Federal Court  Cour fédérale

Date: 20110126

Docket: T-1582-10

Citation: 2011 FC 89

Ottawa, Ontario, January 26, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

DOUG KIMOTO, VIC AMOS AND WEST COAST TROLLERS (AREA G) ASSOCIATION ON BEHALF OF ALL AREA G TROLL LICENCE HOLDERS

Applicants

and

THE ATTORNEY GENERAL OF CANADA, GULF TROLLERS ASSOCIATION (AREA H) AND AREA F TROLL ASSOCIATION

Respondents

REASONS FOR ORDER AND ORDER

[1] What should be done with US$30 million received by the Minister of Fisheries and Oceans, the Honourable Gail Shea, pursuant to amendments to the *Pacific Salmon Treaty* with the United States? Stripped to its essence, for each of ten years commencing in 2009, Canada has agreed to reduce its catch of chinook salmon off the West Coast of Vancouver Island by 30 percent. In that way more salmon may return to spawn in their American rivers of origin, and thus, hopefully, stock

will be built up over the long term. The United States undertook to pay US$30 million to support a Canadian mitigation program. US$15 million has already been paid, and the balance is due this year.

[2] The Minister has so far achieved the 30 percent reduction by restricting the number of days in which the Applicants may fish. However, for the future she intends to reduce the number of fishermen by using the bulk of the American funding to buy-back chinook salmon fishing licenses, not only from the Applicants, but also from two other demarcated fishing areas where allotments have not been reduced.

[3] The Applicants ask that the decision be quashed. They seek a declaration that the fund is impressed with a trust or an equitable lien or charge in their favour, and that the spending program declared by the Minister is in violation of the Treaty and the *Fisheries Act*. Such spending constitutes an unjust enrichment at their expense. In any event, the decision is unreasonable. The Applicants say the money should go to them.

[4] The Attorney General's position, on behalf of the Minister, is that her decision is not justiciable, that the proposed spending program is well within the discretion afforded her under the Treaty and at law, more particularly under the *Fisheries Act* and the *Financial Administration Act*, and that in any event private citizens can neither benefit from, nor be burdened by the terms of a treaty which has not been given force and effect by statutory enactment. Procedural objections have also been raised.

[5] Although the Applicants make a strong case that they are the ones most directly and most adversely affected by the reduction in the chinook salmon catch, I find they have no special interest in the mitigation fund and that the decision of the Minister was well within her discretion both at law and under the terms of the Treaty. There has been no unjust enrichment. The judicial review shall be dismissed.

THE *PACIFIC SALMON TREATY*

[6] Pacific salmon is a treasured resource. The harvest is a most important industry not only in British Columbia, but also in Alaska, Washington, Oregon and Idaho. The five species of Pacific salmon, chinook, sockeye, pink, coho and chum, are highly migratory. Generally speaking, they head north from their rivers of origin, reach the pinnacle of their migration off Alaska and then return home to spawn. Some Fraser River salmon are caught or "intercepted" by Washington state fishermen (although "fisher" is currently the politically correct term, in my book a "fisher" is still a "weasel".) Other Canadian salmon are intercepted by Alaskan fishermen and women while the majority of chinook salmon caught by Canadians are American in origin. This case is limited to chinook salmon.

[7] The management of Pacific salmon has been the subject of discussion between Canada and the United States for well over a century. In 1985, the two countries entered into the *Pacific Salmon Treaty*. Both Governments recognized the need for conservation and rational management, that the country in whose waters salmon stock originate has the primary interest and responsibility for same, that salmon originating in the waters of each party are intercepted in substantial numbers by

nationals of the other and that it is in the interests of all to cooperate in the management, research and enhancement of Pacific salmon stocks.

[8] The Treaty is quite detailed, over 150 pages in length. It establishes a joint Pacific Salmon Commission, sets out different issues and principles and has articles dealing specifically with, among others, the Fraser River, the Yukon River and trans-boundary rivers.

[9] More to the point Annex IV amended in 1999, 2002, 2005 and of concern to us in this case, as of January 1, 2009, deals with chinook salmon in Chapter 3.

[10] The management regime set out in the chinook salmon chapter is complex. The fisheries are of two types:

a. Aggregate abundance-based management (AABM) fisheries in which the total allowable catch is determined annually by the Commission, based on the abundance of stock that year.
b. Individual stock-based management (ISBM) fisheries which are generally located in or near the rivers of origin. The basis of their management is the status of individual stock or stock groups.

[11] The 2009 amendments cover the period from 2009 to 2018. There is an agreed 15 percent reduction in the maximum allowance catch levels for the Alaskan AABM fishery and a 30 percent reduction for the West Coast of Vancouver Island AABM fishery. The reduction is about equal in

terms of the number of fish. Further reductions in Alaskan or Canadian fisheries, or both, be they AABM or ISBM, may take place contingent upon certain events.

[12] There are a number of financial measures. Both countries have agreed to fund a research program and a wire tagging assessment program. Coming now to the US$30 million, the United States undertook to provide US$41.5 million of which US$30 million:

> […] is to be made available to Canada to assist in the implementation of this Chapter. Specifically, $15 million (U.S.) is to be provided in each of two U.S. fiscal years from 2009 to 2011, inclusive, or sooner (for a total of $30 million U.S.), with the following understandings:
>
> i. the bulk of this funding would be used by Canada for a fishery mitigation program designed, among other purposes, to reduce effort in its commercial salmon troll fishery; and
>
> ii. Canada will inform the Commission as to how this funding was utilized in support of the mitigation program within two years of receiving such funding.

[13] During the hearing I enquired if "reduce effort" was a term of art, and whether there was a French version of the Treaty. The Treaty was only signed in English, and given the broad powers already enjoyed by the Minister under the *Fisheries Act*, it was not necessary to ratify or give effect to it by way of bilingual domestic legislation. There is, however, a French version for Canadian domestic purposes.

[14] The key provision reads:

> […] étant entendu que :
>
> 1. la majeure partie de ces fonds sera utilisée par le Canada dans le cadre d'un programme d'atténuation des impacts des activités de pêche conçu, entre autres

> choses, pour réduire son effort de pêche commerciale à la traîne du saumon;

[15] The parties are in general agreement as to the meaning of "reduce effort." A catch may be calculated in terms of "boat-days." To achieve a reduction in what otherwise would have been the catch, the Minister could reduce the number of days in which a given area is open for fishing or could reduce the number of boats by reducing the number of licenses. One could also achieve a reduction by restricting allowable fishing gear, but all seem to agree that that is not a viable alternative in troll fishing. Trolling is the only method by which chinook salmon may be caught.

[16] As stated, in 2009 and 2010 the Minister achieved the agreed result by reducing the number of fishing days. She now intends to reduce the number of fishing vessels by buying back licenses. A "buy-back" is a political reality. The licenses are only good for one year and in theory she could perhaps simply not renew some licenses. However that is a path no one wishes to pursue.

THE MINISTER'S TWO DECISIONS

[17] In fact, the Minister made two decisions, only one of which is subject to this judicial review. The Treaty calls for a 30 percent reduction off the West Coast of Vancouver Island, in what is domestically known as Area G. Within that area, in addition to commercial fishing, there is a harvest for First Nations food, social and ceremonial purposes, and sport fishing. The entire reduction has been taken from the commercial fishing allotment. That decision is essentially a political one and not reviewable by this Court (*Gulf Trollers Assn v Canada (Minister of Fisheries and Oceans)*, [1987] 2 FC 93 (FCA) and *R v Huovinen*, 2000 BCCA 427, 188 DLR (4th) 28). What is under review is the decision to buy-back licenses. The Area G fishermen are of the view that no

license should be bought back, but rather the US$30 million should be paid to them to retool their vessels to fish other species and thus to keep their communities viable and jobs in place for their sons and daughters. A license buy-back will not "reduce effort" and, in any event, no buy-back scheme should be extended to the Respondents in the other two areas in which chinook salmon fishing is permitted, Area H (an ISBM area), which lies between Vancouver Island and the mainland, and Area F (an AABM area) to the north. Not only have their quotas not been reduced, but recently there has been no chinook salmon fishing at all in Area H.

[18] The Minister's decision under review has three elements:

a. A voluntary, permanent license retirement program for troll license holders in Areas F, G and H;
b. A $500,000 program to support economic development in Vancouver Island West Coast communities; and
c. $1 million to study the development of a new salmon allocation framework.

[19] The Applicants' case is multi-layered and subtle to the extreme. I think it better to analyze the issues in accordance with the defences raised on behalf of the Minister. They are:

a. The Treaty confers no benefits on Area G fishermen which would create a charge of any nature on the US$30 million;
b. Canada was entitled to receive the American funding;
c. The planned expenditure is in accordance with the Treaty and with Canadian law;

d. Even if the Treaty conferred benefits on the Applicants, they cannot, in a domestic court, claim benefit of a Treaty which has not been the subject of domestic legislation;

e. The Applicants claim money. They must proceed by way of action under section 17 of the *Federal Courts Act* (or in the provincial courts which have concurrent jurisdiction), and not by way of judicial review under sections 18 and following of the Act;

f. The Applicants assert that this is a representative proceeding. However the requirements of the Rule 114 of the *Federal Courts Rules* have not been met;

g. In any event, there is insufficient evidence to support the Applicants' case. Although a motion to strike affidavits in whole or in part was withdrawn during the hearing, the Court was called upon to ignore hearsay evidence and documents brought forward through inappropriate witnesses, who could not speak to them.

WAS THE MINISTER ENTITLED TO REDUCE THE CHINOOK SALMON CATCH?

[20] Leaving aside the US$30 million payment, the Applicants recognize that the Minister has the power to reduce the catch in the interest of conservation, and that in her discretion she could take the full reduction from what would otherwise be the commercial catch in Area G (*Gulf Trollers,* above, and *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans),* [1997] 1 SCR 12).

[21] They are somewhat ambivalent when it comes to the US$30 million. If they receive the money well and good. If they do not, the Minister is indirectly selling part of the catch to the

Americans. This is something she cannot do (*Larocque v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, 270 DLR (4th) 552).

[22] I disagree; section 2 of the *Financial Administration Act* defines "public money/fonds publics" as including:

[…] (*d*) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract.	[…] *d*) les fonds perçus ou reçus par un fonctionnaire public sous le régime d'un traité, d'une loi, d'une fiducie, d'un contrat ou d'un engagement et affectés à une fin particulière précisée dans l'acte en question ou conformément à celui-ci.

[23] A treaty is a contract between sovereign states and so we must first consider how the US$30 million may be spent. The money is:

a. to assist in the implementation of Chapter 3; and

b. the bulk (which I take to be more than 50 percent) is to be used for a "fishery mitigation program":

    i. to "reduce effort" in the commercial salmon troll fishery; and

    ii. perhaps for other purposes consistent with the chapter.

[24] Given the terms "the bulk of this funding" and "among other purposes," it cannot be said with certainty that even US$15 million must be used to "reduce effort" in the commercial salmon troll fishery, much less the entire amount.

[25] Furthermore, although the Chapter specifically targets Area G for the entire reduction, the money is to be used to reduce effort in the commercial salmon troll fishery at large, of which there are three areas: Area F, Area G and Area H.

[26] As the fishery is a public resource, one could argue that we are all affected. Certainly, the communities on the West Coast of Vancouver Island are adversely affected, including shipyards, ship chandlers and fish processors.

[27] The Applicants answer by saying that advisory boards have taken the position that the best way to mitigate is to direct the funds to the license holders themselves. With respect, although she did consult, and did take socio-economic conditions into account, the Minister was under no obligation to follow the advice of any advisory group, or even advice from within her own Department.

[28] The Applicants claim that the buy-back scheme as currently announced is unreasonable and will not serve to reduce effort. They say a buy-back program for Areas F and H will neither reduce effort nor reduce the harvest. Furthermore, within Area G itself the same holds true if only the licensees who are currently inactive decide to sell. In addition, the way the regulations now stand, for the most part, a license buy-back would not assist the trollers but would rather assist net fishermen, through a rather complicated allotment scheme.

[29] These submissions presuppose that the situation will remain steady over the following eight years. If one thing is certain, it is that nothing is certain. Witness the Fraser River sockeye which

practically disappeared in 2009 but returned in overwhelming abundance in 2010. A fisherman may be inactive one year, in the sense of not fishing for chinook salmon, but active in another. The current allotment scheme could be changed. Indeed part of the US$30 million is to be used to finance such a study. In addition, there are ways and means for fishermen to transfer from one area to another.

[30] Parts of this application for judicial review may smack of prematurity in that the Minister does not intend to spend the US$30 million all at once and circumstances may well change over time, circumstances which may cause her to change her mind. However, since the Applicants take the position that none of the money should be spent other than by grant to them, I do not consider the application to be premature.

[31] The Applicants are also concerned that the buy-back will be by way of a reverse auction, *i.e.* that the Government will buy from those who are willing to sell at the lowest prices. The Minister could indeed proceed that way. However, the record suggests that preference will first be given to Area G, and that prices will be based on fair market value. This leads to the further complaint that the fair market value has been dropping, and has dropped further as a result of the Treaty.

[32] As I said during the hearing, a government run by politicians is not necessarily a good thing, until we consider all the other alternatives, such as a dictatorship or a government run by the armed forces or religious leaders. A government run by judges would fall into that category. I am not called upon to decide if the Minister's could have made a better decision, in other words to make the decision for her. I am called upon to review it in order to determine whether it is justiciable in the

first place, and, if so, whether it meets the appropriate standard, be it correctness or reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[33] I find:

a. the decision to be justiciable, except as regards to the conferring of benefits under the Treaty;
b. there is no separate and distinct legal issue to be reviewed on the correctness standard;
c. the application of the law to the facts is a mixed question subject to the reasonableness standard of review; and
d. the decision was reasonable as per paragraph 47 of *Dunsmuir*, above, in that it fell within the range of acceptable and rational solutions. The decision was transparent, intelligible, and justified in the sense of being defensible in respect of the facts and law.

[34] Officials at Fisheries and Oceans Canada provided the Minister with a detailed backgrounder. They suggested that she had two options as how to spend the US$30 million. As she did not give separate reasons, we are to assume that she chose the option she did for the reasons set out in the backgrounder.

[35] The option chosen was to approve a troll-wide mitigation program. The pros which were listed were, among others, that permanent license retirement would support economic viability by creating a smaller fleet with higher average income per vessel, that as Area G would be the area

most directly impacted, the first round of license reductions might focus on that area and that the development of a new allocation framework would address key policy and management changes such as a move to a quota-based fishery which would support improved economic viability. The cons were that this option would not be supported by West Coast Vancouver Island interests, including Area G fishermen, and that some would expect a premium or a price above market value were they to agree to a buy-back.

[36] The other option, which would be limited to Area G, would certainly address the direct impact of harvest reductions on the Area G fleet and help address broader or secondary community impacts. However this strategy would not be consistent with a number of principles identified by the Department and would not be supported by the Province of British Columbia, and, of course, by commercial fishermen and stakeholders in other areas. The use of mitigation funds for direct compensation or temporary vessel tie-up would not provide value for money or support long term economic viability, and would require Fisheries and Oceans Canada to freeze or at least restrict license holders from other areas moving to Area G, thereby undermining the objective of effort reduction. Furthermore, direct compensation in vessel tie-up would increase the risk that other fleets and fisheries would expect similar programs in times of low abundance or limited harvest opportunities.

[37] Fisheries and Oceans Canada claims it also took account of the advice of an Integrated Advisory Group. However, the conclusion of the IAG was that two broad views were put forward without recommending one over the other. Thus, it is submitted that it was factually incorrect to suggest that the group supported the option which was selected.

[38] On reading these documents, I am not satisfied that there was any misstatement of fact. Even if there were, it must be inevitable that, from time to time, reports to government ministers misspeak as to certain facts. However, it would be intolerable, and unreasonable, to take the position that the Minister must, herself, ferret through all the reports, and the documents upon which they were based. It was reasonable for her to act upon the reports she received.

[39] Having concluded as a I have that the Minister's decision is in accord with the Treaty, the *Financial Administration Act* and the *Fisheries Act*, there is no need to deal at any length with the Applicants' submission that the Minister is doing indirectly what she cannot do directly, *i.e.* sell a public resource in order to fund fishing programs. This case is quite distinct from *Larocque*, above, and *Chiasson v Canada (Attorney General)*, 2008 FC 616, 295 DLR (4th) 744, reversed in part at 2009 FCA 299, 314 DLR (4th) 512.

[40] In *Larocque*, the Federal Court of Appeal declared that the Minister could not sell a fishing license to raise funds dedicated to fishery projects. While that matter was proceeding through the courts, the Minister did essentially the same thing a following year in *Chiasson*. The license was provided in exchange for money to carry out research. This was achieved by reducing the proportion of the total allowable catch which would have otherwise gone to the Applicants. They sought a declaration that they were entitled to the money.

[41] Following *Larocque*, I declared in *Chiasson* that the Minister could not sell a license in the circumstances in which he did. I refused to declare that the Applicants were entitled to the funds on

the grounds that that should be the subject of an action, rather than a judicial review, but did declare that the Minister could not hold what I thought were ill-gotten gains. In the Court of Appeal, which limited itself to the second point, it was noted that as a result of the Minister's action, the total allowable catch actually went up that year, so that it could not even be presumed that the Applicants had suffered any detriment. They had a smaller slice, but of a larger pie. Furthermore, the Applicants claimed money, which is not a remedy available in judicial review. They should have taken an action, as indeed they had. In this case the Applicants have also filed an action, which has been held in abeyance. Their position is that they need first obtain a declaration by way of judicial review, and then proceed to an order for payment by way of the action.

[42] This case is completely different from *Larocque* and *Chiasson.* The Minister did not sell anything. As a conservation measure, she agreed to reduce the total allowable catch, and could have done so without any payment whatsoever. The money was an added bonus, if you will, and her intention is to pay it out in accordance with the Treaty.

[43] This should dispose of the unjust enrichment claim. As per *Garland v Consumer Gas Co,* 2004 SCC 25, 1 SCR 629, there are three elements to such a claim:

a. enrichment of the defendant, or respondent;

b. a corresponding deprivation to the plaintiff, or applicant; and

c. an absence of juristic reason for the enrichment.

[44] Although the Applicants may have been deprived in the sense of having their catch reduced, there was a juristic reason; the Treaty and the requirements of the *Financial Administration Act*.

Furthermore, the Minister was not enriched. That argument presupposes that if it were not for the US$30 million received from the Americans, US$30 million would have to have been taken from the consolidated revenue fund to mitigate the loss. However, there is no legal obligation on the part of the Government to help make good the Applicants' loss, although politically and morally that may well be the right thing to do. Indeed, the record indicates that Fisheries and Oceans Canada, which always seems to have funding problems, is in discussion with other Departments and the Province of British Columbia with a view of coming to the aid of those adversely affected by the Treaty.

[45] The Applicants' reliance on the Report of the Pelagic Sealing Commission is misplaced. Pursuant to the *Treaty of Washington, 1911*, among the United States, Great Britain, Russia and Japan, for the preservation of fur seals, Great Britain, on behalf of Canada, received US$200,000 from the United States. In accordance with the statute respecting Inquiries concerning Public Matters, the Honourable Louis Arthur Audette, Assistant Judge of the Exchequer Court, was appointed a Commissioner to inquire into and recommend what should be done with the funds. He recommended that the funds be paid to the Canadian sealers directly affected, or their estates. However, to use his own words:

> The subject-matter of this great contest is to be approached and decided according to the true principles of equity and good conscience, *ex aequo et bono* having regard to what is fair and just in the relation between the State and its subjects and the duties and obligations arising therefrom, respectively, and not according to the strict principle of law, because none of the sealers have any legal claims.

[46] The Applicants point out that under section 3 of its governing Act, the Federal Court is a Court "of law, equity and admiralty." However, "equity" means that system of law, in large

measure discretionary, administered in the English Courts of Chancery before they were merged with the law courts. This is not a court of equity in the sense used by Commissioner Audette. It does not fall upon me to make recommendations, but rather to decide whether it was open to the Minister to make the decision she did. It was.

CAN THE APPLICANTS BENEFIT FROM THE TREATY?

[47] The Minister takes the position that even if she were acting outside the scope of the Treaty and Canadian law, and even if the Treaty conferred rights on the Applicants, they do not have a judicial claim because as a condition precedent thereto the Treaty must have been implemented by national legislation. She is correct. The authorities are conveniently set out in the decision of the Court of Appeal for Ontario in *R v Vincent* (1993), 12 OR (3d) 427, application for leave to appeal to the Supreme Court refused. In speaking for the Court, Mr. Justice Lacourcière referred to the well-established case law that rights created or conferred by an international treaty belong exclusively to the sovereign contracting parties. The treaty is beyond the reach of municipal courts unless implemented by legislation.

[48] Reference was made to the decision of the House of Lords in *Rayner (JH) (Mincing Lane) Ltd v United Kingdom (Department of Trade & Industry)*, [1990] 2 AC 418, [1989] 3 All ER 523, where Lord Templeman said at pages 476-477:

> A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by

> statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.

[49] Lord Olivier of Aylmertown added at page 500:

> That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law of conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

[50] All this led Mr. Justice Lacourcière to conclude at page 440:

> [Translation] This excerpt clearly demonstrates that an international treaty cannot confer a right upon an individual, or upon a group of individuals. A right mentioned in an international treaty is not justiciable before a Canadian court. We are of the opinion that an international treaty cannot create rights in favour of individuals, nor groups of individuals, who reside in the contracting countries. In an international treaty with a sovereign state, the Crown is not and cannot be the trustee or agent of a subject, and the subject cannot be the beneficiary of the trust.

[51] Although the common law now recognizes that third parties may sue on contractual stipulations for their benefit (*Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108), it would be far too much of a stretch to conclude that the Supreme Court intended thereby to change Canadian perception of the international law pertaining to treaties.

[52] Were I concerned that the money may be spent contrary to the confines of the *Financial Administration Act*, I should have had to consider whether the Applicants, even though they cannot claim benefit of the Treaty, should have been granted public interest standing to quash the decision, as no one, not even a Minister is above the law.

ACTION OR JUDICIAL REVIEW?

[53] The question arises whether the Applicants have chosen the right vehicle by which they seek to have the decision of the Minister quashed, as well as for declaratory relief. Section 18(1)(*a*) of the *Federal Courts Act* provides:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal;	*a*) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
[emphasis added]	[notre soulignement]

The only exception is section 28 which gives the Federal Court of Appeal originating jurisdiction to hear applications for judicial review from certain named federal boards, commissions or other tribunals.

[54] However, as the result of amendments to the Act which came into force in 1992, sections 17(1) and 17(2)(*a*) now provide:

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.	17. (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne.
(2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which	(2) Elle a notamment compétence concurrente en première instance, sauf disposition contraire, dans les cas de demande motivés par :
(*a*) the land, goods or money of any person is in the possession of the Crown;	*a*) la possession par la Couronne de terres, biens ou sommes d'argent appartenant à autrui;
[emphasis added]	[notre soulignement]

[55] On the one hand, the Applicants seek to have the Minister's decision quashed and ask for declaratory relief. On the other, although they frame their cause of action as one in unjust enrichment, when all is said and done, they are seeking money. An order to pay money is not one of the remedies contemplated by section 18 of the Act. They must proceed by way of action, be it in this court or in a provincial court.

[56] The Applicants were well aware of what the Supreme Court has now termed the "separate silos" approach. If they obtain the administrative relief they seek, they then will seek to have their losses quantified in an action in this court. In fact, they have already instituted an action which, by agreement, lies in abeyance.

[57] This approach was entirely in accord with the decision of the Federal Court of Appeal in *Grenier v Canada*, 2005 FCA 348, [2006] 2 FCR 287. However just last month, the Supreme Court overruled *Grenier* six times over in *Canada (Attorney General) v TeleZone*, 2010 SCC 62, *Canada (Attorney General) v McArthur*, 2010 SCC 63, *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64, *Nu-Pharm Inc v Canada (Attorney General)*, 2010 SCC 65, *Canadian Food Inspection Agency v Professional Institute of the Public Service of Canada*, 2010 SCC 66 and *Manuge v Canada*, 2010 SCC 67. The centerpiece of these decisions is *TeleZone*, on appeal from the Court of Appeal for Ontario. TeleZone took an action in the Ontario Superior Court of Justice for breach of contract, negligence and unjust enrichment arising from the alleged failure of Industry Canada to issue it a personal communication services license. The issue was whether it was a condition precedent that the decision be set aside by the Federal Court in accordance with section 18 of the *Federal Courts Act*. The Court characterized the matter as one of access to justice. The provincial superior courts have concurrent jurisdiction in accordance with section 17 of the *Federal Courts Act* and so section 18 is to be understood as a reservation or subtraction from that grant. It is to be construed narrowly. It is significant that TeleZone was not seeking to have the decision not to issue it a license quashed. Mr. Justice Binnie said at paragraphs 19, 23 and 52:

> [19] If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.
>
> [23] I do not interpret Parliament's intent, as expressed in the text, context and purposes of the *Federal Courts Act*, to require an

> awkward and duplicative two-court procedure with respect to all damages claims that directly or indirectly challenge the validity or lawfulness of federal decisions. Such an outcome would have to be compelled by clear and explicit statutory language. Neither the *Federal Courts Act* nor the *Crown Liability and Proceedings Act* do so, in my opinion. With respect, not only is such language absent, but the reasonable inferences from both statutes, especially the concurrent jurisdiction in all cases where relief is claimed against the Crown granted to the provincial superior courts, leads to the opposite conclusion.
>
> [52] All of the remedies listed in s. 18(1)(*a*) are traditional administrative law remedies, including the four prerogative writs — *certiorari*, prohibition, *mandamus* and *quo warranto* — and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.

He concluded at paragraph 78:

> To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

[58] While *TeleZone*, *McArthur* and *Canadian Food* deal with actions in provincial courts, *Parrish & Heimbecker*, *NewFarm* and *Manuge* deal with actions instituted in the Federal Court.

[59] In *Manuge*, the Court of Appeal, as reported at 2009 FCA 29, 4 FCR 478, held that the vehicle to set aside the decision of a federal board or tribunal must be judicial review. As noted by

the Supreme Court in *TeleZone*, the rigours of *Grenier* may be tempered by the Federal Court itself by converting an application for judicial review into an action in which the duel remedies of setting aside the decision and financial compensation may be sought (*Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 FCR 476).

[60] The Minister submits that following *TeleZone* the proper vehicle in this case is not the judicial review before me, but rather the action which has been held in abeyance. The point is not raised as a game ender, as even a fresh action would not be time barred, but rather to seek guidance as to the circumstances in which this cumbersome duality of procedures can be avoided. Strictly speaking, since I have already come to the conclusion that the Applicants have no cause of action, it is not necessary to comment. However, in the same spirit in which the point was raised, I note that in *Grenier* the decision under attack had already been executed, and that *TeleZone* did not seek to have the decision in question set aside. Rather, the Minister had taken the approach that the action was a collateral attack on the decision of a federal board or tribunal, an attack which could only be undertaken by way of judicial review in the Federal Court.

[61] In this particular case, save for the expenditure of $200,000 authorized by Prothonotary Lafrenière, the Case Management Judge, the Minister has undertaken not to spend the US$30 million unless authorized by the Court.

[62] In *TeleZone* and *Grenier*, it would have served no useful purpose to invalidate the decisions. Likewise in *Parrish & Heimbecker*, a licensing case in which the plaintiff complied, it did not seek

to have the decision set aside. In line with *TeleZone* and *Grenier*, above, Mr. Justice Rothstein, speaking for the Court, said at paragraph 19 that:

> Parrish complied with the re-issued import licence. It imported the wheat and fulfilled its contracts. Bringing an application for judicial review to invalidate the licensing decisions would serve no practical purpose. Parrish now brings an action in tort to recover the additional costs of complying with the [Canadian Food Inspection Agency]'s licensing decisions.

In this case, the Applicants seek to have the decision set aside, a decision which has not yet been acted upon, and also look for compensation.

[63] I draw guidance from the Supreme Court's decision in *Manuge*. The issue there was whether Mr. Manuge had to seek judicial review of provisions of a disability benefit plan before commencing his action for damages. Madam Justice Abella referred to paragraph 78 of *TeleZone*, quoted above, and held there was a residual discretion to stay an action if it was premised on public law considerations, with only a thin pretence to a private wrong. The issue was whether the action should be stayed, not whether it should be dismissed. She stated at paragraph 19:

> The exercise of the discretion to stay an action in this context is dependent on an identification of the essential character of the claim as an assertion of either private law or public law rights. I agree with the Crown that some of Mr. Manuge's claims raise issues that are amenable to judicial review. However, the question is not just whether some aspects of Mr. Manuge's pleadings could be addressed under ss. 18 and 18.1 of the *Federal Courts Act*, but what, in their essential character, his claims are for.

She concluded at paragraph 21 that "[a]t their core, Mr. Manuge's claims are less about assessing the exercise of delegated statutory authority or the decision-making process that led to the

promulgation or ‘monthly application’ of s. 24(a)(iv) [of the Canadian Forces’ Service Income Security Insurance Plan Long Term Disability Plan], and more about s. 15(1) of the *Charter*.”

[64] If I had to choose, I would have, as the Applicants have, chosen the judicial review route. Notwithstanding that statutory justification can be raised in defence of an action, given that the Applicants have knowledge of the decision, and that it has not been executed, it would be inappropriate for them to lie in the bushes until the US$30 million is spent and then claim financial compensation.

[65] While it is very common for the Court in granting judicial review to refer the matter back to the federal board or tribunal in question for reconsideration, and although that is what the Applicants originally sought in their pleadings, at the hearing they simply asked that the decision be quashed. This would be consistent with their position that once the decision is quashed and a declaration issued in their favour, the next step would be to reactivate the action. The Court may, in its discretion, make a declaration without sending the matter back (*MiningWatch v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6).

[66] Although plaintiffs who take a money action against the Crown in provincial courts may find that action stayed pending the outcome of a judicial review, depending, of course, on the circumstances, this Court may be more flexible. Rule 57 provides that an originating document shall not be set aside only on the ground that a different document should have been used.

[67] *Grenier* is of recent origin. Perhaps we shall return to the practice which prevailed prior to that decision. In *Sweet v Canada* (1999), 249 NR 17, [1999] FCJ No 1539 (QL), Mr. Justice Décary pointed out that prior to the 1992 amendments to the *Federal Courts Act*, declaratory relief could only be sought by way of an action. The amendment created procedural uncertainty, which could be addressed by converting an application for judicial review into an action. I hasten to add that the Court may also bifurcate issues and first proceed with respect to the legality of the decision of the federal board or tribunal.

[68] As Mr. Justice Décary noted at paragraph 14 of *Sweet*:

> This unfortunate merry-go-round is a waste of resources for the litigants as well as for the Court. I am not at all convinced that a motion to strike on the ground that pleadings show no reasonable cause of action is the proper vehicle in cases where the issue is whether a party should have proceeded by way of judicial review or by way of action. It seems to me that whether the procedure used is or is not the proper one does not relate to whether the procedure, if proper, discloses a reasonable cause of action. The intent of the Rules is precisely to avoid striking out pleadings that should have originated in another form. Once it is ascertained that a given proceeding falls into one or the other of the two categories (judicial review and action), the duty of the Court is to determine which is the applicable category and to allow the proceeding to continue in that way. Means must be found by counsel and by the Court to address the issue intelligently and with a sense of practicality.

IS THIS A REPRESENTATIVE ACTION?

[69] The Applicants seek judicial review not only on their own behalf, but also on behalf of all Area G license holders. Although our *Federal Courts Rules* contemplate class proceedings, be it by way of action or judicial review, they have instead invoked Rules 114(1) and (2) which provide:

114. (1) Despite rule 302, a proceeding, other than a proceeding referred to in	114. (1) Malgré la règle 302, une instance — autre qu'une instance visée aux articles 27

section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that

ou 28 de la Loi — peut être introduite par ou contre une personne agissant à titre de représentant d'une ou plusieurs autres personnes, si les conditions suivantes sont réunies :

(*a*) the issues asserted by or against the representative and the represented persons

a) les points de droit et de fait soulevés, selon le cas :

(i) are common issues of law and fact and there are no issues affecting only some of those persons, or

(i) sont communs au représentant et aux personnes représentées, sans viser de façon particulière seulement certaines de celles-ci,

(ii) relate to a collective interest shared by those persons;

(ii) visent l'intérêt collectif de ces personnes;

(*b*) the representative is authorized to act on behalf of the represented persons;

b) le représentant est autorisé à agir au nom des personnes représentées;

(*c*) the representative can fairly and adequately represent the interests of the represented persons; and

c) il peut représenter leurs intérêts de façon équitable et adéquate;

(*d*) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

d) l'instance par représentation constitue la façon juste de procéder, la plus efficace et la moins onéreuse.

(2) At any time, the Court may

(2) La Cour peut, à tout moment :

(*a*) determine whether the conditions set out in subsection (1) are being satisfied;

a) vérifier si les conditions énoncées au paragraphe (1) sont réunies;

(*b*) require that notice be given, in a form and manner

b) exiger qu'un avis soit communiqué aux personnes

directed by it, to the represented persons;	représentées selon les modalités qu'elle prescrit;
(*c*) impose any conditions on the settlement process of a representative proceeding that the Court considers appropriate; and	*c*) imposer, pour le processus de règlement de l'instance par représentation, toute modalité qu'elle estime indiquée;
(*d*) provide for the replacement of the representative if that person is unable to represent the interests of the represented persons fairly and adequately.	*d*) pourvoir au remplacement du représentant si celui-ci ne peut représenter les intérêts des personnes visées de façon équitable et adéquate.

[70] This Rule should be read in conjunction with Rule 184(2)(*a*):

(2) Unless denied by an adverse party, it is not necessary that a party prove	(2) À moins qu'une partie adverse ne les nie, une partie n'est pas tenue de prouver les allégations suivantes :
(*a*) its right to claim in a representative capacity;	*a*) son droit d'agir à titre de représentant;

[71] The Minister calls into question the Applicants' mandate and submits that it is obvious from the record that there is not a community of interest among all Area G license holders. Mssrs Kimoto and Amos are "highliners," among the 20 percent who harvested 80 percent of the catch. While they may not be interested in a buy-back program, those who were less successful, or who have not fished chinook salmon recently, may well be interested. There is no provision, as in class proceedings, for someone to opt out.

[72] The history and significance of Rule 114 are set out in a recent article by Chief Justice Lutfy and Emily McCarthy, “Rule-Making in a Mixed Jurisdiction: The Federal Court (Canada)” (2010) 49 Sup Ct LR 313.

[73] During the hearing, I stated that if I had to consider this Rule at all, I would invoke subsection 2 and cause the license holders to be surveyed, as Prothonotary Lafrenière did as mentioned in *Eikland v White River First Nation*, 2010 FC 854, [2010] FCJ No 1051 (QL), at paragraph 23. I added that I did not think that the application could be dismissed if the exigencies of Rule 114 were not met. Even if they do not represent others, Mssrs Kimoto and Amos certainly represent themselves. An action which is not certified as a class action continues. I think the same should hold true in a representative proceeding.

INSUFFICIENT EVIDENCE

[74] In the week preceding the hearing, the Minister filed a motion for an order that some of the affidavit evidence adduced by the Applicants be struck. As appropriate, given that judicial reviews are summary proceedings, Prothonotary Lafrenière referred the matter to me as the Judge designated to hear the matter. At the outset of the hearing, I said I would not consider it as a discreet upfront motion but rather that counsel could combine submissions on the motion with the submissions on the application for judicial review. The Applicants would then reply, and the Minister would have the last word on the motion.

[75] As it was, counsel withdrew the motion during the hearing. A lack of enthusiasm was noted on my part to get into principled exceptions to the hearsay rule. The issue remains, however,

whether certain affiants were competent to exhibit documents, what weight should be given to hearsay, and whether the affidavits lacked sufficient particularity.

[76] Mssrs Kimoto and Amos point out that since the total allowable catch for First Nations ceremonial purposes and that of sport fishermen was not reduced, the 30 percent reduction means their catch was reduced by approximately 50 percent. They are criticized for not giving financial particulars of alleged financial loss. They were not cross-examined.

[77] Given that the money aspects of the claim have to proceed by action, I am prepared to assume that they have suffered a loss. However, there is no unjust enrichment claim. Even if there were, it would be more appropriate to make such a declaration in terms of the action, rather than this judicial review (*Chiasson*, above).

[78] Quite rightly, the Minister took issue with some of the evidence led by Ms. Kathy Scarfo, a fisherwoman affiliated with the Applicants, such as United States congressional allotments, and statements from government officials in Alaska and Washington States. I give no weight whatsoever to these documents. They were issued post-Treaty and cannot serve as an aid to interpret the purpose for the US$30 million payment. Furthermore, Ms. Scarfo is hardly in a position to describe the workings of the U.S. federal and state governments.

COSTS

[79] There is no reason why the Minister should not be awarded costs, which usually follow the event. A lump sum figure of $10,000 was suggested, which was later upped to $20,000. The reason

the figure was increased undoubtedly arises from counsel's frustration that the reply to his submissions was taking as long as the submissions themselves. However, four days were set aside for the hearing which ended midmorning of the fourth day. I am satisfied that the Minister could tax at least $10,000 but I am not prepared to make an off-the-cuff finding that she could tax $20,000. In the circumstances, I consider an award of costs in favour of the Minister of $10,000 to be fair and reasonable.

[80] The co-Respondents only moved to be added as parties a week before the hearing. They do not seek costs and none shall be granted.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. This application for judicial review is dismissed with costs in favour of the Attorney General of Canada in the amount of $10,000.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1582-10
STYLE OF CAUSE:	DOUG KIMOTO, VIC AMOS AND WEST COAST TROLLERS (AREA G) ASSOCIATION ON BEHALF OF ALL AREA G TROLL LICENCE HOLDERS v THE ATTORNEY GENERAL OF CANADA, GULF TROLLERS ASSOCIATION (AREA H) AND AREA F TROLL ASSOCIATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 10-13, 2011
REASONS FOR ORDER AND ORDER BY:	HARRINGTON J.
DATED:	JANUARY 26, 2011

APPEARANCES:

Christopher Harvey, Q.C.	FOR THE APPLICANTS
Harry J. Wruck, Q.C. Alex Semple Steven C. Postman	FOR THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA
David K. Jones	FOR THE RESPONDENTS, GULF TROLLERS ASSOCIATION (AREA H) AND AREA F TROLL ASSOCIATION

SOLICITORS OF RECORD:

Mackenzie Fujisawa LLP Barristers & Solicitors Vancouver, B.C.	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, B.C.	FOR THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA
Bernard & Partners Barristers & Solicitors Vancouver, B.C.	FOR THE RESPONDENTS, GULF TROLLERS ASSOCIATION (AREA H) AND AREA F TROLL ASSOCIATION