



# Environmental Appeal Board

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## DECISION NO. 2009-WIL-022(c)

In the matter of an appeal under section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488

<b>BETWEEN:</b>	Jack Leggett	<b>APPELLANT</b>
<b>AND:</b>	Director Wildlife Branch	<b>RESPONDENT</b>
<b>AND:</b>	Freshwater Fisheries Society of BC	<b>THIRD PARTY</b>
<b>AND:</b>	Ministry of Environment, Fisheries Program	<b>THIRD PARTY</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Gabriella Lang, Panel Chair	
<b>DATE:</b>	May 14 and May 15, 2009	
<b>PLACE:</b>	Williams Lake, B.C.	
<b>APPEARING:</b>	For the Appellant:	David G. Perry, Counsel Jennifer Frahm, Articled Student
	For the Respondent & For Third Party	
	Ministry Fisheries Program:	Joseph G. McBride, Counsel

## APPEAL

[1] Jack Leggett appeals the April 9, 2009 decision of Tom Ethier, Director of Wildlife (the "Director"), Ministry of Environment (the "Ministry") to issue a permit to possess and transport live kokanee from Clearwater Trout Hatchery to Chimney Lake, near Williams Lake, B.C. (the "Permit"). The Permit was issued to the Freshwater Fisheries Society of BC (the "Society") to stock Chimney Lake with kokanee salmon.

[2] The Environmental Appeal Board (the "Board") has authority to hear this appeal under section 93 of the *Environmental Management Act*, and section 101.1 of the *Wildlife Act*. Sections 101.1(4) and (5) of the *Wildlife Act* state:

(4) The appeal board may conduct an appeal by way of a new hearing.

(5) On an appeal, the appeal board may

(a) send the matter back to the regional manager or director, with directions,

(b) confirm, reverse or vary the decision being appealed, or

- (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

[3] Mr. Leggett asks the Board to reverse the Director's decision.

## BACKGROUND

[4] Chimney Lake is located about 26 kilometres southwest of Williams Lake. It is about 430 hectares in size. Since about 1947 the lake has been stocked with more than 20 different strains of rainbow trout, coming from various parts of British Columbia and the United States. Chimney Lake is one of several lakes stocked by the Ministry to enhance angling opportunities in that part of the Cariboo region.

[5] Mr. Leggett resides in the Chimney Lake area and is Director of the Chimney Felker Lakes Landholders Association (the "Association"). He is also a former employee of the Ministry, Fish and Wildlife Section and a regular angler for rainbow trout in Chimney Lake.

[6] In April 2008, Mr. Leggett, on behalf of the Association, appealed a 2008 decision by the Director to issue a permit to possess and transport kokanee salmon to Chimney Lake. That permit was issued to a Ministry employee. Mr. Leggett's grounds for appeal included: concerns that the introduced kokanee would spawn in the lake and then compete with the lake's rainbow trout population; and that the kokanee would migrate downstream to Felker Lake.

[7] In June 2008, Mr. Leggett advised the Board that the kokanee had been put into Chimney Lake. Mr. Leggett asked the Board to still hear his appeal. On July 16, 2008, the Board issued a decision dismissing Mr. Leggett's appeal as moot (*Jack Leggett v. Director, Fish and Wildlife*, Appeal No. 2008-WIL-006(a)) (unreported).

[8] On April 9, 2009, the Director issued the Permit to the Society pursuant to section 3 of the *Freshwater Fish Regulation*, B.C. Reg. 261/83 (the "Regulation"). The Regulation is made under the *Wildlife Act*. The Permit is valid effective April 9, 2009 until July 31, 2009. The Permit forms part of Authorization No. 11060 Concerning The Movement of Live Fish in British Columbia, which also includes permission to transfer live fish within BC pursuant to the *Fishery (General) Regulation* under the federal *Fisheries Act*.

[9] On April 14, 2009, Mr. Leggett filed this appeal and also asked the Board to issue an immediate interim stay of the Permit because of the Ministry's actions in 2008 (stocking the lake before the appeal was heard). By letter dated April 15, 2009, the Board advised the Director and the Society of this 2009 appeal and that it had granted an immediate interim stay of the Permit.

[10] The Director objected to the interim stay and challenged Mr. Leggett's standing to bring this appeal. The Director also requested an expedited hearing of this appeal because the timeframe for stocking kokanee in Chimney Lake, according to the Ministry, is between late April and the end of May. As a result, the Board

took submissions from the parties on the stay application and on the question of standing.

[11] In a decision dated April, 28, 2009, the Board held that Mr. Leggett has standing to appeal the Permit; granted Mr. Leggett's application for a stay pending a decision on the merits of this appeal; and ordered the appeal to be heard on an expedited basis (*Jack Leggett v. Director, Fish and Wildlife*, Appeal No. 2009-WIL-022(a) & (b)). The Board also offered the Society full party status in the appeal. The Society made no appearances or submissions regarding the standing and stay applications [The Panel notes that the Society made no appearances or submissions during any part of this appeal.]

[12] Before the hearing began, the Ministry asked the Board to allow the Ministry's Fisheries Program (the "Fisheries Program") to be added as a third party. The Ministry submitted there might be some distinction between the positions taken by the Director and the Fisheries Program during this appeal. The Board noted this was a highly unusual request and it was not convinced that the party status was necessary because the Respondent could call witnesses from the Fisheries Program. However, out of an abundance of caution and to ensure the Board would hear all of the Ministry's evidence and argument in the appeal, the Fisheries Program was added as a third party.

[13] The Appellant submits that the Board should reverse the Director's decision because of the environmental risks, including potential irreparable harm to the ecosystem that may be caused by the release of kokanee into Chimney Lake. The Appellant also submits the Board should review not just the Permit itself, but should review it together with the Ministry's kokanee stocking plan for Chimney Lake. The Appellant submits the Permit is part of the whole stocking plan and transaction.

[14] Finally, the Appellant asks the Board to rule on the extent of its jurisdiction in this matter; specifically, whether the Board required to defer to the Director's judgment in this appeal.

## ISSUES

[15] The issues in this appeal, to be considered separately, are:

1. What can the Board review: the Permit by itself, or the Chimney Lake Stocking Plan as one of the factors considered in the issuance of the Permit?
2. What is the extent of the Board's jurisdiction in this appeal?
3. Whether the Permit should be rescinded?

## RELEVANT LEGISLATION

The following sections of the *Wildlife Act*, the Regulation, the *Ministry of Environment Act* and the *Environmental Management Act* are relevant to this appeal:

**Wildlife Act****Officers Exempted**

86 The offence provisions of this Act and the regulations and section 9 of the *Firearm Act* do not apply to an officer engaged in the performance of his or her duties.

**Appeals to the Environmental Appeal Board**

101.1(4) The appeal board may conduct an appeal by way of a new hearing.

(5) On an appeal, the appeal board may

- (a) send the matter back to the regional manager or director, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

**The Regulation****Offences**

2 A person commits an offence where he

- (a) has in possession,
- (b) transports, or
- (c) traffics in

live fish unless authorized by a permit or a licence

**Authorization by permit**

3 A regional manager or a person authorized by a regional manager may issue a permit in accordance with this regulation on the terms and for the period he or she specifies authorizing a person to

- (a) possess,
- (b) transport, or
- (c) traffic in

live fish.

***Ministry of Environment Act*****Powers and functions of the ministry**

4. (1) The purposes and functions of the ministry are, under the direction of the minister, to administer matters relating to the environment.
- (2) Without limiting subsection (1) the purposes and functions of the ministry include the following:
- (a) to encourage and maintain an optimum quality environment through specific objectives for the management and protection of land, water, air and living resources of British Columbia;
  - ...
  - (c) to manage, protect and conserve all water, land, air, plant life and animal life, having regard to the economic and social benefits they may confer on British Columbia;
  - ...

***Environmental Management Act*****Minister's authority**

- 5 The duties, powers and functions of the minister extend to any matter relating to the management, protection and enhancement of the environment including, but not limited to, the following matters:
- ...
  - (b) development of policies for the management, protection and use of the environment;
  - ...
  - (e) preparing and publishing policies, strategies, objectives, guidelines and standards for the protection and management of the environment.

**DISCUSSION AND ANALYSIS****1. What can the Board review: the Permit by itself, or the Chimney Lake Stocking Plan as one of the factors considered in the issuance of the Permit?**

[16] At the beginning of the hearing, the Respondent submitted that the Permit, on its own, was the only government decision before the Board and that the Board could not look beyond that single authorization. The Respondent asked the Panel to hear only evidence regarding issuance of the Permit.

[17] The Appellant submitted that the Permit is part of a broader transaction, the stocking of Chimney Lake with kokanee. There could be no other purpose for the Permit and, therefore, the Board should hear evidence about the larger transaction.

[18] The Panel held that it is unlikely that the Director would issue the Permit just so kokanee could travel somewhere in the province. The Permit explicitly states that the Society is “authorized by this permit to possess and transport live kokanee from Clearwater Trout Hatchery to Chimney Lake pursuant to section 3 of the Freshwater Fish Regulation” [underlining added]. The Director clearly had a reason for authorizing kokanee to be transported to Chimney Lake - an interest in getting fish into the lake, a stocking program or project that this Permit was part of. Therefore, the Panel held that evidence of that reason, of the program or project that this Permit is part of, would be allowed during the hearing.

[19] The Permit document has two authorizations. The top of the document is a license issued on behalf of the Federal Minister of Fisheries and Oceans granting permission to the Society to “import/transport live fish into or within the Province of British Columbia” pursuant to section 56(1) of the *Fishery (General) Regulations* made under the Federal *Fisheries Act*. The middle of the document is the authorization issued by the Director (cited above).

[20] Victoria Marshall, a fishery science biologist with the Fish and Wildlife Branch of the Ministry, explained how possession and transport permits are processed and issued, and how stocking decisions are made. Ms. Marshall has worked in the area of small lakes fisheries for a number of years. She is a member of the Federal/Provincial Introductions and Transfers Committee (the “Committee”).

[21] The Committee was established to coordinate the actions of the Federal Department of Fisheries and Oceans and the province. The province owns the lakes and the federal government has jurisdiction over salmon, so the two governments use the Committee to review and process lake stocking decisions. They also jointly authorize the possession and transportation of fish to lakes for stocking, as in this case.

[22] Ms. Marshall explained that the Committee reviews fish stocking proposals for new lakes, i.e., lakes not already being stocked. If stocking is proposed for a lake for the first time, especially if the lake has wild strains of fish, the Committee can ask for an environmental assessment. But if the lake is already stocked with fish, not just the stocking strain, the Committee considers stocking to be a lower risk to the ecological system of the lake and, generally, has no concerns.

[23] The Ministry’s 2007 kokanee stocking plan for Chimney Lake was discussed by the Committee in 2008 because it was controversial. Since that lake was already stocked with rainbow trout, and because mainly sterile kokanee were going to be used, Ms. Marshall stated that the Committee considered the kokanee stocking proposal to be a low risk to the lake ecosystem. Also, kokanee are native to this area.

[24] Ms. Marshall also explained how a possession and transport authorization is issued. Generally, the Society applies for one permit per hatchery, based on the type of fish leaving the hatchery. The application and authorization are based on

zones which have broad watershed criteria. The Committee looks carefully at those criteria to avoid fish crossing zones.

[25] In 2009, the Committee received a separate application from the Society for kokanee destined for Chimney Lake. There were concerns that the stocking would be contentious, and this way other programs to stock other systems would not be impacted.

[26] Ms. Marshall described how the Society conducts the transportation after submitting a plan identifying the hatchery and receiving lakes. The Society carries the fish in a disinfected tanker truck. The transport routes pass water bodies, but are not close enough to be at risk to other lakes. There are emergency protocols in case of an accident. Once the fish get to the receiving lake, the Society uses a hose extended 10-16 feet into the lake to put the fish into the lake. According to Ms. Marshall, the Society stocks about 900 lakes a year.

[27] Mike Ramsay, the Ministry's current Fish and Wildlife Section Head for the Cariboo Region, also provided information about the stocking procedure. He confirmed that it is the province that is the proponent of stocking plans and, specifically, the Chimney Lake stocking program. According to Mr. Ramsay, the idea to stock the lake with kokanee surfaced in 2005 after an assessment of angling performance. The Ministry notified various stakeholders and interested parties in late 2006 about its kokanee stocking proposal, and also held an open house in January 2007. There was opposition to the plan, so, in the spring of 2007, the Ministry stocked Bobb Lake with kokanee instead of Chimney Lake. The Ministry then developed the Chimney Lake Stocking Plan 2007, which reviewed kokanee as a stocking option, addressed concerns expressed by opponents and explained the benefits of kokanee stocking.

[28] In about March, 2008, the Ministry decided to stock Chimney Lake with kokanee that spring. A Ministry employee applied for and received a permit to possess and transfer 60,000 kokanee to stock Chimney Lake. That 2008 permit has similar federal and provincial authorizations as the 2009 Permit issued to the Society.

[29] The Panel finds, based on Ms. Marshall's description of the permit and transport process, that the pick-up from the hatchery, the possession, the transportation and the deposit of fish into the receiving lake is one transaction: it is, in effect, the stocking. In 2008, a Ministry employee was authorized to possess, transport and, in effect, stock Chimney Lake with kokanee. In 2009, the Society obtained the same authorization.

[30] The Panel also finds that the Permit is just the enabling part, the tool for implementing the Ministry's stocking plan. Without the Ministry's intent to stock Chimney Lake with kokanee, and without the stocking proposal later developed into the stocking plan document, there would be no need for the Permit. There is no need to take kokanee from a hatchery to stock Chimney Lake (or any other receiving lake) without the stocking plan.

[31] Every regulatory decision has an underlying reason or purpose, and in this case the Panel finds that the Chimney Lake Stocking Plan is clearly one of the underlying reasons or purposes for Permit. Therefore, the Panel finds that it has

the jurisdiction to review the Chimney Lake Stocking Plan as one of the factors considered in the issuance of the Permit.

**2. What is the extent of the Board's jurisdiction in this appeal?**

[32] The Appellant asked the Board to specifically address the extent of its jurisdiction in this appeal. He made the request because of the following events.

[33] In 2008, when the Appellant received notice of the Ministry's intent to stock Chimney Lake with kokanee, he, on behalf of the Association, appealed the 2008 possession and transfer permit issued to a Ministry employee. While that appeal was pending, without notice to Mr. Leggett or to the Board, the Ministry went ahead and stocked Chimney Lake with kokanee.

[34] On May 13, 2009, the day before this hearing started, counsel for the Fisheries Program advised Appellant's counsel that the Fisheries Program is considering moving the fish to Chimney Lake and putting the fish in the lake if the "barriers" to the Society moving the fish are not removed before the stocking window expires. In other words, regardless of this appeal process, regardless of the Board's stay order, and regardless of the outcome of the appeal, the Ministry intends to move and deposit the fish into the lake using its wildlife officers. The Ministry submits that wildlife officers do not need a permit to possess or transport fish, and the Fisheries Program has a federal license to release the kokanee into the lake.

[35] This letter was brought to the Panel's attention as the hearing started. The Panel was asked to rule whether the hearing should proceed given this position taken by the Fisheries Program.

[36] At the hearing, the Appellant characterized this letter as threatening an "end run" around the appeal, regardless of what evidence was presented. The Appellant suggested that the Fisheries Program, and the Director, are flouting the authority of the Board – specifically the stay issued by the Board on April 15, 2009 (see above). The Ministry's intent to proceed with the stocking by any means would make the Board's proceedings a sham.

[37] The Appellant further argued that the *Wildlife Act* does not provide immunity to wildlife officers possessing or transporting kokanee to stock Chimney Lake. The Regulation applies to "anyone" who intends to possess and transport live fish in the province. The immunity in section 86 of the *Wildlife Act* does not allow the Ministry, or its employees, to bypass a Board order.

[38] The Respondent's position is that section 86 of the *Wildlife Act* gives wildlife officers immunity from any offences under the Regulation if they are performing their duties. The Ministry suggested that possessing and transporting fish would be no different than removing a nuisance bear. The Ministry submitted that only third parties need a permit to move fish. If a wildlife officer is on government business, the officer is not subject to the offence provisions in the *Wildlife Act* or its regulations.

[39] The Panel has reviewed the Regulation and section 86 of the *Wildlife Act*, as well as the Board's decision to stay the Permit. Section 2 of the Regulation states that:



2 A person commits an offence where he

(a) has in possession,

(b) transports, or

(c) traffics in

live fish unless authorized by a permit or a licence

[underlining added]

[40] Section 86 of the *Wildlife Act* states

The offence provisions of this Act and the regulations and section 9 of the *Firearms Act* do not apply to an officer engaged in the performance of his or her duties.

[41] In essence, the Respondent submitted that section 2 of the Regulation did not apply to wildlife officers in the performance of their duties; in this case, those duties would include transporting live fish without a permit or license.

[42] At the hearing, the Panel held that the section 86 is not a blanket immunity applicable to all actions by wildlife officers. There are situations requiring officers to act quickly, such as dealing with nuisance bears or removing injured animals. In such situations, there would be immunity from any offences that might be committed.

[43] In this case, there is clearly a regulatory requirement to have a permit to possess and transport live fish in the province (section 3 of the Regulation). In 2008, a Ministry employee applied for, and received, just such a permit. To now say that, in 2009, the permit provisions of the Regulation do not apply because the Ministry is in a hurry to stock Chimney Lake suggests that the Ministry wants to pick and choose which regulatory provisions apply to it, and when they should apply.

[44] The Panel also noted that, in its decision to stay the Permit, the Board found that the Appellant's concerns about the kokanee stocking program were part of his appeal of the Permit. So, even if the Ministry by-passes the regulatory permit process, that would not end this appeal. The Permit is not the sole issue in this appeal. Therefore, the Panel held that the hearing should proceed.

[45] In its closing submissions, the Appellant submitted that the Board, as an independent tribunal, has the power to review the Director's decisions and makes its own decisions. It has been granted broad powers by the *Wildlife Act* and is not required to defer to the Director.

[46] In response, the Respondent/Fisheries Program submitted that the Board should not concern itself with the business of the Ministry's Fish and Wildlife Branch. It is not the proper role of the Board to scrutinize the Ministry's role as a proponent of programs. The Board's role is to oversee the actions of government in its regulatory functions, such as issuing guiding licenses. The Respondent/Fisheries Program also submitted that the Board should defer to the Director's judgment.

[47] The Board was created by statute to be an independent body to hear environmental appeals. Section 93 of the current *Environmental Management Act* continues the Board's jurisdiction to hear appeals under several environmental statutes, including the *Wildlife Act*. Additionally, the Board's expertise in environmental issues has been recognized in several decisions (see the list in *Beazer East, Inc. v. Environmental Appeal Board et al.*, 2000 BCSC 1698).

[48] With respect to this appeal, the Panel notes that the Board's authority to review decisions made by a director under the *Wildlife Act* is explicitly set out in section 101.1 of that act. Section 101.1(1) states that a person affected by a decision of a director that affects a licence or permit, may appeal the decision to the Board. Section 101.1 sets out the powers of the Board with respect to an appeal; specifically,

(4) The appeal board may conduct an appeal by way of a new hearing.

(5) On an appeal, the appeal board may

(a) send the matter back to the regional manager or director with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

[underlining added]

[49] The Panel regards these provisions as explicitly allowing the Board to hold a "new hearing" (or hearing *de novo*) and to consider new evidence, not just what the Director considered. Further, the Board's ability to make "any" decision the Director could have made, means it does not have to defer to the Director. The Board, as an independent tribunal, may take a fresh look at the evidence and issues that it considers relevant in any appeal (see: *British Columbia Railway Company et al v. Director of Waste Management*, (Appeal No. 2000-WAS-018(b), March 3, 2004) (unreported)).

[50] The Panel finds that the Board has the jurisdiction, and is capable of making an independent decision, based on the facts and submissions presented to it during an appeal. In this case, that means the Board may consider new evidence related to the Ministry's plan to stock Chimney Lake with kokanee because that plan is one of the underlying reasons for issuing the Permit. It also means the Board can make its own independent findings regarding whether a Permit should be issued.

### **3. Whether the Permit should be rescinded?**

[51] The Appellant submits that the release of kokanee into Chimney Lake could result in irreparable harm to the lake's ecosystem. The Appellant identified kokanee reproduction in the lake, competition with the rainbow trout and the depletion of zooplankton stocks as environmental risks associated with the

Ministry's stocking plan. The Appellant's position is that the risks of such long term, irreversible harm far outweigh any benefit that may arise from the Ministry's main goal of increasing angler opportunities in the lake.

[52] The Appellant is not only a resident of the Chimney Lake area, a Director of the Chimney Felker Lake Landholders Association, and a regular angler on Chimney Lake. He is also a Registered Professional Biologist. In addition to his Bachelor of Science and Master of Science degrees, his professional experience includes 34 years of Fish and Wildlife management with the British Columbia government. He held the position of Manager of Fisheries in the Cariboo Region from October 1969 to May 2003. From 1998 to 2003, the Appellant was a section head in charge of fish and wildlife management. As a manager and section head, he was involved in fish stocking, lake classification, preparing regulations and habitat protection. He has also co-authored books on salmonids, and fishes and forestry.

[53] The Appellant has been expressing both his concerns about kokanee stocking, and those of the Association, to the Ministry for some time. Partially in response to these concerns, and also to inform the local community generally, the Ministry sponsored an open house in January 2007 to review its kokanee stocking proposal. The Appellant and others continued to be opposed to the release of kokanee into Chimney Lake, and kokanee were not stocked in 2007. The fish went to Bobb Lake instead.

[54] In 2008, the Appellant and the Association continued to oppose the plan and appealed the Director's decision to issue a possession and transport permit to a Ministry employee. The appeal became moot when the Ministry stocked Chimney Lake with kokanee before the appeal could be heard. The Appellant then wrote to the Director more than once expressing his opposition to the stocking plan. After receiving no reply, he wrote to the Minister of Environment in January 2009.

[55] Rodger Stewart, Regional Manager, Environmental Stewardship Division, replied on behalf of the Minister. Mr. Stewart advised that the Ministry examined the alleged risk that stocking kokanee would result in the natural colonization and overstocking of Chimney and Felker Lakes and obtained a third party assessment. He stated that the fry stocked in May 2008 were 97.5% sterile and, therefore, limited natural reproduction was only remotely possible; however, that risk was extremely low.

[56] This letter had an attachment outlining potential survival rates and potential number of spawners from that stocking program. The Appellant questioned the numbers provided by the Ministry. He submitted that the survival rates could be higher, especially when some kokanee survive to the yearling stage and beyond. He also said that the survival rate would be higher in the pelagic (deep water) areas where kokanee would have less competition.

[57] The Appellant described the spawning conditions of Chimney Lake – it has inlet and outlet creeks that rainbow trout use for spawning. The Association has refurbished some of these trout spawning areas. The lake also has shoals with springs where he has observed rainbow trout trying to spawn. Kokanee use similar spawning areas, therefore, in his opinion the lake would provide suitable habitat for kokanee to spawn. The Appellant has studied and observed spawning behavior of

fish throughout his career and believes that the Ministry underestimated the number of potential spawners. A female could attract 3-4 males to fertilize the eggs, not the 1 to 1 ratio suggested by the Ministry.

[58] To avoid the risks of spawning and growing a kokanee population in the lake, the Appellant would not stock the lake until a totally sterile stock is available. He would also study the effects of the 2008 stocking on the rainbow trout population because the kokanee could compete directly with trout for food, especially as the number of kokanee increases. The lake has limited capacity for biomass production, and reidside shiners, suckers and chub already compete with trout.

[59] The Appellant asked Dr. Gordon Hartman, a retired fisheries scientist, to review the stocking plan from a biological perspective. Dr. Hartman has advance degrees in ecology and behavior of stream dwelling salmonid and trout. He commenced his study of fish biology over 50 years ago, working for a period with the Ministry's Fish and Wildlife Branch in fish reproductive behavior, the biology of rainbow trout, interaction and competitions between salmon and steelhead. He also has fisheries management experience, including reviewing plans for the underlying science. His curriculum vitae shows years of experience working with, studying and authoring papers on various aspects of fish biology, with much of that work in British Columbia and the Yukon. Based on his extensive qualifications related to salmonid and trout biology, and fisheries management, the Panel found that Dr. Hartman qualified as an expert witness in the area of kokanee competition with rainbow trout in Chimney Lake, and the science underlying stocking management plans.

[60] Dr. Hartman clarified that he had no personal opinion or view about whether kokanee should be stocked in Chimney Lake, and he was not compensated for his review. He looked at the Chimney Lake Stocking Plan, the science to support it and also reviewed some outside sources.

[61] Dr. Hartman's comments focused on what he viewed as the stocking plan's lack of underlying science, statistical evidence, and references. He could not find information quantifying the spawning habits of rainbow trout, the outlets or inlets of Chimney Lake, and no biological assessment of habitat of the lake. As to statements in the plan related to spawning behavior of the stocked kokanee, the rainbow trout's potential use of pelagic zones for feeding and competition, he found there was inadequate science to support the statements. For example, there are no references to assertions about the number of viable spawning pairs per 4,000 fish, or the assumption that females spawn 1:1 with males when in fact the ratio could be 1:3-4. He also found an absence of analysis about second generation spawners and their potential impacts on the lake.

[62] He characterized the stocking plan's description of kokanee feeding habits and movement into deep water during the day as overly simplified, especially the migration patterns; they are not always the same. For example, in Nicola Lake, one-year kokanee were on the surface in daytime and in deep water in the evening; the following year, the patterns switched. In his opinion, it is better not to put fish into the lake until biological research is undertaken. It is better to get the data before putting a plan into action; data such as knowing the growth rate of trout in the lake, their distribution and feeding habits in Chimney Lake.

[63] Dr. Hartman also reviewed an analysis of the stocking plan undertaken by Dr. Ken Ashley, a former Ministry employee. The Ministry commissioned this independent review in response to objections to the stocking plan (see below). Dr. Hartman noted the generalized statements in the Ashley report and reliance on older data. For example, he takes issue with Dr. Ashley's assertion that there are likely no risks to the rainbow trout in Chimney Lake from stocking sterile kokanee. He believes there may, in fact, be risks, but data is needed to ascertain the risks.

[64] Dr. Hartman's main point is that good data is needed as a basis for sound resource management decision making. In his review of the Ministry's document, he did not find references to data or research to support the conclusions used to support the Ministry's stocking plan.

[65] In response, Mike Ramsay testified about the origins of the proposal to stock Chimney Lake with kokanee and the development of the stocking plan. Mr. Ramsay is a Registered Professional Biologist with degrees in biology and aquaculture. He has fish management experience with the Federal Department of Fisheries and Oceans and, since 1994, has been a fisheries biologist with the Ministry.

[66] Mr. Ramsay said the impetus for stocking kokanee in Chimney Lake came from an analysis of Chimney and other lakes to see how they were performing from an angling perspective. The Ministry was interested in increasing angling days. Chimney Lake has attributes appealing to anglers: proximity to Williams Lake, paved access, camping area, day use access and boat launches. Also, Chimney Lake has been stocked with trout for many years to augment angling opportunities. The lake has minimal or no trout production from the stock strains. The lake seemed like a logical place to stock because the Ministry could attain vast angling improvement in a short period of time.

[67] In late 2006, the Ministry sent letters to various stakeholders and interested parties, advising them of its proposal to introduce a kokanee stocking program for Chimney Lake and to continue to stock rainbow trout. Those contacted included the Williams Lake Band, Esketeme First Nation, BC Wildlife Federation, Williams Lake Sportsman Association, the Chimney Felker Ratepayers Association, and Jack Leggett.

[68] The letters outlined the attributes of Chimney Lake and its similarities to Ten Mile Lake, which supports a kokanee fishery in addition to an existing rainbow trout fishery. Ten Mile Lake provides a popular opportunity for a kokanee fishery during times when the trout fishery is depressed. The Ministry felt Chimney Lake could similarly meet its enhancement objectives to provide a kokanee angling opportunity close to Williams Lake, and diversify the recreational angling opportunities on the lake with both a rainbow trout and a kokanee fishery.

[69] The Ministry proposed stocking 60,000 kokanee in the spring of 2007. The letters provided notice of a public forum on January 17, 2007 to gauge public reaction. The Sportsman Association, the BC Wildlife Federation and others in the general Williams Lake area supported the proposal. The Chimney Felker Ratepayers Association, the Association and the Appellant expressed serious concerns, and therefore, Chimney Lake was not stocked with kokanee in 2007.

[70] To address the issues raised by the Appellant and others, Mr. Ramsay developed the plan. He said that he did not design it as a technical package or as a scientific study as suggested by Dr. Hartman. The stocking plan is for general public information. The Ministry does not have the staff or resources for the research efforts Dr. Hartman expected. However, Mr. Ramsay said that he did rely on information available to the Ministry, input from technical and biological staff, as well as information about comparable stocked lakes in the area.

[71] The two issues raised with the Ministry were the potential negative impact on any native rainbow trout, and on the trout fishery. Because of historical stocking with about 20 different trout strains, Mr. Ramsay said the chance of a native strain is non-existent. As to impacts on the trout fishery, Mr. Ramsay said other lakes in the region are stocked with rainbow trout and with kokanee to provide alternative fisheries (fishing during different times of the year). The benefit to stocking both species is more angling opportunities.

[72] Kokanee residualization (reproducing and establishing a population) was another key concern. Mr. Ramsay referred to the 12 lakes that the Ministry stocks with kokanee. Only three of these lakes show kokanee reproducing naturally. In nine lakes with inlets and outlets, there have been limited or no natural reproduction. These risks are diminished when using sterile stock. In two lakes where there is a natural kokanee spawning population, Tyee and McLeese, the Ministry manages the kokanee population by increasing the fishery – allowing more anglers and allowing more fish to be caught.

[73] For the Chimney Lake program, the Ministry would use similar regulatory methods to limit the kokanee population and stock rainbow trout that eat kokanee. First Nations would also participate in the fisheries management with traditional fishing methods. Mr. Ramsay did commit to the Association that the Ministry would maintain the rainbow trout fishery. Also, if the kokanee were hurting that fishery, or other negative impacts were observed, the Ministry would reassess its program and even stop the stocking.

[74] For the public outreach, Mr. Ramsay prepared charts to explain the Ministry's analysis. One is a risk assessment listing areas of concern (e.g., impact on wild fisheries), probability of event, potential impact, how the impact would be addressed and overall risk which the Ministry identified as low. Mr. Ramsay prepared another chart of potential benefits: diverse angling opportunities, increased angler participation and increased local economic benefits.

[75] Mr. Ramsay also had a table listing the lakes that the Ministry is monitoring, angler days, species, and gross revenues. He explained that the Ministry does creel surveys and aerial boat counts to establish the number of anglers. The gross revenue numbers are based on an average daily expenditure by anglers. Mr. Ramsay concluded that the potential environmental impacts were low, but the overall angling and economic benefits of kokanee stocking were high.

[76] After meetings with the Chimney Felker Ratepayers who still had concerns, the Director retained Dr. Ken Ashley, a former Ministry employee, to independently review the stocking plan. Dr. Ashley was described by Dr. Hartman as very experienced and highly regarded.

[77] In his report, Dr. Ashley referenced the Ministry's fishery goals as set out in its Freshwater Fisheries Program Plan (MofE 2007a), and in the Ministry policy on stocking fish in lakes (MofE, 2007b). The latter policy gives first priority to the conservation of wild indigenous species, and to support the stocking or transplant of fish into lakes where, among other things, there is an identified demand for additional recreational opportunities, an evaluation of risks to native species has been completed, and appropriate consultation with First Nations has taken place. That policy provides direction on the stocking procedures to follow when identifying benefits and assessing biological risks.

[78] In his report, Dr. Ashley reviewed Chimney Lake's suitability for rainbow trout and kokanee. He noted that the indigenous non-salmonid fish in the lake (lake chub, reidside shiner, suckers) present strong competition to juvenile rainbow trout, but the Ministry has worked to minimize the competition by varying the size and brood origin of stocked rainbow trout. He also wrote that kokanee are a limnologically suitable option to diversify angling opportunities in Chimney Lake.

[79] Stocked sterile kokanee would likely pose no risks to the rainbow trout in Chimney Lake.

[80] Based on his review, Dr. Ashley recommended proceeding with 30,000 sterile kokanee a year for the first two years in order to evaluate the effect of the kokanee on the pelagic zooplankton. He also recommended: annually monitoring the kokanee population to see if natural spawning occurs; reducing the stocking rate if natural kokanee reproduction occurs; and conducting angler surveys every two years to quantify the angling effort.

[81] In 2008, the Ministry did not follow Dr. Ashley's recommendation on the stocking number because Mr. Ramsay said his goal was to establish a fishery so the public could catch fish. There was a limited window in 2008 for stocking so the Ministry went ahead. Mr. Ramsay stated his primary goal is to provide additional angling opportunities and economic benefits to the province and the local community.

[82] Also in March of 2008, Rodger Stewart, the Regional Manager, sent a letter to various stakeholders including First Nations and the Chimney Felker Ratepayers Association. In that letter, he reviewed the goals of the Ministry's project, the risk assessment process and results, and he committed to the Chimney Lake residents that the stocking process would not be the final step in establishing a kokanee fishery. Specifically, his staff would continue to assess various fish stocks, maintain a viable rainbow trout fishery on Chimney Lake, undertake fall surveys to ensure that no kokanee are spawning, and meet with property owners to discuss issues arising from the kokanee fishery.

[83] Mr. Ramsay did start a creel survey in Chimney Lake in the last 18 months, and started plankton trolling to have a baseline on plankton composition. Over the past winter some sampling was done to see if juvenile kokanee were growing. He also had another meeting with the ratepayers in February 2009, and asked whether the residents had observed any changes and if they had any concerns after the kokanee had been in the lake for nine months.

[84] Based on the evidence presented, the Panel finds that the Appellant identified valid environmental risks associated with stocking Chimney Lake with kokanee. The Appellant's primary concern is that the high risk of adverse impacts was not sufficiently studied or given enough weight by the Ministry in its stocking plan.

[85] The Panel also finds that the Ministry did consider environmental risks associated with stocking kokanee in Chimney Lake, and paid particular attention to the issues raised during its public consultation process. Using the information available to it, particularly from its own technicians and biologists and its experiences with stocking other lakes, it assessed the level of risk and concluded the risks were low. The Ministry also obtained a separate review of its stocking plan. The reviewer found that the regional fisheries staff did analyze the stocking plan. He also assessed similar risks and concluded the risks were low.

[86] The Appellant asks the Board to apply the "precautionary principle" to the environmental risk in deciding this matter. That phrase and the "precautionary approach" are used in some Canadian statutes such as the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

[87] The Appellant submits that there is a risk of serious or irreversible environmental damage to Chimney Lake's ecosystem by stocking it with kokanee. The Appellant further submits that because of scientific uncertainty and the potential for irreversible damage, the Respondent should be cautious and defer stocking initiatives until more information is available.

[88] This Board has considered the application of the precautionary principle in previous decisions related to the issuance of permits for discharging waste. The Board applied a "cautious" approach in cases where the relevant provisions of the province's *Environmental Management Act* indicate that a cautious or preventive approach is to be taken when making decisions involving permits for waste discharge to the environment (see for example, *Myrus James et al v. Regional Manager* (Appeal Nos. 2003-WAS-021(b), 2003-WAS-022(a), 2003-WAS-023(a), November 17, 2004 ) (unreported)).

[89] Although there is no clear legislative language in the *Wildlife Act* regarding the precautionary approach or the precautionary principle, the mandate of both the Minister and the Ministry contain elements of protection of the environment and conservation, in addition to their role in managing the wildlife resource (see, for instance, section 4(2)(c) of the *Ministry of Environment Act*, and section 5 of the *Environmental Management Act*).

[90] Moreover, on the facts of this case, the Ministry and this Panel agree that there are environmental risks to stocking Chimney Lake with kokanee. However, the Panel agrees with the Ministry that, based on the evidence presented, those risks are relatively low, and there are ways to manage those risks.

[91] The Panel finds there is considerable evidence that the fish stocks in Chimney Lake have been engineered for decades, and there is little chance any native or wild stock remain in that lake. The lake continues to be stocked with rainbow trout to support a trout fishery. That means the Ministry is actively managing the resources of that lake.



[92] The Panel also finds that there is scientific uncertainty about the effects of kokanee stocking. That is clear from both the Appellant's evidence and Dr. Ashley's report. To address the uncertainty and ongoing environmental concerns, the Ministry has committed to monitoring and assessing the impacts of kokanee in Chimney Lake, and to using management measures to sustain both a viable rainbow trout fishery and a kokanee fishery. The Panel accepts the evidence that other lakes in the area have sustained both kokanee and rainbow trout, and that the Ministry manages those populations by adjusting stocking and fishing activities. The Ministry's commitment to monitor and manage is sufficient to respond to adverse environmental impacts in the circumstances of this case.

[93] The Panel also notes that the Ministry has an important goal in its resource management portfolio – increasing angling opportunities. This is a principle goal of the Freshwater Fisheries Program Plan and policy for stocking lakes in the Cariboo Region.

[94] Further, the above-noted goal is consistent with the Ministry's powers and functions under the *Ministry of Environment Act* as well as the Minister's authority as set out in the *Environmental Management Act*.

[95] In particular, the Ministry has broad statutory authority to manage the natural resources of the province. Section 4 of the *Ministry of Environment Act* sets out the purposes and functions of the Ministry in matters related to the environment. Those include: to manage, protect and conserve all water, land, air, plant life and animal life, having regard to the economic and social benefits they may confer on British Columbia [underling added].

[96] In addition, section 5(b) and (e) of the *Environmental Management Act* states that the duties, powers and functions of the Minister extend to any matter relating to the management, protection and enhancement of the environment including: development of policies for the management, protection and use of the environment; preparing and publishing policies, strategies, objectives, guidelines and standards for the protection and management of the environment [underlining added].

[97] The Panel finds that these statutes define the Ministry's role as not just protector of the environment, but as manager of environmental values for economic and social benefits. In that management role, the Ministry has authority to develop policies and programs consistent with achieving those benefits. Two of those policies are the Freshwater Fisheries Program Plan ([www.env.gov.bc/esd](http://www.env.gov.bc/esd)) and the lake stocking policy; both are designed to maintain and develop diverse and sustainable opportunities for fishery resource users.

[98] The Panel also finds that the evidence demonstrates a long standing practice by the Ministry to stock lakes for angling opportunities that enhance recreational experiences and provide economic benefits. The Ministry's stocking plan for Chimney Lake is consistent with this practice, its overall angling objectives and the two policies cited above.

[99] The Panel further finds that the Ministry's consultation process included public meetings, consultations with First Nations, contacts with various stakeholders and meetings with the Appellant, the local landholders and ratepayers groups.

Concerns were identified; and environmental and other risks were assessed. The Ministry's evaluation of the environmental risks may not have been as thorough as the Appellant would like, nonetheless the Panel finds that the Ministry did not ignore potential risks and did analyze them. Based on its assessments, the Ministry concluded that Chimney Lake is both a sound biological location for kokanee and a well-situated location to provide angling opportunities. The Panel finds that the Appellant has not provided a sufficient basis to reject this conclusion. There is no new evidence that would impact the decision to stock the lake with kokanee.

[100] The Panel finds that the Permit should not be rescinded.

## **DECISION**

[101] In making this decision, the Panel considered all the relevant documents and evidence before it, whether or not specifically referred to here.

[102] For the reasons stated above, the Panel confirms the Respondent's decision to issue the Permit to the Third Party, Freshwater Fisheries Society of BC.

[103] Accordingly the appeal is dismissed.

[104] In addition, the previously issued stay of the Permit is rescinded.

"Gabriella Lang"

Gabriella Lang, Panel Chair  
Environmental Appeal Board

May 22, 2009