PACIFIC FISHERMAN'S DEFENCE ALLIANCE, ET AL. v. HER MAJESTY THE QUEEN, ET AL. AND NISGA'A TRIBAL COUNCIL

Federal Court of Canada, Trial Division, Dube J.F.C.C., February 12, 1987

C. Harvey, for the plaintiffs
G.O. Eggertson, for the defendants
J. Aldridge, for the intervenor

The plaintiffs applied for an order that the defendants be restrained from concluding, initialling or announcing a land claims agreement with the Nisga'a Tribal Council. The plaintiffs were mainly associations of licensed commercial fishermen who feared that a portion of the tidal fisheries on which they operated would be granted to the Nisga'a Tribal Council as part of a claim settlement.

Held: Application denied.

1. The plaintiffs cannot in principle oppose the settlement of aboriginal rights which are recognized by the court and enshrined in the Constitution. Since the confidential negotiations had been going on for over ten years, they should be continued and not be restrained before fruition.

2. There was no assurance that if the injunction was granted and the plaintiffs were unsuccessful at trial, that they would be in a position to reimburse fort the delay inflicted upon the negotiation proceedings. Also such an injunction could gravely disturb and seriously harm the progress of other negotiations going on with other Indian tribes.

3. The plaintiffs did not show that there was a "serious issue to be tried". The concluding, initialling or announcement of a land claims agreement with the Nisga'a Tribal Council would not constitute be itself an actual or imminent or apprehended harm.

4. The plaintiffs did not establish that there would be irreparable harm as there was no conclusive evidence that the potential increase in the catch of fish that would be allocated to Indians would be harmful to existing commercial fishermen.

5. The balance of convenience favoured the defendants.

DUBE J.: This application is for an order pursuant to Rule 469 that the defendants be restrained from concluding, initialling or announcing a land claims agreement with the Nisga'a Tribal Council until trial or further notice.

Apart from the B.C. Wildlife Federation, which represents numerous sports fishermen and clubs with interest in the fresh water fisheries of British Columbia, the plaintiffs are associations of licensed commercial fishermen who operate on the tidal fisheries of the west coast of Canada.

In their statement of claim, the plaintiffs allege that they have a right of access to the sea fishery which is in law a liberty not to be restricted or removed by any exercise of the prerogatives of the Crown. In the alternative, they claim that the rights to the sea fishery are vested in the Crown in right of the Province of British Columbia and cannot be abrogated by the exercise of any federal power. They allege that any purported allocation or grant of exclusive rights to apportion those fisheries is ultra vires and any purported transfer to the Nisga'a Tribe of the federal right to manage or regulate those fisheries is ultra vires the federal power, being an abandonment of the sovereign legislative power vested in Parliament by the Constitution Act, 1867. As a further alternative, they claim that any agreement with the Nisga'a granting them exclusive fisheries over these waters will deprive the plaintiffs of a liberty pursuant to s.7 of the Canadian Charter of Rights and Freedoms.

As appears from affidavits filed in support of this motion, the plaintiffs wrote on May 3, 1984 to the then Minister of Indian and Northern Affairs ("the Minister") requesting a right to a fair hearing in the Nisga'a land claims negotiations, which the plaintiffs feared involved a proposal to grant a portion of the fishery to the Nisga'a Tribal Council. On June 8, 1984 the chief federal negotiator, John Bene, ("the negotiator") answered that no agreement had been reached and that negotiations were continuing. (The defendant Fred Walchli is the present negotiator.) On June 26, 1984 the then Minister advised that "at this exploratory stage, all discussions between the various parties, the federal government, the British Columbia government and the Nisga'a Tribal

Council, are being held in camera". Some three meetings were held between the Offices of Native Claims and representatives of the plaintiffs. The latter were briefed in general terms but no documents were produced.

Further correspondence followed. In the course of injunction proceedings launched before the Supreme Court of British Columbia, a document was filed indicating that the negotiator was proposing to grant a portion of the fisheries to the Nisga'a Tribal Council as part of a claim settlement.

The plaintiffs say that they are alarmed at the prospect of the negotiator reaching an agreement with the Nisga'a Tribal Council granting away a portion of the fisheries and fear that once an agreement in principle is reached after a decade or more of negotiating, there will be very little room for further negotiation. They want their action before this Court to be resolved before the defendants are allowed to come to an agreement without the plaintiffs' participation.

The plaintiffs also point to a recent address of the present Minister to the House of Commons, December 18, 1986 announcing "a comprehensive native land claims policy" and to a published policy paper wherein the Minister wished "to make it cleat that the third parties be consulted".

It is trite law that in order to obtain an interlocutory injunction, the applicant must show: (1) that there is a serious issue to be tried; (2) that he will suffer irreparable harm; (3) that the balance of convenience favours him.

In support of their application for an injunction, the plaintiffs argue that there is indeed a serious issue to be tried. They assert that there will be irreparable harm if an important portion of the western fisheries is taken away from them and allocated to the Nisga'a Tribe. They allege that the balance of convenience weighs in their favour as negotiations could still continue until trial, provided no agreement is signed before that date.

In MacMillan Bloedel Limited v. Mullin et al., [1985] 3 W.W.R. 577, [1985] 2 C.N.L.R. 58, the British Columbia Court of Appeal granted an injunction to two Indian bands restraining MacMillan Bloedel from logging on a island lying off the west coast of Vancouver. The injunction raised two questions which the Court answered in the affirmative: whether there is a fair issue to be raised as to the existence of the right and whether the property should be preserved in its present actual condition until the question can be disposed of at Trial. The Court held that is an injunction prevents MacMillan Bloedel from logging pending the trial, and the Court eventually decides that MacMillan Bloedel has the right to log, then the timber will still be there and MacMillan Bloedel will not have suffered an irreparable harm.

The plaintiffs claim that, similarly in the instant case, if the injunction is granted and the plaintiff's action is dismissed at trial, the negotiations can still continue; whereas should an agreement be concluded between the government and the Nisga'a Tribal Council before trial, then it will be too late for the plaintiffs to make their case.

The plaintiffs allege that they are interested parties in the matter. They exercise a public right to fish on Canadian tidal waters. That right will be affected by a claim settlement. They have a right to a fair hearing and that right has been confirmed by a government policy, so they claim.

The plaintiffs canvassed a 1913 Privy Council decision, Attorney General for B.C. v. Attorney General for Canada, [1914] A.C. 153, 83 L.J.P.C. 169, 110 L.T. 484 (H.L.). The Court held therein that the right of fishing in the sea is a public right, not dependent upon any proprietary right, and that the Dominion has the exclusive right of legislating with regard to it. They rely mostly on these pronouncements of Viscount Haldane (at page 168):

> But in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which is prima facie in the public.

and (at page 169):

> But their Lordships are in entire agreement with him or his main proposition, namely that the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike…. The right into which this practice has crystalized resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway….

The plaintiffs submit, therefore, that they have a strong case and are entitled to a status quo pending trial. Should negotiations be concluded before trial, they say they will have been deprived of their remedy, whereas an injunction would cause no prejudice to the defendants. The injunction would merely postpone any announcement as to the fishing component of the negotiations and the negotiations will be free to proceed with agreements on other elements being negotiated, viz land, forests, etc.

On the other hand, I must accept the first proposition of the Crown, that aboriginal rights do exist and they include fisheries. Dickson J. (now Chief Justice of the Supreme Court of Canada) said as follows in Kruger v. R. [1978] 1 S.C.R. 104, wherein he said that:

> Claims to aboriginal title are woven with history, legend, politics and moral obligations.

Another relevant decision is that of the British Columbia Court of Appeal, Ronald Edward Sparrow v. her Majesty the Queen et al. (unreported) #CA005325, December 24, 1986 [reported [1987] 1 C.N.L.R. 145, [1987] 2 W.W.R. 577]. At the outset the Court states that [p.146 C.N.L.R.]:

> Before April, 1982 it was clearly the law that fishing by Indians, even if in exercise of an aboriginal right to fish, was subject to any controls imposed by the Fisheries Act, R.S.C. 1970 c.F-14, and the regulations made thereunder.

The issue in that appeal was whether that power to regulate is now limited by s-s.35(1) of the Constitution Act, 1982.

In a 1898 Privy Council decision, Attorney General for the Dominion of Canada v. Attorneys General for the Provinces of Ontario, Quebec and Nova Scotia, [1898] A.C. 700, 67 L.J.P.C. 90, 78 L.T. 697 (H.L.), the Privy Council held inter alia that the enactment of fishery regulations and restrictions is within the exclusive competence of the federal parliament and is not within the legislative powers of provincial legislators.

As to the 1913 Privy Council decision above referred to by the plaintiff, although that judgment recognizes to the public a general right to fish, that right may be regulated on tidal waters by the federal government. Viscount Haldane said (page 169):

> But to the practice and the right there were and indeed still are limits or perhaps one should rather say exceptions.

and (page 170):

> That no public right of fishing in such waters, then existing, can be taken away without competent legislation. (My emphasis)

The competent legislation is obviously the Fisheries Act [R.S.C. 1970, c.F-14].

In a Federal Court of Appeal decision on November 3, 1986, Minister of Fisheries and Oceans et al. v. The Gulf Trollers Association, [1987] 2 W.W.R. 727, wherein Marceau J., on behalf of the Court, held that in exercise of the Parliament's legislative competence under s-s.91(12) of the Constitution Act, 1867, it may establish close and open times for catching fish, not only for the purpose of conservation but also for a purpose of socio-economic nature. Referring to the distribution of legislative powers under ss.91 and 92 between the central parliament and the provincial legislatures, he said that the distribution was made on the basis of classes of subjects, not of interests or concerns.

The Crown submits that Parliament may manage the fishery on socio-economic or on other grounds, including allocation to Indians. If, in the course of management, damages are caused to other parties, then compensation is available: in that sense allocation of quotas or licences does not cause irreparable damages to present holders of fishing licences.

Amended Part 1 of the Constitution Act, 1982 (i.e. the Canadian Charter of Rights and Freedoms) now provides under s.25 that the guarantee in the Charter shall not be construed so as to abrogate or derogate from any aboriginal treaty or other aboriginal rights. Subsection 3591) provides that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are recognized and affirmed. Subsection 35(3) defines "treaty rights" as including rights "that now exist by way of land claim agreements or may be so acquired".

In short, the plaintiffs cannot in principle oppose the settlement of aboriginal rights which are recognized by the courts and enshrined in the Constitution. Obviously, settlement and negotiations are the better way to proceed and there is no room for all interested groups to be present. Their interests are represented by the Government of Canada.

Basically, the Crown's case is that the province has no right to regulate tidal water fisheries and that the federal government has the exclusive right so to do. Subsection 35(1) of the Constitution Act, 1982 recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. It is, therefore, the duty of the federal government to negotiate with Indians in an attempt to settle those rights. The plaintiffs have no absolute right to specific fisheries. They merely enjoy a temporary right, always subject to federal management and control. Under the Fisheries Act, R.S.C. c.119, s.1 [R.S.C. c.F-14, s.34] the Minister is authorized to issue and cancel fishing licences and he may allocate to the plaintiffs or to the Indians certain fishing areas and licences. The government's task is to determine, define, recognize and affirm whatever aboriginal rights existed. It may not ignore them under the guise of protecting so-called public fishing rights.

The Crown submits that the plaintiffs are trying to establish a noval position: never before have government negotiators in their dealings with Indian tribes with reference to aboriginal or treaty rights been obliged to bring in as parties to the negotiations outside groups with private interests. Obviously, if that principle is accepted with reference to fisheries, the same situation will prevail with reference to land or forestry or any other aspects of aboriginal rights. Those rights, by their very nature, attract or disrupt other established interests. The position of the Crown is that interested parties ought to be generally informed and consulted but not brought in as participants at the negotiating table.

The Crown's position is also that the negotiator has no authority to finalize any agreements. He is merely authorized to negotiate with the Nisga'a Indians to see is a settlement can be reached. Any tentative settlement negotiated by him would be subject to the approval of the Minister and other ministers of the Crown concerned under their respective jurisdictions and to final approval by the Cabinet. Should legislation be required to effect any settlement, as has happened in certain other settlements, then parliament would be the final authority.

The current policy of the department, as expressed by the Minister and referred to earlier, is that there will be consultation with parties whose rights are affected. There will be separate negotiations with them. The Crown submits that if any person or group of persons affected by the myriad of government negotiations taking place in the country would have a right in law to participate, such a principle would in effect paralyze the government. The negotiations with the Nisga'a Tribe have been going for some ten years and are not about to be completed. That process cannot be held up so as to invite all interested parties to the negotiating table.

According to the Regional Director General of the Department, the Nisga'a Indians would withdraw from further negotiations with the Crown is third parties were included. That opinion, however, has not been confirmed by the Indians and counsel for the intervenor does not share it.

As to the right of fair hearing, the Crown states that the negotiator has no power to compel witnesses, to call for documents, or to make decisions. He is not a board or a presiding officer at a hearing. He is merely a negotiator. The plaintiffs have no right in law to a fair hearing at a negotiating procedure between two other parties.

Since these confidential negotiations have been going on for the past ten years, the status quo calls for the negotiations to continue and not to be restrained before fruition. In a 1985 Federal Court of Appeal decision Attorney General of Canada v. Fishing Vessel Owners Association of B.C., [1985] 1 F.C. 791, Pratte J., speaking on behalf of the Court, dealt with injunction matters and said at page 795 that it was wrong for the Trial judge to assume that the grant of the injunction would not cause any damage to the government:

> When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

He found that the Trial Judge did not in that case take into consideration that the respondent's application sought, in a sense, to disturb rather than preserve the status quo.

I also note that there is no assurance that, if the injunction is granted and the plaintiffs are unsuccessful at trial, that latter would be in a position to reimburse for the harm caused by the delay inflicted upon the negotiation proceedings. This case cannot be isolated. Other negotiations are going on with other Indian tribes in other provinces with reference to other aboriginal rights. The spectre of an injunction suspended above all these negotiation tables could gravely disturb and seriously harm the progress of those negotiations as well.

As to the duty of fairness in a hearing, a 1986 Court of Appeal decision, Canadian Tobacco Manufacturers' Council et al. v. Attorney General of Canada (1986), 65 N.R. 392 (F.C.A.) held that the National Farm products marketing Council which conducted a public hearing on the advisability of recommending to the Minister that a national tobacco marketing agency be established, had a duty of fairness, notwithstanding that it had power merely to inquire and advise because its recommendations could affect the rights and interests of the manufacturers. The Court also held that fairness dictated that the study be produces and considered because it was a timely professional study relevant to an issue of critical importance to the Council's report to the Minister. Mahoney J. said at page 398:

> A tribunal which inquires and recommends but does not decide may be required to observe procedural fairness. Whether or not the requirement exists in a given situation depends on either or both of two considerations:
>
> (1) The actual role of the enquiry in the decision making process; and (2) The potential effect of the recommendation itself absent an ensuing decision.

In my view, the arbitrator is not such a tribunal. He is merely a negotiator attempting to bring together two parties interested in negotiating their respective rights and duties. He owed no duty to parties outside the negotiations.

In short, they duty of fairness applies to a hearing and not to negotiation proceedings. Consultation is not participation. There is consultation going on now with the interested third parties. If the process is not satisfactory, there might be cause for greater input by the interested third parties to the Minister and vice versa. That can be done at separate sessions without disturbing the negotiations.

In these negotiations, only the national government can speak for all interested third parties. In British Columbia, there are 26 tribes and only the Nisga'a aboriginal rights are being negotiated. Others are flooding the courts. Because of their socio-economic and political nature, it is indeed much preferable to settle aboriginal rights by way of negotiations than through the courts.

It is true that in this matter Collier J. has already dismissed an application to strike our the plaintiffs' action, as the learned Judge found that it was not "plain and obvious" that there was no cause of action. However, the threshold test for an injunction is much higher. The former test was that the applicant had to show a "prima facie case". Now, as a result of the American Cyanamid case [1975] A.C. 396 (H.L.), the applicant must only show that there is a "serious issue to be tired". That test is still more exacting than the "plain and obvious" criterion to be applied in strike-out procedures.

The plaintiffs seek an injunction restraining the defendants from concluding, initialling or announcing a land claims agreement with the Nisga'a Tribal Council until trial. Such conclusion, initialling or announcement does not constitute by itself an actual or imminent or apprehended harm. There is no conclusive evidence that the potential increase in the catch of fish to be allocated to Indians is harmful to existing commercial fishermen. There is affidavit evidence to the effect that any change in allocation of fisheries would be accomplished by the purchase, at fair market value, of existing licences and the transfer of such licences to Nisga'a fishermen. This would be done through voluntary transfer of licences on the part of existing commercial fishermen. If the transferor of a licence is not satisfied with the amount of the compensation tendered, he may, of course, seek remedy before the courts. In other words, not only is there no irreparable harm, there is no actual or imminent harm to be apprehended.

That was not the case in the MacMillan Bloedel injunction relied upon by the plaintiffs. There, bulldozers were present and advancing against the forest. I find sustenance for my view in the following extract from the British Columbia Court of Appeal decision (at page 607) [p.77 C.N.L.R.]:

> The fact that there is an issue between the Indians and the province based upon aboriginal claims should not come as a surprise to anyone….The federal government has agreed to

> negotiate some claims. Other claims are being advanced….It is significant that no injunction has been sought in that action, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations. (my emphasis)

In my view, therefore, while it may not be plain and obvious that the plaintiffs have no cause of action, they have proved to my satisfaction that they have a serious issue to be tried. While this finding disposes of the instant application, I must add that even had the plaintiffs established a serious issue to be tried, I would still, in the exercise of my discretion, have refused to grant the injunction because the plaintiffs have not established irreparable harm and, furthermore, the balance of convenience favours the defendants.

Consequently the application is denied with costs in the cause.

ORDER

The application is denied. Costs in the cause.