

Federal Court



Cour fédérale

Date: 20140916

Docket: T-1078-13

Citation: 2014 FC 884

Ottawa, Ontario, September 16, 2014

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**THE SQUAMISH INDIAN BAND AND
SYETÁXTN, CHRISTOPHER LEWIS ON HIS
OWN BEHALF AND ON BEHALF OF ALL
MEMBERS OF THE SQUAMISH INDIAN
BAND**

Applicants

and

MINISTER OF FISHERIES AND OCEANS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Since 2001, the Squamish Indian Band has sought to increase its entitlement to fish sockeye salmon for food, social, and ceremonial (FSC) purposes in or near the Fraser River in British Columbia. At the time of this application for judicial review, the Squamish were entitled

to 20,000 sockeye per year. The Band has been seeking an increase to 70,000 sockeye per year and to expand their fishing into the Lower Fraser River. They say their allocation is inadequate to their needs, is much lower on a per capita basis than the allocations given to their neighbours, and fails to recognize their historical fishing activity in the Fraser River and the particular importance of sockeye in their culture.

[2] In a letter dated May 17, 2013, a Director of Fisheries and Oceans Canada (DFO) for the Lower Fraser Area, on behalf of the Minister of Fisheries and Oceans, informed the Squamish that the department was not yet in a position to increase the Band's allocation or its fishing area. The Director asked for additional information about the Band's fishing activities and requested a meeting to discuss a variety of issues relating to the Band's request.

[3] The Band interpreted this letter as a rejection of its request and applied for judicial review of the "decision" contained in it.

[4] The Minister maintains that no decision had been made on the Band's request, which is borne out by the fact that on May 8, 2014 a further communication from DFO to the Band granted it an increased allocation to 30,000 sockeye per year, pending future discussions. Accordingly, the May 17, 2013 letter did not contain a decision and is not, in the Minister's view, subject to judicial review. Therefore, this application for judicial review is, according to the Minister, premature.

[5] I am satisfied that the May 17, 2013 letter did not represent a decision on the Squamish Band's request. Rather, it set out DFO's position on the request, asked for further information, and invited future discussion on various related issues. Accordingly, there is no basis for the Squamish Band's application for judicial review.

II. The Minister's "Decision"

[6] On May 17, 2013, the Director of DFO for the Lower Fraser Area, Mr. Gilles Verret, wrote to the Co-chairs of the Squamish Band Council. He described the factors that must be considered in responding to requests for increases in FSC allocations, including conservation and sustainability, community needs, historic fishing habits, the community's catch history for all species, monitoring and reporting plans, and potential implications for other Aboriginal groups.

[7] Mr. Verret also noted that sockeye are heavily subscribed in the Lower Fraser River, so DFO had to proceed cautiously before making any changes. Pending further analysis, DFO was "not in a position to agree to changes in allocation numbers for Fraser River sockeye or changes to a fishing area". Part of the further analysis would involve consideration of the fisheries currently operated by the Squamish Band. Mr. Verret requested further information on that activity. He also conveyed his interest in discussing access to Fraser River sockeye in 2013 by way of supplemental licences. Further, he expressed hope that issues relating to fisheries management could be discussed at a future meeting. He proposed a date of June 7, 2013.

III. Is judicial review available?

[8] The Squamish Band argued that the May 17, 2013 letter, in effect, amounted to a rejection of their request for an increased allocation for Fraser River sockeye. I disagree. Looking at that letter in the context of the events and discussions preceding it, as well as those following it, I cannot conclude that it represented a decision on the request for increased allocation. At the same time, I can understand how the Band may have interpreted Mr. Verret's letter as a rejection of its request.

A. *Factual Background*

[9] In 1992, DFO created the Aboriginal Fishing Strategy [AFS] in order to recognize the Aboriginal right to fish for FSC purposes as laid out by the Supreme Court of Canada in *R v Sparrow*, [1990] 1 SCR 1075. The AFS provided to First Nations the maximum allocations of specific species that could be harvested each year, and specified the areas in which they could fish. FSC policies set out the criteria that DFO considers when requests for changes in allocations are made.

[10] Since creation of the AFS, the Squamish Band has been allocated 20,000 Fraser River sockeye each year. On July 5, 2011, the Band requested an increase to 70,000, and an expansion of its fishing area. The Band also requested a chance to meet with DFO officials to discuss its request.

[11] A month later, DFO sent a non-committal response, noting that discussions between DFO and the Band were ongoing, and that the request would involve “considerable time and effort by both DFO staff and the Squamish Nation”. The parties held an “initial meeting” on December 13, 2011. On January 27, 2012, the Band Council Co-Chairs summarized their request again and undertook to provide DFO with information about the Band’s proposed allocations for all species of fish. The Co-Chairs also noted that DFO’s position at the December meeting had been that the request for an expansion of the Band’s fishing area would be explored further. The next step was for DFO to provide the Band with a map that would permit the Band to identify precisely in which areas it wished to fish so that the parties could work cooperatively on this issue. In summary, the parties agreed to continue to discuss the various issues arising from the Band’s request in order to arrive at an agreement for the 2012-2013 fiscal year and to develop a work plan for that purpose early in 2012.

[12] The Band sent another letter to DFO on April 18, 2012, noting that DFO had not responded to its earlier letter, notwithstanding DFO’s commitment to achieve an agreement for 2012-2013. Just over a week later, DFO finally responded to the Band’s January 27, 2012 letter. DFO explained that there could be no increase in allocation for 2012 given the forecast for low numbers of sockeye that year. The letter outlined the various factors that would be taken into account in addressing the Band’s request and noted the need for further discussions.

[13] The parties met on May 11, 2012 and, on July 13, 2012, the Co-Chairs wrote to DFO to provide further information relating to the various factors that DFO said needed to be taken into

account. The Co-Chairs found the discussions to be encouraging and expressed hope that an agreement could be reached during the summer of 2012. That did not happen.

[14] Following a meeting on November 23, 2012, the Co-Chairs wrote to the Area Director, Mr. Verret, noting that time was running out on DFO's commitment to arrive at an agreement during the 2012-2013 fiscal year. They asked DFO to respond before January 25, 2013. In his reply, dated January 25, 2013, Mr. Verret proposed meeting dates in March 2013 for further discussions. A meeting took place on March 8, 2013.

[15] The Co-Chairs followed up with a letter dated April 17, 2013. They explained that they had provided all of the information DFO had asked for and, therefore, expected a positive response to their request for an increased allocation for the 2013-2014 fiscal year. They proposed another meeting on May 17, 2013. That, of course, was the date Mr. Verret sent the letter that is the subject of this putative application for judicial review, described above.

[16] The parties met again on June 7, 2013 as had been proposed by Mr. Verret in his May 17, 2013 letter. At the meeting, DFO offered a temporary supplementary licence to the Band, but it was rejected. DFO reiterated its need for further information, including data relating to the Band's fisheries, calculation of the community's food needs, proposed harvesting, monitoring and enforcement plans, precise boundaries for the proposed new fishing areas, and reaction from neighbouring bands with overlapping claims and parallel requests for increased allocations.

[17] With respect to consultation with affected bands, DFO had no plan in place in the summer or fall of 2013. Officials felt they could not commence consultations until they had received direction from DFO on the Band's allocation request.

[18] At the hearing of this application for judicial review, the Band sought to introduce fresh evidence about the consultations that were, in fact, carried out prior to the May 8, 2014 letter granting the Band an increase to 30,000 sockeye. It appears that DFO simply sent out a letter on March 31, 2014 to various First Nations asking for a response to the Squamish Band's request prior to April 30, 2014. The Band also sought to introduce as fresh evidence a chart showing total salmon allocations for First Nations in the area of the Lower Fraser River (including the Squamish).

[19] I am satisfied that the consultation letter may be introduced as fresh evidence as it assists the Court by placing in context the alleged decision of May 17, 2013 and the subsequent DFO response of May 8, 2014. However, I am not satisfied that the salmon allocation chart should be admitted. It relates to the reasonableness of the Minister's position, a question that I need not address, given my conclusion that the May 17, 2013 letter did not contain a reviewable decision.

B. *Legal considerations*

[20] The Court can entertain an application for judicial review before a final decision has been reached, but should avoid fragmenting the process. Often, the better course will be to decline relief until a final decision has been rendered because, by then, the dispute may actually have been resolved (*Gitxaala Nation v Canada*, 2012 FC 1336, at para 54).

[21] Here, I find that the May 17, 2013 letter did not contain a final decision regarding the Band's request for a larger salmon allocation. Certainly, looking at the length of time between the Band's request and the date of the letter, and the extensive discussions that led up to it, I can understand why the Band found its contents to be discouraging and indicative of an inclination to deny its request. However, the letter itself did not contain a decision. Mr. Verret neither granted nor denied the Band anything. He simply outlined further steps to be taken. The subsequent letter of May 8, 2014 was more particular and may well be amenable to judicial review, but I need not decide that question here.

[22] In the circumstances, however, to permit the Band to obtain a judicial review of the May 17, 2013 letter would certainly fragment the process which, if allowed to proceed without undue interruption, may well result in a satisfactory resolution of the Band's request. Accordingly, I decline to grant the relief the Band seeks.

[23] The Band's frustration is understandable. The process that unfolded in response to its request for increased allocation was prolix and protracted. The basis on which a decision would be made was unclear, making it difficult for the Band to provide the relevant information. Not all of the delays were caused by DFO, but DFO could clearly have dealt with the Band's request more expeditiously. It recently moved swiftly to conduct an accelerated consultation process and deliver a partial response to the Band's request, but only after this application was set down for a hearing. This suggests to me that DFO could have moved forward on the Band's request in a more timely way, had it been motivated to do so.

[24] In the circumstances, therefore, while I must dismiss this application for judicial review on the grounds that it is premature, I would grant the applicants their costs in bringing it.

IV. Conclusion and Disposition

[25] In its May 17, 2013 letter, DFO did not render a decision on the Squamish Band's request for an increase in its Fraser River sockeye allocation. Therefore, this application for judicial review is premature, and must be dismissed. However, in the circumstances, the Squamish Band is entitled to its costs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed; and
2. The applicants are entitled to their costs.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1078-13

STYLE OF CAUSE: THE SQUAMISH INDIAN BAND, AND SYETÁXTN,
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INDIAN BAND v MINISTER OF FISHERIES AND
OCEANS

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