Federal Court  Cour fédérale

Date: 20150306

Docket: T-73-15

Citation: 2015 FC 290

Vancouver, British Columbia, March 6, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THE COUNCIL OF THE HAIDA NATION AND PETER LANTIN, SUING ON HIS OWN BEHALF AND ON BEHALF OF ALL CITIZENS OF THE HAIDA NATION

Applicants

and

MINISTER OF FISHERIES AND OCEANS

Respondent

ORDER AND REASONS

[1] The Council of the Haida Nation [CHN], on behalf of the Haida Nation [Haida] seek an interlocutory injunction against the Minister of Fisheries and Oceans [the Minister] to prevent the re-opening of a commercial herring fishery in the Haida Gwaii area.

[2] For the reasons that follow, the injunction requested by the Applicants is granted.

I. Background

[3] The Haida Nation comprises the Indigenous people of Haida Gwaii, an archipelago off the west coast of British Columbia which has been their homeland since time immemorial. The Haida have concluded agreements with the Crown governments based on Haida occupation of Haida Gwaii, historically and at present.

[4] It is the Applicants' position that the Haida Gwaii herring stocks and the Applicants' Aboriginal Rights will be put in jeopardy if the roe herring fishery is opened to commercial fishing in 2015.

[5] Due to weak stocks, Haida Gwaii has been closed to commercial herring fishing since 2003 for the roe herring fishery, and 2005 for the spawn-on-kelp fishery. Staff at Fisheries and Oceans Canada [DFO] recommended against re-opening the area for the 2014 fishing season, because of insufficient evidence of herring recovery in Haida Gwaii. The Minister did not adopt that recommendation, and re-opened the area to commercial herring fishing in 2014. Commercial fishermen reached an agreement with the Haida to not fish in the area last year. On December 16, 2014, the Minister authorized a commercial herring fishery in Haida Gwaii for 2015, despite the evidence that stocks in the area were weaker than the previous year.

[6] The Haida Nation is opposed to the re-opening and seeks an injunction for a number of reasons, including: (1) the herring stocks on Haida Gwaii have not sufficiently recovered to a degree that would support a commercial opening; (2) in any event, DFO failed to adequately

consult and accommodate with the Haida Nation in relation to the adverse impacts of the re-opening on the Haida Nation's Aboriginal Rights and Title; (3) DFO failed to develop a herring management framework with appropriate strategies for rebuilding herring in Haida Gwaii; and (4) the re-opening of the fishery, in the absence of an appropriate management plan for herring, is contrary to the honour of the Crown, and the spirit and intent of various joint management agreements and initiatives negotiated between the Haida Nation and the Crown.

[7] For more than a century, the Haida have engaged in political action, negotiations and legal actions to protect their lands, waters and resources including bringing an action in the Supreme Court of British Columbia (Action L020662, Vancouver Registry) seeking declarations of Aboriginal Title to the lands and waters of Haida Gwaii, which includes the roe herring fishery, and seeking, *inter alia*, a declaration of title [the Haida Title Case]. The Haida Title Case is currently before the British Columbia Supreme Court and is ongoing.

[8] For the purpose of protecting Haida Title and Rights to certain of the lands of Haida Gwaii, the Haida Nation appeared before the Supreme Court of Canada [SCC] in 2004, which resulted in a ruling that the Province was under a duty to consult and accommodate with the Haida Nation prior to replacing a Tree Farm Licence. The SCC found that the Haida have a strong *prima facie* case of Aboriginal Title to all of Haida Gwaii (*Haida Nation v BC (Minister of Forests)*, 2004 SCC 73 at para 71).

[9] The Haida Nation has filed claims that were accepted for negotiation under Canada's Comprehensive Land Claims Process (in 1980 and 2009) and in the British Columbia Treaty

Process. The Haida have also been directly and actively involved in seeking reconciliation with the federal and provincial governments for an extended period of time.

[10] As an interim step towards reconciliation, the Haida Nation have negotiated and concluded with Canada and British Columbia a number of agreements creating joint management of the entire terrestrial, and portions of the marine, areas in Haida Gwaii. Since 1980, the Haida Nation has engaged in negotiations which resulted, *inter alia*, in:

a. the 1993 Gwaii Haanas Agreement, which has been in place for a quarter of century, providing for collaboration management with Canada of the Haida Heritage Site and National Park Reserve covering about a quarter of the land area of Haida Gwaii, including the whole of the southern area of the archipelago [the Gwaii Haanas Agreement];

b. the 2010 Gwaii Haanas Marine Agreement, that builds on the success of the Gwaii Haanas Agreement, and expands the responsibilities of the Haida Gwaii Haanas Agreement, to include the cooperative planning, operation, management and use of the marine portion of Gwaii Haanas, designated both as a Haida Heritage Site and later as Canada's first National Marine Conservation Area Reserve [the "Gwaii Haanas Marine Area", and "Gwaii Haanas Marine Agreement"];

c. other agreements, including Strategic Land-Use Plan Agreement and a Reconciliation Protocol with the Province of BC, for shared and joint management of a quarter of the lands and resources, including 74% of the coastline and some marine areas, and a Memorandum of Understanding with Canada for the cooperative management and planning of the *SGaan Kinghlaas* (Bowie Seamount) area as a marine protected area and, for Canada's part, through the *Oceans Act*; and

d. formal protection and shared and joint management of a total of 52% of the land base of Haida Gwaii, and 3,464 square kilometres of marine spaces.

[11] In addition to these processes, the Haida have been actively pursuing the reconciliation of their Aboriginal Title and Rights in respect of the marine areas of Haida Gwaii through the negotiation of a Reconciliation Agreement with Canada and British Columbia [the Reconciliation Agreement]. Various documents with Canada have been tabled, including a

framework for shared and joint decision-making in oceans and fisheries management. The framework highlights both conservation and access to commercial fisheries in the Haida Gwaii area.

[12] The Gwaii Haanas Marine Area is known as "one of the world's ecological and cultural treasures." Gwaii Haanas is the first area in the world formally managed from the mountain top to sea floor, and is recognized as a rare and significant achievement nationally and globally.

[13] The marine and terrestrial areas of Gwaii Haanas were first designated by the Haida Nation as a Haida Heritage Site in 1985, and later by Canada as a National Park Reserve in 1988 and a National Marine Conservation Area Reserve [NMCAR] in 2010.

[14] The 1993 Gwaii Haanas Agreement recognizes the dual assertions of sovereignty, title and ownership by the Government of Canada and the Haida Nation in Gwaii Haanas, including both lands and waters.

[15] Under the 2010 Gwaii Haanas Marine Agreement, Canada and the Haida Nation have agreed that the Gwaii Haanas Marine Area "shall be regarded with the highest degree of respect and will be managed in an ecologically sustainable manner that meets the needs of present and future generations, without compromising the structure and function of the ecosystem."

[16] One of the responsibilities of the Gwaii Haanas Archipelago Management Board [AMB] is "developing ecosystem objectives for the management of activities, including fisheries, as selected by the AMB." The AMB is also responsible for development of a Gwaii Haanas Marine

Area Management Plan, due to be completed in December 2015, and a Gwaii Haanas Marine Area Strategy.

[17] Each year, DFO conducts stock assessments for each of five Stock Areas. In deciding upon commercial herring opportunities DFO has applied a "cut-off level" (of 25% of projected unfished spawning biomass), as the minimum level of stock abundance to permit a commercial herring fishery for the Stock since the mid-1980s. If stock abundance is above the cut-off level, according to its policy, DFO may authorize a commercial herring fishery of the Stock that year. It has generally applied a maximum of 20% harvest rate to determine the potential harvest for the herring fishery in each Stock Area.

[18] In 2011, DFO introduced a new model and method for calculating stock abundance or biomass and the cut-off level. Before 2011, the Haida Gwaii cut-off level was 10,700 tonnes. After 2011, the new model, while using the same percentage (25%) as the cut-off, has resulted in a lower (in absolute terms) cut-off level for Haida Gwaii herring stocks (8,892 tonnes in 2012, 8,741 tonnes in 2013 and 8,491 tonnes in 2014).

[19] It is the Applicants' position that although there have been a few stronger returns in some annual assessments, the state of the Haida Gwaii stock remains weak and uncertain, and below its historical abundance. The most recent stock assessment advice from CSAS comments on the low abundance and notes that the reasons for it are not understood.

[20] In 2014, the DFO stock assessment used one model to provide two forecasts for 2015, based on different assumptions. The "Base Case" used assumptions in place since 2011 and a

"Historical Management Procedure" used assumptions in place prior to 2011. The Base Case predicted that, for 2015, there is a high probability that the Haida Gwaii Stock will be above the cut-off level of 25% of unfished spawning biomass. The Historical Management Procedure predicted that the Haida Gwaii Stock would likely be below the historic cut-off of 10,700 tonnes (therefore a commercial fishery would not be allowed). Although both forecasts had a high degree of uncertainty, according to both the Base Case and the Historical Management Procedure, the Haida Gwaii stock declined from 2013 to 2014 and is predicted to decline further in 2015.

[21] The Minister's position is that the science that underlies the recommendation by DFO to open the fishery and the decision by the Minister to accept a 10% harvest rate and commercial fishery in Haida Gwaii, is supported by the evidence set out in the Affidavit of Dr. Nathan Taylor. According to DFO, the "cut-off" level for opening a fishery in Haida Gwaii is 8,491 tonnes in 2015. Projections are that the stock will be 17,285 tonnes, which is 8,794 tonnes above the cut-off; expressed as a ratio, the stock will be approximately two times the cut-off amount.

[22] Moreover, the Minister asserts that in accepting the more conservation option of a 10% harvest rate, the Minister's decision incorporates a conservative and precautionary approach. Assuming that the 10% harvest of 1800 metric tonnes is reached this year, there is a 91% chance that the spanning biomass will remain above the cut-off in 2015.

[23] On September 12, 2014, CHN, DFO and Gwaii Haanas AMB representatives met to discuss the herring stock assessment, including forecasts for 2015 using the Base Case and Historical Management Procedure. At the meeting, DFO noted that the surveys indicated that the

amount of herring spawn stock in the Haida Gwaii Stock Area had declined significantly from 2013 to 2014, and was projected to decline further from 2014 to 2015.

[24] On November 24, 2014, DFO sought a decision from the Minister on the herring harvest level for the 2015 fishing season [the "2015 Memo"]. Based upon the latest scientific information, consultation and its management objectives, DFO recommended to the Minister that the herring fishery be opened in all five major areas of the Pacific Region. This included three areas that have recently been closed, one of which is Haida Gwaii. DFO specifically proposed two alternative harvest options for the Minister's consideration:

- Option 1, which in the three previously-closed areas would have been at a 15% harvest rate for a total harvest quantity of 13,393 short tons; or
- Option 2, the "most conservative" option, which in the three previously-closed areas would have been at a 10% harvest rate for a total harvest quantity of 8,729 short tons.

The more conservative Option 2 was selected for the approved opening for 2015. It is noted that no harvest was not presented as an option in the 2015 memo.

[25] The 2015 Memo states that stocks are projected to be above the commercial cut-off level for the 2015 season. The recommendation of DFO staff "wanting to see evidence of a durable and sustained recovery before re-opening", is not mentioned in the 2015 Memo. There is further no mention of the long period of low abundance (other than noting First Nations' concerns that the stocks have not sufficiently recovered). The 2015 Memo also does not acknowledge commitments by DFO and CHN to develop ecosystem objectives for the Gwaii Haanas National Marine Conservation Area and Haida Heritage Site.

[26] The 2015 Memo also does not reference the Historical Management Procedure, which would have provided the basis for a "no-catch" option for Haida Gwaii. Further, the 2015 Memo also does not mention the decline in biomass from 2013 to 2014 and the further decline projected for 2015.

[27] On February 4, 2015, CHN and AMB representatives received a letter from Carmel Lowe (DFO Science) and Rebecca Reid (DFO Fisheries Management) about DFO's intention to review the herring management framework over a 3-5 year period starting with a workshop in Haida Gwaii in the spring 2015 and a science symposium on herring research in May 2015. In the letter, DFO once again reiterates their need to align the herring management framework with the DFO Precautionary Approach policy.

[28] On February 13, 2015, DFO's Roger Kanno emailed R. Jones a copy of the final 2014-15 IFMP which had the same catch allocations for the Haida Gwaii Stock Areas as the Draft 2015 IFMP at a harvest rate of 10%.

[29] Given DFO's decision to proceed with planning for a Haida Gwaii opening for 2015, on January 13, 2015, the CHN wrote an open letter to all commercial fishermen through HIAB requesting that they not select Haida Gwaii as their fishing area.

[30] In response, the United Fishermen and Allied Workers Union [UFAWU] sent letters to all commercial herring fishermen asking them not to select Haida Gwaii or Central Coast for fishing. Only 2 licence holders selected Haida Gwaii for fishing. Despite this, DFO did not change the expected harvest.

[31] The UFAWU based their support of the Haida Nation on: "[an] independent science review of the herring stocks in the regions, the lack of inclusive decision-making; our own fishermen's assessment of the state of these stocks; respect for local First Nations insights; and willingness to build a collaborative understanding of the state of the herring in our shared ecosystem." Further, the UFAWU noted "serious questions about DFO models" and "changes in DFO herring stock assessment methodology that have reversed the downward trends found in these areas using the previous methodology".

[32] The Haida Gwaii Stock Area includes much of Gwaii Haanas' coast and Gwaii Haanas in the primary location of the planned commercial herring fishery in Haida Gwaii.

[33] The Respondent states that the Applicants, in seeking this interlocutory injunction, would have the effect of replacing the Minister's decision based on a scientific analysis, while again quite possibly bypassing, for a second time, a detailed review of the actual merits of the decision-making process by this Court. In essence the Respondent argues that the Applicants would prefer a different resource management decision than the one the Minister has made.

[34] The Respondent also argues that the position the Applicants are taking in this application is consistent with the opposition expressed to DFO over the last year to the opening of a commercial fishery on Haida Gwaii. As set out in the Affidavit of Melvin Kotyk, the Applicants oppose the opening of any commercial fishery on Haida Gwaii. Moreover, despite being prompted repeatedly over the last year, the Respondent states that the Applicants have refused to identify or discuss any measurable objectives in terms of ecosystem and specific species.

[35] Finally, the Respondent is of the view that the Applicants appear to seek, amongst other relief, to prohibit the commercial roe herring fishery from opening on Haida Gwaii generally, not just in respect of 2015. Within the Applicants' requested relief is arguably a request for an injunction pending the completion of a management framework and an integrated plan resulting in final relief in the form of an interlocutory injunction that could operate past a decision on the merits of the judicial application itself, and that could operate beyond the decision to open a fishery in 2015.

II. Analysis

A. *The Test for an Interlocutory Injunction*

[36] The test for an interlocutory injunction is set out in the Supreme Court of Canada case of *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] SCR 311 at para 43. The party seeking an interlocutory injunction must prove:

i) there is a serious issue to be tried;

ii) irreparable harm would result if an injunction is not granted; and

iii) the balance of convenience, considering all the circumstances, favours granting the order.

[37] The test is conjunctive, and all three criteria must be satisfied to obtain interlocutory injunctive relief.

B. *Serious Issue*

[38] The Respondent admits that there is a serious issue to be tried, given that the regulation of the Haida Nation fishery and duty to consult and accommodate Aboriginal groups are both serious issues.

C. *Irreparable Harm*

[39] The Respondent argues that an interlocutory is not appropriate, because:

a. there is no court decision establishing and defining the extent of the fishing rights, as in other cases (*Ahousaht Indian Band and Nation v Canada (Attorney General of Canada)*, 2009 BCSC 1494 [*Ahousaht BCSC*]);

b. the Applicants' action for a declaration in respect of title and rights, including the herring fishery, has been in progress for 13 years, and is unlikely to be resolved for several years to come;

c. the extent of the fishing rights articulated by the applicant infers a level of exclusivity that exceeds the right established in *Ahousaht BCSC*, a case that the Applicants refer to in comparison;

d. the application for an interim injunction appears to be premised on an assertion that the Gwaii Haanas Marine Agreement effectively fetters the Minister's discretion to open a fishery, despite the presence in that agreement of explicit language to the contrary (articles 11.1 and 11.2);

e. the Applicants failed to pursue their application for judicial review from the decision of the Minister to open the fishery in Haida Gwaii in 2014, thus foregoing an opportunity to have the court render a decision on the actual merits of their position in the proper forum, as opposed to on an interim injunction.

[40] Moreover, the Respondent states that the Applicants cannot establish irreparable harm given the speculative nature of their position that:

a. there could be harm to the herring stock and that the decision to open the fishery therefore does harm them; and

b. a unique opportunity to accommodate their Aboriginal fishing rights after a lengthy closure of the fishery will be lost.

The Applicants must prove that the alleged irreparable harm is real and substantial, and not merely speculate that irreparable harm is "likely" to be suffered (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7; *International Longshore*, at paras 21, 22 and 25; *Hache v Canada*, 2006 FCA 424 at para 11).

[41] The Respondent argues that the inability to identify non-speculative irreparable harm resulting from the opening is reinforced by the Applicant's assertions that:

a. there is potential for harm to Haida Gwaii stocks if commercial fisheries are opened;

b. the Haida Gwaii stock "should not be subject to the unnecessary risk of a commercial opening, particularly in light of scientific uncertainly" ; and "should not be subject to the unnecessary risk of a commercial opening, particularly in light of scientific uncertainty", and

c. the commercial opening "could jeopardize the Applicants' ability to exercise their Aboriginal Rights respecting herring in the future".

[42] The Respondent also argues that the Applicants' second ground for arguing that the Minister's decision will cause irreparable harm, that it would compromise a "unique opportunity" for Canada to accommodate their Aboriginal rights at a time when "commercial fishing interests are accustomed to not having access to Haida Gwaii as part of their commercial herring operations", is also speculative and the rights asserted by the Haida Nation are not established.

[43] Lastly, the Respondent states that an alleged failure to adequately consult and accommodate cannot, in and of itself, give rise to irreparable harm without establishing that harm

has occurred to a particular Aboriginal right which is the subject matter of the consultation or this would essentially provide an Aboriginal group the ability to veto resource management decisions which the Supreme Court has rejected (*Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214 at paras 4 and 52). In this case, it is not possible to establish harm to an Aboriginal right, as the Applicants have not yet established an Aboriginal right to fish for commercial purposes for herring in the courts.

[44] As a starting point, there is no question that not only did the Haida Gwaii roe herring stock decline from 2013 to 214, but it is predicted to decline further in 2015.

[45] Further, while I do not question DFO's right to adopt a relatively new Base Case modelling method to establish a cut-off level for the roe herring fishery, which results in substantially higher estimates than the previously used Historical Management Procedure, the fact that the forecast range for the estimate in 2015 is anywhere from 8,295 tonnes to 35,621 tonnes is indicative of a high degree of uncertainty in the forecast.

[46] Additionally, the Canadian Science Advisory Report 2014/15, which refers to a decision table for pacific herring in Haida Gwaii, using the Historical Management Procedure, shows that there is a 73% chance that a harvest of 1800 tonnes, the option chosen by the Minister, would result in the biomass falling below the historic cut-off of 10,700 tonnes.

[47] In any event, based on the evidence before the Court, there is a significantly uncertain forecast on the estimated roe herring stock in the Haida Gwaii area for 2015.

[48] When one combines that uncertainty with the DFO's admission that the current management strategy appears to rely on a flawed model and is not effectively resulting in managing roe herring stocks well in the Haida Gwaii area, along with the evidence of recent declining stocks despite zero fishing in the 2014 season, speculation becomes more of a certainty in that irreparable harm is likely to occur if the roe herring fishery is reopened for 2015. The room for error in highly suspect forecasts, in an admittedly small fishery, must be considered a significant risk of harm not compensable in damages.

[49] When combined with the acknowledgement that the Haida Nation's ability to fish roe herring is central to their culture, traditions and way of life, the case is even more compelling, in establishing real potential for irreparable harm. (*Snureymuxw First Nations et al v R*, 2004 FBSC 205 at para 32; *Blaney et al v Minister of Agriculture et al*, 2004 BCSC 1764 at paras 59-60.

[50] Also important in considering irreparable harm, the Applicants point to insufficient consultation by the Respondent with respect to the current fishery management approach in Haida Gwaii. As stated above, the SCC has decided that the Haida have a strong *prima facie* case of Aboriginal Title to all of Haida Gwaii. While ongoing reconciliation negotiations are taking place (and have been for many years), in settling those rights, negotiations between Canada and the Haida Nation have not been fruitful, particularly recently.

[51] As stated above, the marine and terrestrial area of Gwaii Haanas is designated as a Haida Heritage Site (1985) and by Canada as a National Park (1988) and as a National Marine Conservation Areas Reserve [NMCAR] in 2010.

[52] The 1993 Gwaii Haanas Agreement specifically recognizes the dual assertions of sovereignty, title and ownership of both land and waters in Haida Gwaii by Canada and the Haida Nation.

[53] In my opinion, there is a heightened duty for DFO and the Minister to accommodate the Haida Nation in negotiating and determining the roe herring fishery in Haida Gwaii, given the existing Gwaii Haanas Agreement, the unique Haida Gwaii marine conservation area, the ecological concerns, and the duty to foster reconciliation with and protection of the constitutional rights of the Haida Nation.

[54] While these factors do not give the Haida any veto over what can be done in Haida Gwaii with respect to roe herring fishery, or fetter Canada's rights, and must be balanced with commercial rights and public interest, in looking deeply at the facts involved here, I find that the failure to consult meaningfully with the Haida Nation by Canada, and instead unilaterally imposing a highly questionable opening of the roe herring fishery in Haida Gwaii for 2015, also constitutes irreparable harm. Canada's unilateral implementation of the roe herring fishery in Haida Gwaii for 2015 compromises, rather than encourages, the mandated reconciliation process (*Canada (Public Works and Government Services) v Musqueam First Nations*, 2008 FCA 214; leave to appeal refused [2008] SCC No. 374 at para 52; *Platinex v Kitchenuhmaykoosib Inninwing First Nation*, [2006] 4 CNLR 152 at paras 79-80).

[55] This finding rings even more true when one considers the evaluation of AMB priority fisheries against Gwaiii Haanas Interim Management Plan Objectives, August 2014, and the positions taken by Parks Canada, as seen in the excerpts below:

> Parks Canada considers the Haida Nation to be a full partner in the management of Gwaii Haanas… The AMB has been directed by the President of the Haida Nation and Ministers of Environment Canada and Fisheries and Oceans to function in an environment where the authorities of both parties are respected and used to achieve common objectives. The relationship will fail and the intent of the GHA (1993 Gwaii Haanas Agreement) will be undermined if one party exercises their authority unilaterally.
>
> Gwaii Haanas is a protected area established by the Parliament of Canada and the Haida Nation. Guidance from the NMCA indicates that NMCA's such as Gwaii Haanas will be managed differently than other areas of the coast to ensure that ecosystem structure and function is maintained and principles of ecosystem management are followed. There is an expectation from Canada and the Haida Nation that Gwaii Haanas will be managed to a higher standard, with a lower tolerance of risk.
>
> In sustaining the continuity of Haida Gwaii culture and protect features of spiritual and cultural importance, Haida Nation will lead the development of a traditional use plan to ensure this objective is met. The plan will define acceptable areas for fishing and acceptable catch limits… [Emphasis added.]

[56] Canada's own Parks Board ministry, albeit not DFO, clearly recognizes the unique need for the Haida Nation not only to be consulted in respect of the roe herring fishery in Haida Gwaii, but to have a lead role in any consultation.

[57] Based on all my findings above, there is a real and serious risk of irreparable harm if the Haida Gwaii area is reopened for roe herring fishery in 2015.

D. *Balance of Convenience*

[58] The accommodation and reconciliation process between Canada and the Haida Nation is of fundamental importance to both parties and must be respected – that process should continue

to December 2015, such that the status quo of a closed roe herring fishery in Haida Gwaii is maintained.

[59] The UFAWU, who are an integral part of the commercial fishery, supports the Haida Nation's position, for the very reasons why this injunction is being granted:

i) the need for a better and independent science review of the herring stocks;

ii) lack of inclusive decision-making;

iii) their own assessment of the state of the roe herring stocks;

iv) respect for local First Nations insights;

v) a willingness to build a collaborative understanding of the state of the herring in the shared ecosystem.

[60] There are only two roe herring licenses selected for a roe herring fishery in Haida Gwaii, which may well be able to be relocated to the Prince Rupert fishery whose allocation to date is below the allowable catch, and whose season is historically later than that in Haida Gwaii, likely without incurring added transportation and packing costs by the licensees.

[61] Notwithstanding the public interest balance for all Canadians referred to by the Respondent, the balance of convenience favours the Applicants. The Honour of the Crown in dealing appropriately with consultation and reconciliation with the Haida Nation is also very much in the public interest, given the special conservation and ecological agreements governing the Haida Gwaii area.

[62] While there is no question the Minister enjoys deference in governing the roe herring fishery, that deference does not trump the real and serious concerns raised in respect of the Haida Gwaii roe herring fishery this season.

III. Undertaking as to Damages

[63] Rule 373(2) of the *Federal Courts Rules* provides the Court with discretion to grant an injunction without the applicant providing an undertaking as to damages.

[64] In *Ahousaht Indian Band et al v Canada*, 2014 FC 197, the Court held that the First Nation Applicants did not need to give an undertaking to obtain an injunction to stop the herring fishery from proceeding in their Territory.

[65] One of the relevant considerations in the *Ahousaht* case was that the First Nations had given notice to the Minister and the commercial fishery that they were seeking an injunction. Haida Nation has also provided such notice to the Minister and the commercial fishery. This notice allows interested parties to make plans to avoid unnecessary expense should an injunction be granted. Indeed, in this case the UFAW Union has already recommended to all BC commercial herring fishermen that they not select Haida Gwaii as their fishing areas for the 2015 herring season. I find this rationale to be persuasive.

[66] Moreover, the Applicant will not obtain any financial gain by the granting of an injunction. Similar to the situation in *Ahousaht*, the benefit to be gained by an injunction in this case will be to provide an opportunity for the herring fishery to recover, and to protect Haida

Nation's Aboriginal Rights, pending work being undertaken to ensure herring stocks are protected.

IV. Intervenors

[67] The B.C. Seafood Alliance and B.C. Wildlife Federation seek to intervene pursuant to Rule 109 of the *Federal Courts Rules*. The Interveners seek to make submissions on the nature and scope of industry's interest in and participation in the roe herring industry and the impact of the injunctive relief sought by the First Nations Applicants in this proceeding.

[68] I indicated prior to the hearing that, given the Interveners seek to introduce an issue or issues not before the Court, thereby trying to introduce a new matter in this proceeding, and given the representations of both the Applicants and the Respondent, I fail to see how the Interveners' assistance is needed for me to decide the application (*Ontario Federation of Anglers and Hunters v Alderville Indian Band*, 2014 FCA 145 at para 35).

[69] The motion to intervene is dismissed.

ORDER

THIS COURT ORDERS that:

1. The Minister, a Regional Director-General, or any Department of Fishery Officer, is hereby enjoined from opening a commercial herring fishery on Haida Gwaii until the earliest of:

   i) The end of the 2015 roe herring fishery;

   ii) The hearing of the Judicial Review Application;

   iii) The completion of a herring management framework, including the development of appropriate strategies for rebuilding herring;

   iv) The completion of an integrated Gwaii Haanas Management Plan, including ecological indicators in Gwaii Haanas; or

   v) Agreement of the Applicants.

2. The Applicants are relieved from the usual requirement to give an undertaking as to damages.

3. Costs to the Applicants.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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