

Federal Court of Canada  
Trial Division



Section de première instance de  
la Cour fédérale du Canada

Date: 19980508

Docket: T-949-98

**Between:**

**JEAN COULOMBE**

**Applicant**

- and -

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR ORDER**

**(Reasons delivered by telephone conference call  
between Ottawa and Québec on May 8, 1998)**

**RICHARD J.:**

[1] This is a motion by the applicant for an interlocutory injunction pursuant to Rules 358 and 373 of the *Federal Court Rules, 1998*.

[2] The applicant filed a notice of application for judicial review to set aside and declare null and void the May 5, 1998 decision of Mr. St-Gelais of the Department of Fisheries and Oceans of Canada (the Department) that the conditions of the applicant's fishing licence for the 1998 season

will not be issued until the applicant confirms in writing that he has entered into an agreement with a certified at-sea observer company.

[3] The applicant asks the Court to make an order directing the Department to issue to the applicant the conditions of his snow crab, herring and groundfish (except cod) fishing licence for the 1998 season pending the Court's decision as to the validity and legality of the Department's requirement, which is the subject of the notice of application for judicial review.

#### **FACTS OF THE CASE**

[4] The applicant holds a commercial fishing licence for the 1998 season for snow crab fishing in Area 16 and herring and groundfish (except cod) fishing in Area 15.

[5] However, the Department of Fisheries and Oceans of Canada refuses to issue to the applicant the conditions of his snow crab fishing licence with the result that he has been unable to exercise the rights and privileges of his fishing licence since the opening of the snow crab season in Area 16.

[6] The reasons for the Department of Fisheries and Oceans of Canada's refusal to issue the applicant's licence conditions are found in the following letter dated April 15, 1998 from Martin St-Gelais, fisheries management officer and acting district representative, North Shore district, to the applicant:

[TRANSLATION]

**Re: Licence Conditions 1998**

Sir,

Further to your visit to our offices on April 14, this letter is to confirm the procedure in effect for issuing snow crab fishing licence conditions with regard to At-Sea Observer Program coverage.

We would like to begin by pointing out that this year's meeting of the Area 16 snow crab advisory committee was held on March 18, 1998 in Sept-Iles. Industry representatives, including representatives of both Area 16 crab fisher's associations, were in attendance. During the discussions concerning 1998 management measures, the advisory committee agreed that the conditions of crab fishers' licences would be issued as each fisher came to an individual agreement with a certified at-sea observer company. To date, 35 of the 36 crab fishers from Area 16 have complied with this management decision.

The Department of Fisheries and Oceans At-Sea Observer Program is an essential tool for the fishing industry that enables it to gather the scientific data required for the viable management of the resource. In order to accomplish this, we ask that the industry use at-sea observers certified by our department.

Clause 6 of the snow crab fishers' licence conditions reads as follows: "Upon request by a fishery officer or a local manager of an observer company, an observer must be present aboard your fishing vessel at all times during the fishing trip regarding which the request has been made".

Since from the moment the said request is made, it is the fisher's responsibility to retain the services of an observer certified by the Department, we would appreciate receiving written confirmation of the manner in which you intend to fulfill this obligation.

If the action you take is acceptable, we will take the necessary steps to issue the licence conditions to allow you to begin your fishing activities for the 1998 season.

Sincerely yours . . . .

[7] On April 23, 1998, the applicant served his written acceptance of the licence conditions stipulated in clause 6 of the general conditions of snow crab fishers' licences on the authorized representatives of the Department of Fisheries and Oceans of Canada.

[8] On May 5, 1998, Martin St-Gelais replied as follows:

[TRANSLATION]

**Re: Licence Conditions 1998**

Sir,

We acknowledge receipt of your letter dated May 4, 1998. You will find attached a copy of the letter which was sent to you on April 15 concerning the issuance of crab fishing licence conditions for 1988.

The information contained in the said letter is still valid.

Sincerely yours . . . .

### **THE TESTS TO MEET**

[9] As I stated in *Conseil du Crabe des Neiges Inc. et al. v. Canada (Department of Fisheries and Oceans) et al.*,<sup>1</sup> the issue in this motion is whether the applicant should be granted the interim relief he is seeking. He is entitled thereto only if he meets the tests developed in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers Local 832 and Labour Board (Man.)*.<sup>2</sup> Generally speaking, a court should apply the same principles whether the relief sought is an injunction or a stay of proceedings.

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<sup>1</sup> (1996), 116 F.T.R. 8.

<sup>2</sup> [1987] 1 S.C.R. 110.

[10] *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

#### **A SERIOUS QUESTION TO BE TRIED**

[11] There are no specific requirements that must be met to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case.

#### **IRREPARABLE HARM**

[12] At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude.

#### **THE BALANCE OF INCONVENIENCE AND THE PUBLIC INTEREST**

[13] The third test to be applied in any application for interlocutory relief is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. Where the constitutionality of

legislation or, as in the case at bar, the authority of a law enforcement agency is in issue, the public interest must be considered in assessing the balance of inconvenience.

[14] It should be noted that this is an exceptional measure and that the burden is on the applicant to prove that these three tests have been met.

### **APPLICATION OF THESE TESTS TO THE CASE AT BAR**

#### **A serious question to be tried**

##### Applicant's submissions

[15] There is no statutory or regulatory provision which requires the applicant to pay the costs of the at-sea observer or even to enter into a contract with a third party to ensure the presence of at-sea observers in order to obtain his snow crab fishing licence conditions.

[16] There is no statutory or regulatory provision which requires the applicant to pay fees other than those referred to in section 8 of the *Fisheries Act* (R.S.C., c. F-14) in order to obtain his snow crab fishing licence conditions after he has paid all fees payable under the Act and Regulations, as he is then in possession of his fishing licence.

[17] By requiring the applicant to enter into a contract with a company certified by the Department of Fisheries and Oceans of Canada, Biorex in the instant case, in order to ensure the presence of observers on board snow crab fishers' vessels and accordingly requiring the applicant to pay this company \$3,600.00 before his licence conditions are issued, the Department of

Fisheries and Oceans of Canada is requiring the applicant not only to enter into a contract with a third party even though the Act places him under no such obligation, but even more importantly, to pay fees not prescribed by the Governor in Council pursuant to section 8 of the *Fisheries Act*.

Respondent's submissions

[18] The power to issue fishing licences is a discretionary power of the Minister of Fisheries and Oceans of Canada under section 7 of the *Fisheries Act* (R.S.C., 1985, c. F-14).

[19] Paragraph 22(1)(n) of the *Fishery (General) Regulations*, SOR/93-53 (the Regulations), provides that the following condition may be specified in a fishing licence:

- (n) verification by an observer of the weight and species of any fish caught and retained . . . .

[20] Section 39 of the Regulations sets out the conditions which must be met by a person designated as an observer by the Regional Director-General and the duties which the Director-General may assign to the observer.

[21] Section 46 of the Regulations requires the owner or master of a fishing vessel, at the request of the Regional Director-General, to permit an observer who is assigned the duties set out in paragraph 39(2)(a) to go on board that vessel to perform those duties and to remain on board for the period of time specified in the request, and arrange for the embarkation or disembarkation of the observer at such time and place as is specified in the request.

[22] The relevant clause of the crab fishers' fishing licence conditions reads as follows: "Upon request by a fishery officer or a local manager of an observer company, an observer must be present aboard your fishing vessel at all times during the fishing trip regarding which the request has been made."

[23] Thus, the Regulations authorize the Department to include in a fishing licence a condition requiring the verification by an observer of the weight and species of any fish caught and retained.

[24] Furthermore, the Regulations provide that the presence of an at-sea observer may be a condition of a fishing licence, this condition is stipulated in clause 6 of the fishing licence conditions, and the Department does not issue fishing licence conditions until the fisher has come to an agreement with a certified at-sea observer company in order to ensure compliance with the condition.

### Conclusion

[25] The applicant does not challenge the validity of section 46 of the Regulations and recognizes that fishers are bound by this section. While fishers must allow observers on board, however, they are not required to pay for them. Thus, the only question is who must pay for the expenses and costs of the at-sea observer?



[26] What is at issue is the interpretation and application of a statute and the regulations made thereunder. For the purposes of the instant motion, I am prepared to accept that the applicant has raised a serious question to be tried.

### **IRREPARABLE HARM**

#### **Applicant's submissions**

[27] The harm the applicant might suffer should the interlocutory injunction not be granted is of two types: the first is contractual and the second is monetary.

[28] The harm which could be characterized as contractual stems from the fact that in order to obtain the licence conditions required for snow crab fishing, the applicant must enter into a contract with a company certified by the Department of Fisheries and Oceans of Canada and must pay the costs of the services provided by that company.

[29] As for monetary harm, the applicant will not be able to obtain compensation for the damage he has suffered.

[30] Once he has committed or bound himself contractually in this way, the applicant will not be in a position to require the certified company to reimburse the amount of \$ 3,600.00 to him, as it will have provided the services for which it was paid and will accordingly be entitled to payment therefor.

[31] As for the possibility of an action by the applicant against the Department of Fisheries and Oceans of Canada, we feel that it presents difficulties in legal terms both because there is no contractual relationship between the applicant and the Department and because of the legal rules concerning the liability of the Crown and its servants in torts.

**Respondent's submissions**

[32] The respondent submits that the applicant has failed to establish that he would suffer irreparable harm should the interlocutory injunction not be granted. Should the instant motion for an interlocutory injunction be dismissed, the application for judicial review might eventually be allowed and the applicant could subsequently seek damages to compensate for any loss due to the cost of an agreement to obtain the services of an observer, provided that he succeeds in discharging the usual burden of proof in civil liability.

[33] The applicant must also prove a loss, and it must be emphasized that even if the motion for an interlocutory injunction were allowed and the licence conditions issued to the applicant, the Regulations and the relevant clause of the licence conditions still require him to have a designated observer on board at all times during the specified fishing trips and to come to an agreement with a designated company .

[34] The Department accordingly has the power to include a condition concerning the presence of an observer in a fishing licence. It is clear from the Regulations that the observer's presence is the responsibility of the fisher, who must take the necessary steps to ensure the observer is present.

### **Conclusion**

[35] I find that the applicant has not established that he would suffer irreparable harm should the relief not be granted.

### **THE BALANCE OF INCONVENIENCE AND THE PUBLIC INTEREST**

[36] The Minister and persons designated by the Minister are responsible for the orderly administration of the Act and the regulations made thereunder. This is a dispute over the costs to be paid.

[37] The applicant can comply and then challenge the decision.

[38] Even if he receives his licence conditions, he must take the appropriate action to have an observer on board.

[39] It is in the public interest that observers be able to perform their duties and that fishers take the appropriate action to allow them to perform those duties.

**CONCLUSION**

[40] The motion is accordingly dismissed.

**John D. Richard**

Judge

Ottawa, Ontario  
May 8, 1998

Certified true translation

*M. Iveson*  
M. Iveson

FEDERAL COURT OF CANADA  
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.: T-949-98

STYLE OF CAUSE: JEAN COULOMBE  
- and -  
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA

DATE OF HEARING: MAY 8, 1998

REASONS FOR ORDER BY THE HONOURABLE MR. JUSTICE RICHARD

DATED MAY 8, 1998

APPEARANCES:

Raynold Bernatchez For the applicant

Rosemarie Millar For the respondent

COUNSEL OF RECORD:

Bouchard & Bouchard  
Charlesbourg, Quebec For the applicant

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