Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

SEP 0 2 1997

T-1497-97

BETWEEN:

CHIEF ARTHUR M. MANUEL and COUNCILLORS BONNIE ANDREW, RICHARD MANUEL, PATRICK ADRIAN, FRANK DENAULT and ROGER SAULS, each on his or her own behalf and on behalf of the members of the NESKONLITH BAND,

Applicants,

- and -

THE ATTORNEY GENERAL OF CANADA,

Respondent,

FISHERIES COUNCIL OF BRITISH COLUMBIA, SPORTS FISHING INSTITUTE OF BRITISH COLUMBIA, B.C. WILDLIFE FEDERATION, MARINE TRADES ASSOCIATION, CAMPBELL RIVER GUIDES ASSOCIATION,

Intervenors.

REASONS FOR ORDER

REED J.:

The applicants commenced an action for judicial review of four decisions of the Regional Director-General Pacific Region of the Department of Fisheries and Oceans. The decisions in question are variation orders that impose limits on coho fishing. The applicants seek to have those decisions set aside because the decision maker ignored, or took insufficient account of a relevant fact: the applicants' aboriginal rights. If such had been considered, it is argued, the

limitations on the coho fishing would have been more restrictive. In addition to setting the variation orders aside the applicants seek to have the Court order, as a temporary measure, that sports fishing for coho salmon be on a catch and release basis only. Although not set out in the judicial review application, they also seek an order that there be no consequential increase in the by-catch of coho that is permitted to the commercial fishery. By-catch are fish of a species that are caught incidently (in this case coho) by individuals who are fishing for other species (e.g. sockeye). Since the fishing season for coho is now in progress, an interim injunction is sought to put in place the remedies described above until the main application can be heard. The respondent seeks to have the applicants' application converted into an action and the requirement on it to prepare responding affidavits postponed to December 31, 1997. The applicants seek to have the time limits for filing materials on their application shortened and to have that application heard on an urgent basis.

INTERIM INJUNCTION APPLICATION

The applicants assert that they have an aboriginal right to fish for coho in certain Thompson River waters and that that right is constitutionally recognized by section 35 of the *Constitution Act, 1982*. They assert that this imposes an obligation on the respondent to manage the fishery in a way that makes: the conservation of stocks the first priority and the right of the applicants to take the amount of coho that they require for food, social and ceremonial purposes the second priority. The fishing of coho by others, then, becomes the third priority.

The orders that the Regional Director has made and that it is sought to set aside were made pursuant to subsection 6 (1) the *Fishery (General) Regulations*.[1] The orders limit the amount of coho salmon that can be taken during the current

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[1] 6. (1) Where a close time, fishing quota or limit on the size or weight of fish is fixed in respect of an area under any of the Regulations listed in subsection 3(4), the Regional Director-General may, by order, vary that close time, fishing quota or limit in respect of that area or any portion of that area.

fishing season. The applicants claim that the orders were made without regard to the duty owed to the applicants, by the respondent, which duty arises from their aboriginal rights.

In order to obtain an interim injunction, as with an interlocutory injunction, one must prove that irreparable harm will arise if the injunction is not granted. The applicable texts are set out in *Manitoba (A.G.)* v. *Metropolitan Stores* [1987] 1 S.C.R. 110. I will focus on the evidence relating to irreparable harm.

At the heart of the interim injunction application are affidavits filed by biologists. The contents of which appear to conflict. The applicants filed an affidavit, dated May 30, 1997, by Michael Galesloot, Tribunal Fisheries biologist. Attached to that affidavit are documents obtained from the Department of Fisheries and Oceans ("DFO"). These include a memorandum of 1994 written by a Neil Shubert, management biologist, concerning the coho stocks of that year. The 1994 salmon are the brood stock for the salmon that will return this year. The documents also include data that shows the declining stock of coho and a memorandum from a Ken Wilson, dated March 11, 1997, who at the time was a management biologist with the department. That memorandum asserts that the Thompson River coho are on the brink of extinction and that the only course of action consistent with DFO's conservation mandate and Canada's international and constitutional obligations is a complete moratorium on coho directed fisheries that harvest Thompson coho, combined with non-retention and non-possession of coho in fisheries that harvest Thompson coho as a by-catch.

The variation orders that are challenged in this application, No. 1997-341, 1997-342, 1997-343 and 1997-344, were made on July 2, 1997. They impose restrictions to reduce the overall catch of coho from that allowed in previous years. Such limitations, as described by Mr. Graham, Director of the Fisheries

Management Section of the Pacific Region of DFO, are:

i. there will be no directed commercial harvest of coho in southern M.C.;

ii. the daily catch limit for recreational fishers off the West Coast of Vancouver Island and the Trait of Juan de Fuca has been reduced from 4 coho per day to 2;

iii. the daily catch limit for sport fishing on the Fraser River mainstream has been reduced from 4 to 0;

iv. additional time and area closures for commercial fishing to reduce coho encounters; and

v. intensive catch monitoring programs to closely assess the effectiveness of the limitation measures and identify the need for additional in-season actions.

Mr. Galesloot filed an affidavit dated July 17, 1997, stating that in his opinion, based on his own experience and observations as well as the DFO data, the variation orders would not prevent substantial numbers of Thompson River coho from being intercepted in marine sports fisheries. He states that:

> Such interceptions will increase the likelihood that numerous specific coho stocks will not return to Thompson River tributaries to spawn in sufficient numbers to meet minimum escapement targets (as defined by the Department of Fisheries and Oceans). Aside from some localized area closures in the marine sports fishery and the closure of the Fraser River, which may prevent some Thompson River coho mortalities; the sports fishery otherwise remains completely open in areas in which it is known that it will impact on Thompson River coho.

The applicants also filed an affidavit, dated July 16, 1997, by David Ellis, a resource planner and consultant. He attests to the drastic decline in the coho stocks. He asserts that sports fishing for coho will have a serious negative impact on Thompson River coho and that a coho sports fishing could be selectively designed so as not to impact on Thompson River coho. He also asserts that the DFO monitoring system for determining how many coho are being caught is underfunded and inadequate.

In response to the application for an interim injunction, the respondent filed an affidavit of Ron Kadowski, dated July 20, 1997. He is the DFO stock assessment biologist responsible for managing salmon stock assessment programs within the relevant area. Three affidavits of Bud Graham (dated July 23, 24 and 28, 1997, respectively) were also filed. An affidavit of a Mr. Luedke (dated July 25, 1997), a salmon stock assessment biologist with the Stock Assessment

Division for the West Coast of Vancouver Island was filed.

Mr. Kadowski challenges the accuracy of the Wilson and Ellis opinions. He questions Mr. Wilson's ability to draw conclusions about Canada's international and constitutional obligations. He states that Mr. Wilson is not qualified to provide advice on the risk of extinction of fish such as coho and that there are biologists in DFO who are experts in the field. He indicates that he shares Mr. Wilson's concern about the declining coho stocks, and Mr. Wilson's view that significant action must be taken to ensure that these stocks are not reduced beyond their current levels. He asserts that such actions have in fact been taken through the measures that were introduced. Mr. Kadowski alleges that there are a number of errors and inconsistencies in Mr. Ellis' affidavit including his assertion concerning the level and the impact of sports fishing on the coho stock in recent years. He contradicts Mr. Ellis' assertion that it is possible to design the coho sports fishery in a way that would limit the catch of Thompson River coho and not other species of coho. Mr. Kadowski explains the method by which a 20 to 25% exploitation rate for 1997 was chosen, and asserts:

> ...For 1997, an exploitation rate of 20 to 25% was selected. This exploitation rate will control the risk that the number of spawners in a stated proportion of streams within the aggregate will not fall below a pre-determined level, termed the "Limit Reference Escapement" or LRE. "Escapement" refers to the number of adult coho that escape the various fisheries (aboriginal, commercial and recreational) and make it to their spawning grounds.
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> 12. A variety of LRE's for coho have been considered by DFO's assessment biologists, each representing a different aspect of risk. An escapement greater than 9 females per kilometre would fully seed available habitat and is close to values than would maximize production. Failure to reach this escapement level is not considered damaging to long-term production. An escapement of 1 female per kilometre is considered by DFO assessment biologists to be an absolute minimum and it was recommended that the target exploitation rate should be set to ensure that no populations would fail to achieve that level. It should be noted that through this has been set as an absolute minimum, two intensively studied coho populations have recovered rapidly from escapements of 1 female per kilometre. Assessment biologists have recommended to DFO fishery managers that an exploitation rate for coho be chosen that will ensure that most coho populations achieve an escapement of a least 3 females per kilometre.
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> 13. Any particular exploitation rate can be evaluated by examining the proportion of populations than would be expected to achieve a particular LRE if that exploitation rate was applied. For surveyed Strait of Georgia and Fraser River coho populations (including the Thompson River watershed), it is estimated than the exploitation rate range of 20% to 25% adopted by DFO for the 1997 fishing season will result in:
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> (i) approximately 50% of these populations achieving escapements of at least 9 females per kilometre, i.e., about half of the streams will be fully seeded;

(ii) approximately 90% of these populations achieving escapements of at least 3 females per kilometre; and

(iii) all of these populations achieving escapements of a least 1 female per kilometre.

...

19. For 1997, DFO has determined than an exploitation rate of between 20 and 25 percent for southern B.C. coho adequately protects stocks while providing access to coho for aboriginal fishing, providing some recreational fishing opportunity and allowing for commercial fishing for other salmon species. This range of exploitation will result in 8,300 to 26,400 coho that will escape the various fisheries to spawn in the Thompson River.

20. Contrary to paragraph 21 of Mr. Ellis' Affidavit, continued recreational fishing for coho in 1997 will not impact heavily on Thompson River coho.

Mr. Graham also asserts that the exploitation rate that is allowed under the variation orders will adequately protect the coho stocks including the Thompson River coho. Messrs Graham and Luedke describe the monitoring systems used by DFO and assert that it is adequate and not under funded. There is some ambiguity in the above quoted affidavit material of Mr. Kadowski, particularly with respect to what is meant by "an absolute minimum". But in the absence of cross-examination of the affiant, I am not prepared to interpret that phrase as counsel for the applicants suggested. (The same wording is found is the "1997 Southern British Columbia Coho Salmon Integrated Management Plan".)

In order to grant an interim injunction, an applicant must demonstrate irreparable harm. The difficulty the Court has, is that the evidence, in affidavit form, has not been subjected to cross-examination, it is contradictory and, insofar as irreparable harm is concerned, weighs, on its face, as much in the respondent's favour as the applicants'. (I leave aside the jurisdictional difficulties that exist, in any event, in a court granting what is really a fisheries management order to the respondents rather than proceeding by way of declaration.) I cannot find that the applicants have met the burden that is upon them.

SCHEDULE FOR HEARING JUDICIAL REVIEW APPLICATION - CONVERSION TO AN ACTION?

That brings me to the two motions that were heard by videoconference on Wednesday, August 6, 1997. Counsel for the respondent seeks an order, pursuant to section 18.4(2) of the *Federal court Act* and *Federal Court Rule* 1614, converting this application into the trial of an action and extending the time within which the respondent is required to file its materials to December 31, 1997. The intervenors support the respondent's position. Counsel for the applicants filed a motion seeking to abridge the time for the filing of the respondent's materials and setting a date for hearing the judicial review application as a matter of urgency. The respondent's materials are now required to be filed by August 11, 1997, pursuant to Rule 16. The height of the coho sports fishing takes place in late August and September.

Counsel for the respondent argues that there are good reasons for proceeding with this application as an action. The nature and scope of aboriginal rights are in issue and these require *viva voce* and expert evidence, for example, by anthropologists and historians. A complex constitutional issue is involved and these are best resolved when a complete factual context is provided. Counsel asserts that extensive expert evidence regarding the adequacy of the DFO orders to accomplish conservation objectives are required and the Court will wish to see and hear these witnesses in order to assess their credibility. In addition, the extent of the record upon which the decisions in question were made, is somewhat indeterminate since the decisions are not that of a tribunal where there is a transcript and precisely delineated evidence.

Counsel for the applicants filed material in support of her clients claim to aboriginal rights when she filed the Application for Judicial Review. She does not seek to add additional material. She notes that the respondent has known that

her clients were contemplating a Court action for some time and there has been no material filed to date by the respondent, questioning her clients' assertion. I am persuaded that if anyone is to suffer from any weakness in not providing more extensive evidence with respect to the aboriginal rights in issue, it will be the applicants. If they wish to proceed on the basis of the material already filed, then, a trial proceeding should not be imposed on them.

Counsel for the applicants argues that this is not a factually complex case. It is legally complex. The issues in her view are clear: (1) her clients have an aboriginal right; (2) that right imposes an obligation on the respondent to manage the Thompson River coho fishery in a certain way, that is by giving priority to aboriginal rights and concommitantly to the conservation of the stock; (3) the decisions that were made by the Regional Director were made without regard to the applicants' aboriginal rights and the duty owed to them; (4) since the variation orders were made without regard to a relevant consideration, they should be set aside; (5) since their setting aside would reactivate a regime what is less protective of her clients' rights than that which existed under the variation orders, the Court should, as an interim measure, until a new DFO decision is made, impose a mandatory order prohibiting the fishing of coho by sports fishers.

As noted above, the applicants have already filed the evidence on which they rely to support the aboriginal rights they assert. They must establish the rights they claim in order to have standing to challenge the decisions they seek to have set aside, on the grounds they put forward. I have indicated that I do not think the applicants should be required to convert their application into an action to provide a more extensive factual record for the Court, with respect to the aboriginal rights claimed, if they do not wish to do so. I have not been persuaded that the respondent will suffer prejudice from proceeding by affidavit.

The second issue set out above is a legal issue. It will be established, or

not, through the jurisprudence. Whether a duty exists and the content and scope of that duty is crucial to the applicants' claim. The third issue has a very narrow factual basis and, indeed, much of the evidence pertaining to that matter appears to be in the affidavits filed in response to the interim injunction application. The fourth issue is again largely a legal one - a legal conclusion that follows from whatever determination is made on the previously listed issues. None of these *require* that the application be turned into a proceeding by action.

Counsel for the respondent argues that this application for judicial review should be turned into an action because it is necessary to adduce extensive expert evidence concerning the conservation measures adopted by DFO, in order to demonstrate to the Court that those measures are adequate. The extent to which such evidence becomes significant, however, depends on the scope of the duty, if any, that the respondent owes the applicants: is it a duty to manage fishing and the stocks so that aboriginal needs are met before anyone else is permitted to take fish; it is a duty to manage the stocks so that the Thompson River coho do not become extinct? The adequacy of the variation orders as conservation measures, in the context of the applicants' judicial review application, plays a dependent role. It may also be relevant to whether a Court would grant the mandatory order sought (point first above), assuming the Court decided that such an order rather than a declaration was appropriate. The factual dispute, concerning the adequacy of the conservation measures, might also be relevant to any argument the respondent might make that even though the decisions were made without regard to the applicants aboriginal rights, and the duty owed to them, this was in administrative law terms an inconsequential error since adequate conservation measures have been taken; the decisions, therefore, should not be set aside.

Counsel for the respondent sees a need to file numerous expert affidavits explaining how the exploitation rates for the 1997 season were established, and why these are considered to be adequate to conserve the Thompson River stocks.

Counsel for the applicants states that she does not intend to rely on any materials other than DFO documents. Her position is that the content and unreasonableness of the decisions appears from DFO's own documents.

As with any judicial review application the decisions made are being challenged by reference to the material that was before the decision maker at the time the decisions were made. With respect to the uncertain parameters of the record and the documents that should be part of that record, some of those documents have been identified already in the affidavits filed to support and rebut the request for the interim injunction. The respondent of course has the opportunity to add further documentation of this nature, as part of her affidavit material. The applicants have identified with specificity in their Notice of Motion what they consider to be the record on which they will rely (as contemplated by Federal Court Rule 1613).

Of considerable concern, in deciding whether or not to grant the motion to convert the application for judicial review into a proceeding by way of action, against the wishes of the applicants, is the fact that by the time a trial could be completed, the applicants' claim would be moot (e.g. as part of that procedure the respondent seeks to have the filing of her material postponed until December 31, 1997). The salmon return every three years. A decision with respect to this year's stocks does not carry over to the 1998 season. The height of the sports fishing season is in late August and September. The orders that are being challenged were not issued by the respondent until July 2, 1997. In effect, the applicants would be denied a remedy, even if successful, if a procedure by trial of an action was imposed on them. In addition, counsel for the applicants states that she and her clients chose a judicial review proceeding not only to avoid the time delays attendant upon a trial process but also to keep the legal costs down. She asserts that her clients cannot afford the cost of a lengthy and time consuming trial and should not be forced into one when they have chosen to proceed by

judicial review. These are compelling arguments.

For the reasons given, the respondent's motion pursuant to subsection 18.4(2) and Rule 1614 will be dismissed. The time limits set out under Rules 1606, 1607, 1608 and 1609 shall be abridged. The applicants have already filed their materials pursuant to Rule 1603. The respondent will file her affidavit materials by August 11, 1997, as required by Rule 1603 - there will be no abridgment of that time period. The applicants' application record shall be filed by August 14, 1997; the respondent's application record shall be filed by August 19, 1997. The applicants and respondent shall be at liberty to modify these dates, on consent, providing all application records are filed by August 20, 1997.

The hearing of the within judicial review application shall commence on August 21, at 9:00 a.m., in Vancouver to continue on August 22. Counsel are asked to allocate the available time among themselves on an appropriate basis. I suggest that all counsel might address as a first stage of argument, the existence, scope and nature of the aboriginal rights and the existence, scope and nature of the duty owed by the respondent, in the person of the Regional Director, when making the variation orders. This suggestion cannot and is not intended to bind the judge hearing the application but it may be a useful way of limiting the argument to the time available since once the scope of the duty owed has been determined, the extent to which the variation orders fulfil or fail to fulfil that obligation may become obvious.

One last consideration must be addressed. On July 21, 1997, Mr. Justice Campbell granted the intervenors status to intervene. As part of that order he stated that "Any evidence to be brought by an intervenor be the subject of a court order on an application brought after the filing of the Respondent's record". I interpret that as meaning that intervenors were not given, by that order, a right to file additional evidence, but that if any of them wanted to do so they should

apply to the Court for an order permitting such after the respondent's application record had been filed. The time frames that have now been set for the filing of the respondent's application record and the hearing of the application frustrate that provision. The intervenors know, now, the material upon which the applicants rely. It has already been filed. They will know on August 11, 1997, on what material the respondent will rely. In order to provide them with a realistic opportunity to seek to add additional material to that which the parties place before the Court, and to avoid a situation requires the judge hearing the application on the merits to spend time determining whether or not additional materials should be admitted, the intervenors are requested to make any such application to the Court by August 15, 1997. I note that these are the kinds of issues about which counsel can with goodwill agree upon among themselves, in the interest of enabling an efficient and timely hearing of the merits to take place.

B. Reed
Judge

Ottawa, Ontario
August 8, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-1497-97
STYLE OF CAUSE:	Chief Arthur M. Manuel et al. - and - The Attorney General of Canada - and - Fisheries Council of British Columbia et al.
PLACE OF HEARING:	Vancouver, British Columbia Ottawa, Ontario
DATE OF HEARING:	July 28 and 29, 1997 August 6, 1997

REASONS FOR ORDER OF THE HONOURABLE MADAME JUSTICE REED

DATED: August 8, 1997

APPEARANCES:

Ms. Karen Wristen	FOR THE APPLICANT
Mr. Paul Partridge Ms. Nancy South	FOR THE RESPONDENT
Mr. Christopher Considine Ms. Jacqueline Beltgens	FOR THE INTERVENOR; Sports Fishing Institute of British Columbia
Mr. Keith Lowes	FOR THE INTERVENOR; Fisheries Council of British Columbia

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