in fact poses; and
- The Province breached its duty of procedural fairness to the petitioners, specifically the individual mink farmers whose entire livelihood is directly and negatively impacted, in failing to consult with them before reaching the ban decision.

[15] In the present application, the petitioners seek an interlocutory order suspending the prohibition on breeding or acquiring mink and the requirement to slaughter kits born on mink farms, pending the hearing of the petition on its merits.

[16] The petitioners submit that any effort to retain breeding herds without the benefits of breeding would result in massive expense with slim or no chance of recovery. On the other hand, the petitioners argue that the impact of the interim stay on the public would be nominal as a consequence of a significant cull that was undertaken to reduce the numbers of mink, such that if breeding is allowed to occur, the total population of mink would be well within the number that the Province, through s. 4.1(2), has already implicitly deemed to be acceptable.

- [17] The timing, the petitioners submit, is critical because mink breeding occurs only once a year during the month of March. The farm petitioners have deposed that if they were to delay the start dates of the breeding season beyond March 10th, they will not be able to track the minks' heat cycle or attempt to mate mink a sufficient number of times to ensure conception and implantation, and thus will not be able to produce a viable crop this season.
- [18] The respondents submit that the petitioners have not met their burden under any of the tests required for an interim stay and seek to have the application dismissed.

Preliminary Issue

- [19] There is a preliminary issue. The petitioners seek an interim injunction and named as respondents in the petition the Queen in Right of the Province and the Minister of Agriculture, Food and Fisheries. The respondents submitted that both the respondents named and the relief sought are not appropriate.
- [20] In the respondents' submission, the appropriate respondents in a judicial review of a cabinet regulation are the Lieutenant Governor in Council and the Attorney General. Further, they submit it is not correct to name the minister or ministry responsible for that area of policy or the Crown in a judicial review of a regulation, since the minister was not the decision maker. It is also not correct to ask for an injunction against the Crown or the minister acting within the scope of their duties in relation to a non-constitutional challenge, citing *Maxwell's Plumbing and Heating Ltd. v. British Columbia*, 2017 BCCA 285 at para. 24.
- [21] The respondents submit that the Lieutenant Governor in Council can be subject to an interim order under s. 10 of the JRPA staying the operation of the impugned regulation. This is not an injunction but would be an effective relief for the petitioners if they are able to establish the merits of interlocutory relief.
- [22] The Attorney General proposes to proceed as if the petitioners had named the correct respondents and had asked for an interim stay under s. 10 of the JRPA.
- [23] The parties agreed to proceed on the basis proposed by the respondents and that approach is acceptable to the Court. In the result, the question for the Court is whether the test for an interim stay under s. 10 of the JRPA has been met.

Legal Principles

- [24] The test for a stay of an exercise of statutory power of decision under s. 10 of the JRPA is the same as the test for an interlocutory injunction. A stay is available where the applicant demonstrates that there is a serious question to be tried, that irreparable harm will result if a stay is not granted, and that the balance of convenience favours granting a stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334 [RJR].

- [25] With respect to the first stage, whether there is a serious question to be tried, the standard to be met is not high. The analysis is similar to that employed in an application to strike pleadings. However, some reference to evidence is available.
- [26] Irreparable harm refers to the nature of the harm and not its magnitude. It is a harm that either cannot be quantified in monetary terms or which cannot be cured: RJR at 315. Examples of such harm include where one party would be put out of business by the court's decision, or suffer permanent market loss or irrevocable damage to its business reputation. There must be a sound evidentiary foundation to support a claim that irreparable harm will result, see *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 60 [*Vancouver Aquarium Marine Science Centre*].
- [27] The balance of convenience is determined by comparing the irreparable harm to the applicant if the relief is not granted with the irreparable harm to the respondent or the public interest if it is granted and the respondent ultimately succeeds on the merits. There is a presumption that a duly enacted but challenged law promotes the public interest, and only in clear cases will interlocutory relief be granted in advance of a complete review of the merits, see *Harper v. Canada (Attorney General)*, 2000 SCC 57 at para. 9; *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 96.
- [28] The same presumption that duly enacted regulations are directed at the public good and serve a valid public purpose applies to interlocutory relief in challenges that the regulations are ultra vires their enabling statutes, see *Grain Farmers of Ontario v. Ontario Ministry of the Environment and Climate Change*, 2015 ONSC 6581 at para. 25, *aff'd* 2016 ONCA 283.

Discussion

Serious Issue to be Tried

- [29] The petitioners submit that the petition raises serious issues regarding the scope of the Province's decision-making power in extinguishing an entire agricultural industry and the reasonableness of such a decision. The petitioners submit that the ban decision of the Regulation Amendments improperly treads on the federal jurisdiction over the regulation of interprovincial and international trade and commerce under s. 91(2) of the Constitution Act, as their true nature, character, purpose, and effect are an attempt by the Province to restrict international and interprovincial fur trade.
- [30] Counsel submits that the dominant purpose of the Regulation Amendments is to sunset the mink farming industry and dissociate the fur-trade industry from British Columbia, and not the management of animal and public health. Although the Province has the power over property and civil rights under s. 92(13) of the Constitution Act, this only grants the Province the authority to regulate trade and commerce within the province.

- [31] The international and interprovincial sale of pelts are an integral part of mink farming, and mink farming subsists on pelt sales. The only options for the Farm Petitioners to bring their pelts to market are outside the province. Counsel submits that a ban on mink farming therefore amounts to a ban on interprovincial and international mink fur trade and, as a result, is an improper interference with federal jurisdiction under s. 91(2). The Regulation Amendments consequently are ultra vires.
- [32] Further, the purported authority for the regulation amendment of the AHA are ss. 93(1)(d), 95, 100(3) and (6), and 101(7). The petitioners submit that there is no authority under these provisions to impose a complete ban on a regulated activity, that being mink farming itself.
- [33] The respondents submit that the petitioners have failed to advance a serious question to be tried, and thus fail at the first stage of the RJR analysis. The respondents submit that the fact that a product is largely or even entirely sold interprovincially or internationally has no effect on the constitutional jurisdiction over the circumstances of its production.
- [34] In the present case, the respondents submit that the dominant purpose and effect of the AHA is to protect animal health and human health by empowering the regulation of persons responsible for animals in the province, and that the dominant purpose and effect of the impugned regulations is to prohibit mink breeding in British Columbia to reduce the risk of zoonotic spillback (i.e., evolution of a variant in an animal host species that subsequently infects humans again) in farmed mink populations leading to a variant of concern of the SARS-CoV-2 virus.
- [35] In the respondents' submission, these are clearly matters in relation to s. 92(13), property and civil rights, or s. 92(16), a matter of a local or private nature. The respondents submit that, as the Supreme Court of Canada has stated in *Schneider v. The Queen*, [1982] 2 S.C.R. 112 at 135-136, public health falls under provincial competence.
- [36] Accordingly, in the respondents' submission, it is not arguable that preventing an activity in the province of British Columbia that creates a risk of an outbreak of disease in the province is in relation to international or interprovincial trade in commerce. Accordingly, in the respondents' submission, the petitioners' argument is doomed to fail and no stay or injunction should be granted on that basis.
- [37] The respondents advance a similar argument with respect to the petitioners' argument concerning the AHA, submitting that there can be no dispute that mink farming is a regulated activity, so to succeed in showing that the impugned regulation is outside the scope, the petitioners would have to establish that breeding is not a matter in respect of mink farming. The respondents say this does not raise a serious question to be tried. The phrase "in respect of", according to the Supreme Court of Canada in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39, is "the widest of any expression intended to convey some connection between two related matters." By all accounts, breeding is highly connected to mink farming.

- [38] The respondents submit further that there is no right to procedural fairness for legislative decisions of cabinet citing *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at 756-757 and, in any event, submit that the petitioners did have the opportunity to address the issues.
- [39] Finally, with respect to the petitioners' argument that the Regulation Amendments do not in fact promote the objectives of the AHA, the respondents note that the court's analysis of the vires of regulations does not involve assessing the policy merits of the regulations to determine if they are necessary, wise, or effective, nor inquiring into the underlying political, economic, social, or partisan considerations, citing *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at 111, and *Katz Group Canada Inc. V. Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras. 25-28.
- [40] In my view, with respect to the first stage of the RJR analysis, the issue of whether a prohibition of a regulated activity falls within the scope of the regulation in respect of that activity is a question that meets the serious question test. That is sufficient to meet the burden at the first stage. As this is an application for interim relief, I do not intend to express any opinion with respect to the balance of submissions concerning the arguments advanced at this stage.

Irreparable Harm

- [41] The next question is irreparable harm. In that regard the Farm Petitioners submit that they are suffering and will continue to suffer irreparable harm should the ban on breeding stand pending resolution of the petition. Counsel submits that the harm includes, but is not limited to:

- losses related to the ongoing ban on breeding which will result in:
 - o an inability to maintain viable herds beyond the 2022 cycle with no kits being born to replace harvested animals and to provide breeding stock for the 2023 cycle;
 - o the loss of specific breeding stock with specific lineage and genetics developed over time with certain farms, including unique fur quality and fur colourations specific to those farms, as no breeding can occur to maintain the stock of those mink; and,
 - o the inability to resume operations for 2023 farming cycle, should the Court find in their favour as a result of the breeding ban and the inability to maintain a viable herd; and
- losses in association with the cessation of mink farming in the future including:
 - o the decommissioning of farms and equipment;
 - o the transition of mink farming properties to new businesses, including the requirements of new facilities, equipment, and retraining of employees;
 - o loss of good will and reputation with farm suppliers and purchasers of fur pelts;

o losses related to the inability to meet existing obligations such as bank loans and mortgages, as these obligations were based on the ability of the borrowers to earn money through mink-farming operations; and

o interference with the Farm Petitioners' economic relations and lost profits.

- [42] The Farm Petitioners submit that they will suffer, failing assistance of the Court, irreparable harm in the form of complete disruption to their business and livelihood, disruption of their dealing with third parties including buyers and farm suppliers, the loss of employees, and the loss of goodwill.
- [43] Counsel submits that the complete shutdown of an industry and consequent losses, including the inability to perform one's chosen occupation, cannot be rectified by an award of monetary damages. Counsel submits that it is impossible to quantify the losses under the Regulation Amendments in monetary terms. Even if the Regulation Amendments are ultimately invalidated, with a ban on breeding in place the Farm Petitioners will not be able to sustain their herds and breeding stock following the 2022 farming cycle. The loss of specific lineages, important genetic lines, and unique colourations cannot be remedied in monetary terms.
- [44] The respondents submit that the petitioners have failed at the second stage to meet the test of irreparable harm. First, counsel submits that the claims are, in essence, business loss claims which are ultimately financial in nature and hence compensable in damages. Further, and in addition, the petitioners, in the respondents' submission, have failed to provide the necessary evidence that they will in fact be harmed financially relative to a situation in which mink breeding continues for an additional season. There must be an evidentiary foundation beyond speculation that irreparable harm will result if interlocutory relief is not granted, see *Vancouver Aquarium Marine Science Centre* at para. 60. In this case, the respondents submit the petitioners have put forward no evidence that mink farming would be profitable if an additional mink breeding season were to take place, and they have not compared that eventuality with insurance under federal and provincial programs.
- [45] I have concluded that the petitioners have, for the purpose of this present application, demonstrated irreparable harm, in particular in relation to the loss of breeding stock. Joseph Williams is a ranch manager for Williams Fur Farm Ltd. and the current president of the petitioner BCMPA. In his first affidavit sworn February 15, 2022, at paras. 86-94, he sets out the very long process of selective breeding that is represented by the breeding stock, and detailed the many obstacles to replace such stock.
86. The COVID-19 restrictions imposed by the public health orders caused stress when raising the mink crop in 2020 and in 2021.

87. The mink farming ban has caused irreparable harm to our breeder herd. It is impossible to ban mink fur farming under a transition model, or slow phase out process, as mink farming occurs on a yearly cycle. The breeding herd is immediately rendered valueless upon farming being banned, as any mink that remained alive after the time of the ban without the potential to breed becomes strictly a cost. Any effort to retain the breeding herd, without the benefit of breeding, would incur massive expense.
88. If a herd is lost, it could take years to produce the quality in each colour of mink that the market is looking for. Even if a certain colour could be purchased, a seller would never sell their best quality or top producing adult females.
89. Purchasing mink from more than one farm is very dangerous on a biosecurity level. The chances of getting mink specific diseases when buying mink from another farm is a serious concern to producers. Whenever even a few mink are bought from another farmer, they must be quarantined and tested and watched for infection or diseases. It would be difficult to do this with so many mink coming from different farms around North America.
90. If a herd were to be replaced, most mink would need to be purchased from the USA. That requires border controls, government permissions and veterinarians. It is very difficult to fly mink on cargo jets because of the smells, and I am not aware of any airline that does that anymore. This would require special cages for transport by law that would have to be built by producers first, and it would require many trips by plane or by truck. This would be a large financial investment just for the transportation of the animals.
91. In the past, even when 200 breeding males from another farm were purchased for genetic purposes, the costs associated with transportation are usually the same as the cost of what the animal was.
92. As such a specialized industry, it would not be possible to re-stock the herds that were in British Columbia over one year. It would take multiple years to source the amount of quality breeding females and males that would be needed. Farms in Canada have, on average about 3,000 breeding females.
93. Even if mink could be replaced from other farms, those other farms would not sell their highest quality mink. For example, if a pastel colour mink was purchased from another farm it would not be their palest one, which would be the most desirable colour. It would take four to six years, or possibly longer, to work on refining the quality and the colour of mink that could be purchased on the market.
94. The employees of the mink farming industry are also lost due to the ban. Even in one year, the industry in BC will be forever impacted as the feed supply and trained employees will all move on. The specialized nature of mink farming means that there is no skilled and trained workforce that can replace our employees. We would be forced to train an entire new staff to handle a new breeding. A trained staff would require multiple years and seasons to train, and 100,000 mink could not be raised with 90% new employees. This would be a massive

animal welfare issue and most likely a total crop failure.

- [46] It is clearly not a simple matter of going into the market and replacing the stock in the event that the petitioner should ultimately succeed and, in my view, this satisfies the test with respect to the second stage.

Balance of Convenience

- [47] The third stage is balance of convenience. With respect to that, the petitioners submit that the balance of convenience favours the relief sought. Counsel notes that it is likely that some of the Farm Petitioners will not be able to resume mink farming operations, even if ultimately successful, in the absence of interim relief. Moreover, by not allowing breeding in 2022, the Farm Petitioners, if successful, will have to source additional mink from out of the province and this will create unnecessary risk of possible exposure to the SARS-CoV-2 virus.

- [48] The industry has implemented stringent safety measures in collaboration with provincial authorities, such that counsel submits, that the measures undertaken are sufficient to contain the infection and the risk to the public. Any risk of transmission, in the submission of the petitioners, can be and has been managed properly and is outweighed by the benefits to the local economy and associated jobs.

- [49] Section 4.1 of the Fur Farm Regulation provides:

4.1(1) The chief veterinarian must not issue a new licence or renew a licence permitting mink to be kept on a fur farm

- (a) on which no mink have been kept previously, or
 - (b) in the circumstances described in section 3 (2), except as authorized under subsection (3) of this section.
- (2) If the chief veterinarian renews a licence permitting mink to be kept on a fur farm, the maximum number of mink that may be kept under the licence is the lesser of the following:
- (a) the maximum number imposed under section 4 (1) (b);
 - (b) the number of breeding mink stock reported as being kept under the order made under the Public Health Act by the provincial health officer on July 26, 2021 and entitled "MINK FARMS -- July 26, 2021";
 - (c) the number reported, on the application for the licence, as the number of mink being kept at the time the application was made
- (3) For the purposes of subsection (1) (b), the chief veterinarian may, on renewing a licence permitting mink to be kept on a fur farm, permit the licensed fur farmer to enlarge or make significant changes to structures on the fur farm if
- (a) the chief veterinarian receives, with the renewal application,

- (i) relevant construction plans,
 - (ii) the statement referred to in section 3 (3) (d), and
 - (iii) any other information the chief veterinarian requires, and
- (b) the chief veterinarian is satisfied that the enlargement or changes are not being made for the purpose of accommodating a number of mink greater than the maximum number permitted under subsection (2).

[50] The petitioners note that on July 26, 2021, there were 270,400 mink in the province. Counsel notes further that there currently are only about 10,825 mink on farms in the province, roughly 20 percent of the number of breeding stock usually in the province at this time of the year. If all of these mink were to be bred this year, they would produce approximately 46,500 kits, meaning that there would be a total of 48,025 mink in the province.

[51] The petitioners submit that the Province already determined that the number of mink in the July 2021 population was an acceptable risk. Hence, if the Farm Petitioners were permitted to breed their herds this year, the potential number of mink that would be in the province would be approximately one-fifth of the total number of mink that were in the province on July 30, 2021, which the petitioners submit is well below the acceptable risk limit.

[52] Counsel notes further that the AHA provides orders for the destruction of animals where the necessary preconditions have been met, notably where the Chief Veterinarian reasonably believes that preventive measures would be inadequate to protect animal health or the public health in relation to diseases that are transmissible from animals to humans. No such order has been made in the present case. The petitioners submit this is strong support for the contention that the preventive measures undertaken are sufficient to protect the public health.

[53] The petitioners submit further that, while it is the case that risk increases with the number of mink, the number of mink, even if breeding is permitted this breeding cycle, would remain far below the level that was in the province at the time of the announcement of the measures. That number must be taken as the number that the Province accepted as within an acceptable margin of risk. Thus, to permit breeding would not increase the risk beyond that acceptable margin.

[54] The respondents submit that the Court can take judicial notice of the existence of SARS-CoV-2 and the devastating effects of COVID-19. Moreover, it is clear that the evolution of a new variant of concern leading to a new wave of COVID-19 could be a potentially catastrophic outcome.

[55] Mink is the leading domesticated animal reservoir of the virus. While no variant of concern has occurred, that remains a possibility. There has been no breeding season in which mink have been exposed to the virus with Omicron as the dominant variant. It is not possible to say what the epidemiological characteristics could be of a descendent of Omicron that evolved in mink populations.

[56] Omicron is now the dominant variant in the human population and is highly transmissible. Even vaccinated workers are at risk of transmission to mink. Counsel submits that given the possibility of a catastrophic result and the deference that is owed to the public authority in such circumstances, the balance of convenience does not favour the petitioners.

[57] In RJR, the Court noted at 346, 348-349:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts the licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

[58] In the present circumstances, I agree with the respondents that the pandemic requires proactive and speedy action by the government and that sometimes this will entail significant economic consequences. There is a risk of the evolution of a new variant of concern leading to a new wave of COVID-19 which could be a potentially catastrophic outcome. While the likelihood of that risk materializing might be low, that likelihood is subject to many uncertainties. None of the measures currently undertaken can be said to have eliminated that risk. Moreover, this is a situation in which the deference to the government authority referred to in RJR should be given. In other words, I must assume that the regulation is directed to the public good and serves a valid purpose. Moreover, I must

assume that it has the effect of promoting the public interest.

[59] On balance, I have concluded that in light of the deference owed to the government's decision making at this stage, the balance of convenience does not favour the petitioners. The determination of the arguments advanced, both generally in the petition and in the context of the present application, will require a full and careful evaluation which will take place when the matter is heard on the merits.

[60] In the result, the application is dismissed without costs.

"C. Ross J."

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