

**IN THE SUPREME COURT OF BRITISH COLUMBIA BETWEEN:**

**JAMES WALKUS FISHING CO. LTD. PLAINTIFF AND: NATIVE CITIZENS FISHERIES LTD., DONALD CHARLES YORKE and GALE YORK DEFENDANTS  
REASONS FOR JUDGMENT OF MASTER BOLTON (IN CHAMBERS)**

Counsel for the Plaintiff: H.S. Delaney and D.C. Hendricks

Counsel for the Defendant: H.P. Swanson Native Citizens Fisheries Ltd.

Counsel for the Defendants: G.A. Lloyd Donald Charles Yorke and Gale York

Place and Date of Hearing: Vancouver, B.C. January 27, 1997

[1] In this application, the defendants seek an order that one of the issues raised by this lawsuit be resolved by a special case. The plaintiff does not agree that a special case is appropriate.

[2] The dispute revolves around herring roe licences. The defendants, Donald Yorke and Gale York, each owned licences. In 1983, they assigned their licences for the current year to James Walkus and John Walkus, who own the plaintiff corporation. This agreement included a right of first refusal in favour of the Walkuses if Yorke and York offered future assignments for terms of a year or more.

[3] A dispute arose with respect to the division of profits in 1983. Litigation was commenced, which did not go to trial until 1988.

[4] In the meantime, in 1985, pursuant to the right of first refusal, Yorke and York gave notice to the Walkuses of their intention to assign the licences, and a further agreement was entered into for what has been described to me as "the long term (up to permanent)" lease of the licences to the plaintiff.

[5] The parties operated under the terms of this assignment until 1988, when the decision of Mr. Justice Gow was received, disposing of the action in respect of the 1983 assignment. The decision was that the agreement was not binding, as the parties were not ad idem. The decision was silent with respect to the right of first refusal contained in the agreement.

[6] The defendants, relying upon this decision, concluded that the right of first refusal was also invalid, and further concluded that the 1985 agreement entered into on the assumption the right of first refusal was binding was equally invalid. They purported to repudiate the 1985 agreement. That act has led to the present litigation, in which Mr. Justice Meredith has granted an injunction to the plaintiff, which essentially resulted in the herring licences being issued from year to year to the plaintiff.

[7] The issue which the defendants seek to have determined by special case is this:

Was there a legally valid and subsisting right of first refusal contained in the 1983 instruments, given the decision of Mr. Justice Gow, as affirmed on appeal?

[8] The defendants argue that much time and money may be saved if the validity of the right of first refusal is dealt with as a preliminary point. They concede that not much saving would result if the decision goes against them, and the court upholds the right of first refusal. But if the decision goes the other way, they say, a ruling that the right of first refusal was invalid would eliminate a great deal of pre-trial discovery and evidence at trial about events prior to the making of the 1983 agreement.

[9] The plaintiff, however, asserts that as the pleadings stand, a preliminary decision that the right of first refusal was invalid would not dispense with the need for evidence of events prior to 1983. This is because the defendants themselves have pleaded (in paragraph 18 of the Amended Counterclaim of the defendants Yorke and York) misrepresentation prior to signing the original 1983 agreement. These alleged misrepresentations, says the plaintiff, will cover much of the same ground as the right of first refusal issue.

[10] There are three possible outcomes of the proposed special case: the right of first refusal will be ruled invalid, it will be upheld, or the court will conclude there is insufficient evidence to rule one way or the other.

[11] This latter outcome was not reviewed in much detail at the hearing, but the facts the defendants propose to put to the court in support of the application are minimal. It strikes me as a distinct possibility that the court would be unable to resolve the issue without further evidence, particularly with respect to the parties' intentions or understanding as to whether the right of first refusal was severable from the agreement covering the 1983 fishing season.

[12] With respect to the possibility of the court upholding the right of first refusal, a special case will actually increase the time consumed by the litigation. The issue will have to be prepared for and argued twice; once for the special case and again to explain the significance of the decision to the trial judge.

[13] It is with regard to the third possibility that the fundamental disagreement between the parties arises. The defendants assert that a decision that the right of first refusal has already been declared invalid will avoid a great deal of pre-trial discovery and evidence at trial on the circumstances leading up to the conclusion of the 1983 agreement. However, I accept that it is more probable than not that the defendants' plea of misrepresentation prior to the signing of that agreement has put in issue many of the same events they are seeking to avoid by the special case.

[14] Thus, to summarize the three possible outcomes of the special case identified in paragraphs 11 to 13 above, the first will result in considerably more time being spent than if the matter proceeded to trial in the normal way. The second will increase the time by an unknown, but probably significant, extent. With regard to the third, it is possible that a fairly considerable time saving could result, but in my view it is more likely that any saving will be minimal, or even that some duplication of effort will still be required.

[15] Given that finding, it hardly seems necessary to look for law on the subject, but I will record briefly that the test for the appropriateness of a special case is essentially one of practical utility: *Jabs Construction Ltd. v. Callahan* [1991] 6 W.W.R. 269 (B.C.S.C.):

The test is whether determination of the issue will or may serve a useful purpose. It is proper to take into account the practical realities faced by litigants and the saving of their time and court time that a preliminary ruling may achieve.

[16] In the circumstances, the application must be dismissed. Costs to the plaintiff in any event.

"A. Neil Bolton"