

Federal Court



Cour fédérale

**Date: 20191125**

**Docket: T-1379-18**

**Citation: 2019 FC 1499**

**Toronto, Ontario, November 25, 2019**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**LAZY BEAR LODGE LTD. AND THE SAID LAZY BEAR  
LODGE LTD. CARRYING ON BUSINESS UNDER THE  
FIRM NAME AND STYLE LAZY BEAR EXPEDITIONS,  
SEAL RIVER HERITAGE LODGE LTD. AND THE SAID  
SEAL RIVER HERITAGE LODGE LTD. CARRYING ON  
BUSINESS AS THE REGISTERED PARTNERSHIP  
CHURCHILL WILD, AND THE SAID CHURCHILL WILD**

**Applicants**

**and**

**CANADA (MINISTER OF FISHERIES, OCEANS  
AND THE CANADIAN COAST GUARD) AND THE  
ATTORNEY GENERAL OF CANADA**

**Respondents**

**ORDER AND REASONS**

[1] By notice of application for judicial review filed on July 19, 2018, Lazy Bear Lodge Ltd. and the Lazy Bear Lodge Ltd. carrying on business under the firm name and style Lazy Bear Expeditions, Seal River Heritage Lodge Ltd. and the Seal River Heritage Lodge Ltd. carrying on

business as the Registered Partnership Churchill Wild, and the Churchill Wild (the “Applicants”) challenge the enactment of the *Regulation Amending the Marine Mammal Regulations*, SOR/2018-126 (the “Regulation”), enacted pursuant to the *Fisheries Act*, R.S.C., 1985, c. F-14 (the “Fisheries Act”); a decision of Canada and the Minister of Fisheries, Oceans and the Canadian Coast Guard (the “Minister”) to enact, publish, register and/or proclaim in force the Regulation on or about June 22, 2018; and a decision of the Minister to refuse or not consider a request by the Applicants for an exemption pursuant to section 38(1) of the Regulation; and all decisions or potential decisions by the Minister to enforce or to apply said Regulation to the commercial activity of the Applicants.

[2] The Respondents are the Minister of Fisheries, Oceans and the Canadian Coast Guard and the Attorney General of Canada (the “Respondents”).

[3] On August 17, 2018, the Applicants requested production of the following materials, pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 (the “Rules”):

- a) scientific studies and reports;
- b) statistics, surveys, calculations and related data and reports;
- c) communications, discussions and/or consultations with commercial stakeholders and the tour operator industry;
- d) communications, discussions and/or consultations with other ministers and governmental bodies
- e) documentation identifying stakeholders that that were consulted, including ecotourism companies, researchers, biologists, recreational boaters, First Nations, NGOs, fishers, sport fishing advisory board members, interested government departments and hunter/trapper organizations;

- f) mailouts to stakeholders including consultation packages and responses received;
- g) existing and proposed regional guidelines for approaching and viewing marine mammals;
- h) reports with respect to collisions and accidental contact between marine mammals and vessels or fishing gear;
- i) comments and responses received in reply to the publishing of the proposed amendments on March 24, 2012; and
- j) evidence that the presence of marine animal watching vessels is disruptive to marine animals.

[4] By letter dated September 6, 2018, the Respondents objected to the production of the materials requested by the Applicants, as follows:

...

(a) The materials requested do not relate to the record before the decision-maker, the Governor in Council, in making the decision under review, being Order in Council P.C.2018-842 enacting the Regulations Amending the Marine Mammal Regulations; and

(b) Any materials that were before the Governor in Council in making the decision under review would constitute a confidence of the Queen's Privy Council for Canada, and cannot be disclosed because of their confidentiality with the exception of the Order in Council itself. As a courtesy, please find the attached in English and in French, a scan of the certified copy of the Order in Council P.C. 2018-842 made June 21, 2018.

...

[5] Together with this letter, the Respondents provided a copy of the Order-in-Council dated June 21, 2018 by which the Regulation was made, pursuant to section 43 of the Fisheries Act.

[6] The Applicants were dissatisfied with the response of the Respondents and on December 20, 2018, they filed a Notice of Motion seeking the following relief:

1. An order requiring that the materials in possession of Canada relating to the regulatory decision making process in respect of the Regulation be produced, including, *inter alia*:
  - a. All materials in the possession of the Department of Fisheries, Oceans and the Canadian Coast Guard relating to the analysis and development of the Regulatory Impact Analysis Statement relating to the Regulation;
  - b. All materials in the possession of the Minister of Fisheries, Oceans and the Canadian Coast Guard relating to the decision by the Minister to issue a regulatory submission to the Privy Council's Office with respect to the Regulation;
  - c. All materials in the possession of the Treasury Board of Canada to approve the proposed Regulation for pre-publication; and
  - d. The decision of the Governor in Council, Canada and the Minister to enact and proclaim in force the Regulation;
2. Costs of this motion; and
3. Such further and other relief as to this Honourable Court may deem just.

[7] The Applicants argue that the decision in question, that is to enact certain regulations, was made by various actors including the Department of Fisheries, Oceans and the Canadian Coast Guard, the Minister of Fisheries, Oceans and the Canadian Coast Guard, the Treasury Board of Canada, and the Governor in Council and that they require access to the documents created and considered by those participants.

[8] The Respondents submit that the decision in question, that is the Regulation, was made only by the Governor in Council and the material produced on September 6, 2018 is the only relevant material to satisfy the requirements of Rule 317 of the Rules.

[9] Subsequent to the hearing of the Motion on June 18, 2019, the Respondents provided the decision in *Gray v. Canada (Attorney General)*, 2019 FC 301, together with submissions as to the relevance of that decision to the Applicant's Motion.

[10] In response, the Applicants submitted a letter dated June 26, 2019 and argued that the decision in *Gray, supra*, is distinguishable on the facts.

[11] In my opinion, the disposition of the Applicants' Motion depends upon the identification of the decision and of the decision maker.

[12] The Applicants attempt to characterize all the steps leading up to the enactment of the Regulation as the "decision." The Respondents argue that the Regulation itself is the "decision."

[13] I agree with the arguments of the Respondents on this issue.

[14] The subject of the application for judicial review is the Regulation. The Motion concerns the scope of the material to be produced by the Respondents in respect of the application for judicial review about the enactment of the Regulation.

[15] The decision maker in this matter is the Governor in Council, acting pursuant to section 43 of the Fisheries Act. That provision gives the Governor in Council the authority to enact regulations “for carrying out the purposes and provisions” of the Fisheries Act on a broad range of subjects.

[16] Rule 317(1) is relevant and provides as follows:

**Material from tribunal**

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

**Matériel en la possession de l’office fédéral**

317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu’elle n’a pas mais qui sont en la possession de l’office fédéral dont l’ordonnance fait l’objet de la demande, en signifiant à l’office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[17] In *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, at paragraphs 107 and 108, Justice Stratas discussed the scope of Rule 317 as follows:

[107] Rule 317 means what it says. The only material accessible under Rule 317 is that which is “relevant to an application” and is “in the possession” of the administrative decision-maker, not others. Rule 318(1) shows us that the material under Rule 317 must come from the administrative decision-maker, not others.

[108] The material must be actually relevant. Material that “could be relevant in the hopes of later establishing relevance” does not fall within Rule 317: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin L.R. (4th) 83 at para. 21. The principles canvassed above—particularly those in section 18.4(1) of the *Federal Courts Act* and Rule 3 of the

*Federal Courts Rules* relating to promptness and the orderly progression of judicial reviews—discourage fishing expeditions.

[18] In *Gray, supra*, Justice Kane adopted the approach set out in *Tsleil-Waututh, supra* and said the following in paragraph 94:

[94] Without meaning to belabor this point, the current and binding appellate jurisprudence in *Tsleil-Waututh* confirms the general rule that Rule 317 provides for production of relevant material, determined with reference to the grounds stated in the Notice of Application, that is in the possession of the decision-maker when making the decision “and nothing more” (at para 112). ...

[19] The merits of the Applicants’ application for judicial review are not before the Court at this time. When the merits of the application are adjudicated, the reviewing Court may begin its task according to the direction given by the Federal Court of Appeal in *Canadian Wheat Board v. Canada (Attorney General)*, [2010] 3 F.C.R. 374 (F.C.A.) at paragraph 46 as follows:

[46] The first step in a *vires* analysis is to identify the scope and purpose of the statutory authority pursuant to which the impugned order was made. This requires that subsection 18(1) be considered in the context of the Act read as a whole. The second step is to ask whether the grant of statutory authority permits this particular delegated legislation (*Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595, para. 14).

[20] The Applicants argue that the Regulation will have long-reaching effects upon their commercial activities. They seek broad production of material in order to support their claim.

[21] A regulation, if enacted pursuant to valid statutory authority does not become invalid solely on the basis of negative consequences of the regulation; see *Sandy Pond Alliance to Protect Canadian Waters Inc. v. Canada*, [2015] 1 F.C.R. 283.

[22] The present Motion concerns only the obligation upon the Respondents to comply with Rule 317(1). The Respondents assert that many, if not all, of the documents that were considered by the Governor in Council are subject to cabinet confidence pursuant to section 39 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5.

[23] The issue of cabinet confidence is not before the Court in this Motion. The merits of the application for judicial review are not yet before the Court.

[24] The Applicants have failed to show that they are entitled to the documents they are requesting, as part of a relevant tribunal record.

[25] In the result, the Motion is dismissed.

[26] The Respondents, if successful on this Motion, seek costs in any event of the cause in the amount of \$1500.00, inclusive of disbursements.

[27] Pursuant to Rule 400(1), costs lie in the full discretion of the Court. In the exercise of my discretion, costs on this Motion are awarded to the Respondents, in any event of the cause in the amount of \$1500.00, inclusive of disbursement.



**ORDER in T-1379-18**

**THIS COURT ORDERS that:** the Motion is dismissed, costs on this Motion are awarded to the Respondents, in any event of the cause in the amount of \$1500.00, inclusive of disbursements.

"E. Heneghan"  
\_\_\_\_\_  
Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1379-18

**STYLE OF CAUSE:** LAZY BEAR LODGE LTD. AND THE SAID LAZY BEAR LODGE LTD. CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE LAZY BEAR EXPEDITIONS, SEAL RIVER HERITAGE LODGE LTD. AND THE SAID SEAL RIVER HERITAGE LODGE LTD. CARRYING ON BUSINESS AS THE REGISTERED PARTNERSHIP CHURCHILL WILD, AND THE SAID CHURCHILL WILD v. CANADA (MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD) AND THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** WINNIPEG, MANITOBA

**DATE OF HEARING:** JUNE 18, 2019

**ORDER AND REASONS:** HENEGHAN J.

**DATED:** NOVEMBER 25, 2019

**APPEARANCES:**

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