

Federal Court



Cour fédérale

Date : 20081128

Docket: T-1271-07

Citation: 2008 FC 1323

Ottawa, Ontario, November 28, 2008

PRESENT: The Honourable Orville Frenette, Deputy Judge

BETWEEN:

**ROLAND ANGLEHART SR., ROLAND ANGLEHART JR.,
BERNARD ARSENEAULT, HÉLIODORE AUCOIN,
ALBERT BENOÎT, ROBERT BOUCHER, ELIDE BULGER,
GÉRARD CASSIVI, JEAN-GILLES CHIASSON,
LUDGER CHIASSON, MARTIN M. CHIASSON,
RÉMI CHIASSON, CIE 2973-0819 QUÉBEC
INC., CIE 2973-1288 QUÉBEC INC.,
CIE 3087-5199 QUÉBEC INC., ROBERT COLLIN,
ROMÉO G. CORMIER, MARC COUTURE,
LES CRUSTACÉES DE GASPÉ LTÉE,
LINO DESBOIS, RANDY DEVEAU, CAROL DUGUAY,
CHARLES-AIMÉ DUGUAY, DENIS DUGUAY,
DONALD DUGUAY, MARIUS DUGUAY,
EDGAR FERRON, ARMAND Fiset,
LIVAIN FOULEM, CLAUDE GIONEST,
JOCELYN GIONET, SIMON J. GIONET,
AURÈLE GODIN, VALOIS GOUPIL,
AURÉLIEN HACHÉ, DONALD R. HACHÉ,
GAËTAN HACHÉ, GUY HACHÉ,
JACQUES E. HACHÉ, JASON-SYLVAIN HACHÉ,
JEAN-PIERRE HACHÉ, JACQUES A. HACHÉ,
RENÉ HACHÉ, RHÉAL HACHÉ, ROBERT F. HACHÉ,
ALBAN HAUTCOEUR, FERNAND HAUTCOEUR,
JEAN-CLAUDE HAUTCOEUR, GREGG HINKLEY,
JEAN-PIERRE HUARD, RÉJEAN LEBLANC,
CHRISTIAN LELIÈVRE, ELPHÈGE LELIÈVRE,
JEAN-ELIE LELIÈVRE, JULES LELIÈVRE,**

**DASSISE MALLET, DELPHIS MALLET,
FRANCIS MALLET, JEAN-MARC MARCOUX,
ANDRÉ MAZEROLLE, EDDY MAZEROLLE,
GILLES A. NOËL, LÉVIS NOËL, MARTIN NOËL,
NICOLAS NOËL, ONÉSIME NOËL,
RAYMOND NOËL, FRANCIS PARISÉ,
DOMITIEN PAULIN, SYLVAIN PAULIN,
PÊCHERIES DENISE QUINN SYVRAIS INC.,
PÊCHERIES FRANÇOIS INC.,
PÊCHERIES JEAN-YAN II INC.,
PÊCHERIES JIMMY L. LTÉE,
PÊCHERIES J.V.L. LTÉE,
PÊCHERIES RAY-L INC.,
LES PÊCHERIES SERGE-LUC INC.,
ROGER PINEL, CLAUDE POIRIER,
PRODUITS BELLE BAIE LTÉE, ADRIEN ROUSSEL,
JEAN-CAMILLE ROUSSEL, MATHIAS ROUSSEL,
STEVEN ROUSSY, MARIO SAVOIE,
SUCCESSION JEAN-PIERRE ROBICHAUD,
SUCCESSION DE LUCIEN CHIASSON,
SUCCESSION DE SYLVA HACHÉ,
JEAN-MARC SWEENEY, MICHEL TURBIDE,
RÉAL TURBIDE, DONAT VIENNEAU,
FERNAND VIENNEAU, LIVAIN VIENNEAU,
RHÉAL VIENNEAU**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion to strike whereby the Applicants seek the dismissal of an amended declaration and of an action in damages; in the alternative, they seek a stay of proceedings

pending a decision on the merits in relation to a judicial review application that might file the applicants pursuant to section 18 of the *Federal Courts Act*, L.R.C. (1985), c. F-7 (the Act). The Applicants invoke section 17 of the Act. Both provisions read as follows:

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.

(2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

(a) the land, goods or money of any person is in the possession of the Crown;

(b) the claim arises out of a contract entered into by or on behalf of the Crown;

(c) there is a claim against the Crown for injurious affection; or

(d) the claim is for damages under the *Crown Liability and Proceedings Act*.

(3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:

(a) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada; and

(b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial

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) Elle a notamment compétence concurrente en première instance, sauf disposition contraire, dans les cas de demande motivés par :

a) la possession par la Couronne de terres, biens ou sommes d'argent appartenant à autrui;

b) un contrat conclu par ou pour la Couronne;

c) un trouble de jouissance dont la Couronne se rend coupable;

d) une demande en dommages-intérêts formée au titre de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*.

(3) Elle a compétence exclusive, en première instance, pour les questions suivantes :

a) le paiement d'une somme dont le montant est à déterminer, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale;

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite

Division or the Exchequer Court of Canada.

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

(5) The Federal Court has concurrent original jurisdiction

(a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(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; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other

à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

(4) Elle a compétence concurrente, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou the Attorney General of Canada;

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

(6) Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

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;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre the Attorney General of Canada afin d'obtenir réparation de la part d'un office

tribunal.

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

fédéral.

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d' *habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

[2] The Applicants allege the following causes of action against the Respondent:

- A. There have been violations of several contractual agreements entered into with the Minister of Fisheries and Oceans (the Minister) in relation to crab fishing in Eastern Canada;
- B. There has been a breach of duty of due diligence when the Applicants' allocation of the Total Allowable Catch (the TAC) was reduced from the year 2003;
- C. There has been misfeasance or the commission of a tort in public office in the exercise of a public duty;
- D. There has been abusive, capricious or bad faith exercise of a management power of the Minister;
- E. The Applicants were deprived of certain rights when their TAC allocation was reduced, which amounts to an expropriation without compensation;
- F. The Minister has made false representations;

- G. There was unjust enrichment to the benefit of the Minister when he used part of the TAC to which the Applicants were entitled to allocate it to other groups of fishers or to finance his own activities;
- H. There was a breach of a fiduciary duty.

[3] The Respondent challenges the action, alleging that the Federal Court does not have jurisdiction over this matter and that the above causes of action are unfounded.

The facts

[4] In 1989, following a crisis in the Eastern Canadian crab fishery, the Minister of Fisheries and Oceans signed an agreement with crab fishers whereby he undertook to limit for the future the number of licenses in circulation in fishing area 12 to 130. In return, the traditional fishers gave up competitive fishing and agreed to finance in a substantial way certain ministerial measures pertaining to the management of the resource.

[5] In 1999, following *R. v. Marshall*, [1999] 3 S.C.R. 456, the Minister informed the fishers that he intended to include Aboriginal persons in the crab fishery. The fishers accepted that change, trusting that the Minister would honour his word to limit the number of licenses to 130; those licenses were to be bought back, when possible, from the existing fishing licenses.

[6] In 2003, the Minister, to finance his programs, unilaterally and effectively reneged on his undertakings by reducing the traditional fishers' share of the total allowable catch without compensation.

[7] Traditional fishermen have objected on the basis that they have invested considerable sums of money in reliance on the undertakings of the Minister and that, following those changes, they have suffered considerable losses for which they should be compensated.

[8] This action was commenced on July 11, 2007 by "some 96" applicants who raise a number of causes of action, summarized hereinabove.

Analysis

[9] This motion to strike was filed by the Respondent pursuant to Rule 221(1) of the *Federal Court Rules*, SOR/98-106 :

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

e) qu'il diverge d'un acte de procédure antérieur;

f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[10] This motion raises the two following basic questions:

- A. Does the Federal Court have jurisdiction over this matter under section 17 of the *Federal Courts Act*?
- B. Is it plain and obvious that the Applicants have no chance of success in the action because the declaration discloses no reasonable cause of action?

[11] Before addressing those matters, the Court must examine the requirements of a motion to strike.

[12] The Rule 221(1) case law is quite clear: Courts are extremely slow to grant a motion to strike. According to the case law, it must be plain and obvious (beyond any reasonable doubt) that the plaintiff's action has absolutely no chance of success; only then can such a motion be granted (see, for instance, *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959). The same rule applies when is in issue the jurisdiction of the Court over the subject-matter of the dispute (*Hodgson et al. v. Ermineskin Indian Band et al.* (2000), 180 F.T.R. 285, affirmed (2000), 267 N.R. 143, permission to appeal before the Supreme Court of Canada denied (2000), 276 N.R. 193).

[13] It seems to me, simply upon reading the pleadings, that it is not "clear, plain and obvious" that the allegations in the Applicants' declaration are beyond the jurisdiction of this Court; hence, the action ought not to be dismissed according to the aforementioned test. In addition, when mixed questions of law and fact are raised, they must be determined by the trial judge and not in the context of a motion to strike (*Nidek Co. v. Visx Inc.* (1998), 82 C.P.R. (3d) 289 (F.C.A.)).

[14] The Respondent submits that the Federal Court does not have jurisdiction to hear this case under section 17 of the Act; it is argued that the Applicants should have first commenced judicial review proceedings under section 18 of the Act to ask the Court to set aside the Minister's decision (*Canada v. Grenier*, [2006] 2 F.C.R. 287 (C.A.) and *Canada v. Tremblay*, [2004] 4 F.C.R. 165 (C.A.)).

[15] The Respondent submits that, since the decisions in issue herein have not been examined in such judicial review proceedings, the Court does not have jurisdiction to hear the action.

[16] In response to that argument, the Applicants submit that some of the Minister's decisions have already been declared illegal in judicial review proceedings (see *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, et *Association des crabiers acadiens v. Canada (Attorney General)*, 2006 FC 1242, 305 F.T.R. 318).

[17] The Applicants submit that they are challenging those Minister's decisions not on the basis of their illegality, but rather their illegitimacy and they submit that tortious acts have been committed in the exercise of ministerial powers; hence the action is within the jurisdiction of the Court under section 17 of the Act.

[18] It is important to make a distinction between a "federal board, commission or other tribunal" and the Crown: when a party seeks to have set aside a decision of federal board, commission or other tribunal, the proper remedy is judicial review, whereas an action against the Crown can be

commenced under section 17 of the Act. The relevant definition of "federal board, commission or other tribunal" is found in section 2 of the Act :

<p>"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the <i>Constitution Act, 1867</i>;</p>	<p>« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la <i>Loi constitutionnelle de 1867</i>.</p>
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[19] Now, according to *Harris v. Canada*, [1999] 2 F.C. 392, generally, the Crown is not viewed as a "federal board, commission or other tribunal". In *Canadian Javelin Ltd. v. La Reine (Terre-Neuve)*, [1978] 1 F.C. 408, the Federal Court of Appeal noted that the definition of the word "Crown" in section 2 of the Act had to be considered in order to determine the scope of the jurisdiction to commence an action against the Crown under section 23 of the Act. It dismissed an appeal from a lower court decision based on absence of jurisdiction of the forum because only Her Majesty in right of Canada was provided for in the *Federal Courts Act*.

[20] Thus, it is not so plain, as submitted by the Respondent, that this Court has no jurisdiction over the subject-matter because the case law is not as settled as he is arguing. In a recent case, *Arsenault et al. v. Her Majesty the Queen*, 2008 FC 299, Martineau J. addressed that question. In that case, the facts were similar to the facts herein; an action in damages was commenced by crab fishers against the Minister of Fisheries and Oceans following reductions of fishing quotas; it was based on the same causes of action as herein. The Respondent raised similar arguments as herein

in support of a motion to strike filed pursuant to Rule 221 of the *Federal Court Rules*; that motion had been granted by Prothonotary Morneau. On appeal, Martineau J. reversed that decision.

[21] Justice Martineau based his ruling, *inter alia*, on *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services of Canada et al., [1995] 2 F.C. 694*, more specifically on the comments of Décary J. at pages 702 à 705. He also referred to Kelen J's opinion in *Agustawestland International Ltd. v. Canada (Minister of Public Works and Government Services Canada)*, 2006 FC 767, where it was held that a dissatisfied bidder could seek damages on the basis of breach of contract, tort, or abuse of procedure. Justice Martineau stated as follows:

[43] In view of several of the concerns expressed with respect to the application of *Grenier* in cases share similarities with the present case, I am unable to accept that this action is doomed from the start because of some jurisdictional defect. . . .

[22] Now, the same arguments have been raised herein and I am of the view that Martineau J.'s reasoning must be followed in this case.

[23] Pausing there, it must recalled that the Minister's discretion to issue licenses for fishing is absolute. Section 7 of the *Fisheries Act*, R.S.C. (1985), c. F-14, provides as follows:

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licenses for fisheries or fishing, wherever situated or carried on.

7. (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences d'exploitation de pêcheries -- ou en permettre l'octroi --, indépendamment du lieu de l'exploitation ou

[. . .] de l'activité de pêche.

[. . .]

[24] In *Comeau's Sea Foods v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, representations had been made by the Respondent to the Appellant as to certain fishing quotas. The latter had incurred \$500,000 in expenses in converting one scallop dragger into a lobster fishing vessel. The Minister refused to issue the fishing licence after having withdrawn the promised quotas. The action in damages was dismissed; the main ground was that the Minister's discretion was unrestricted. However, when the Minister has issued a fishing licence and set fishing quotas, this gives rise to rights and duties (see *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548 (C.A.)).

[25] In a recent case (*Saulnier et al. v. Royal Bank of Canada*), 2008 SCC 58, the Supreme Court of Canada held that a fishing licence has commercial value and that it confers on the holder a right akin to a property right, the loss of which can be compensated. The Supreme Court reiterated that the Minister has a discretion to issue, renew or cancel a fishing licence, according to the exigencies of the management of the fisheries. In addition, the Minister sets large-scale contractual programs in this field under the *Fisheries Development Act*, R.S.C. (1985), c. F-21 :

3. (1) The Minister may undertake projects

(a) for the more efficient exploitation of fishery resources and for the exploration for and development of new fishery resources and new fisheries;

(b) for the introduction and demonstration to the fishers of new types of fishing

3. (1) Le ministre peut mettre sur pied des programmes pour :

a) la rationalisation de l'exploitation des ressources de la pêche et la recherche et la mise en valeur de nouvelles pêches;

b) la présentation et la démonstration aux pêcheurs de nouveaux bateaux, agrès ou

vessels and fishing equipment and of new fishing techniques; and

(c) for the development of new fishery products and for the improvement of the handling, processing and distribution of fishery products.

(2) The Minister may enter into an agreement with any province providing for the undertaking jointly with the government of the province or any agency thereof of any project that the Minister is authorized to undertake under subsection (1).

(3) The Minister may, with the approval of the Governor in Council, enter into an agreement with any province providing for the payment to the province of contributions in respect of the cost of any project that is undertaken by the government of the province or any agency thereof and that the Minister is authorized to undertake under subsection (1).

(4) The Minister may enter into an agreement with any person for the joint undertaking of any project that the Minister is authorized to undertake under subsection (1) or for the payment to any person of contributions in respect of the cost of any such project undertaken by that person.

(5) For the purpose of assisting the formulation and assessment of fisheries development projects, the Minister may undertake economic studies alone or jointly with the government of any province or agency thereof or with any university, educational institution or person, and may coordinate any such studies with similar studies undertaken in Canada.

4. The Minister shall, in carrying out any project or economic study under this Act, make

techniques de pêche;

c) la mise en valeur de nouveaux produits de la pêche et l'amélioration des procédés de manutention, de transformation et de distribution des produits de la pêche.

(2) Le ministre peut conclure avec toute province un accord prévoyant la mise sur pied, conjointement avec le gouvernement de la province ou l'un de ses organismes, de tout programme que le paragraphe (1) l'autorise à mettre sur pied.

(3) Le ministre peut, avec l'approbation du gouverneur en conseil, conclure avec toute province un accord prévoyant le versement à cette dernière de contributions aux frais de tout programme mis sur pied par le gouvernement de la province ou l'un de ses organismes, et que le paragraphe (1) autorise le ministre à mettre sur pied.

(4) Le ministre peut conclure avec toute personne un accord prévoyant la mise sur pied conjointe de tout programme que le paragraphe (1) l'autorise à mettre sur pied, ou prévoyant le versement à une personne de contributions relatives au coût d'un tel programme mis sur pied par cette personne.

(5) Afin d'aider à formuler et à évaluer les programmes de développement de la pêche, le ministre peut entreprendre, seul ou conjointement avec le gouvernement d'une province ou l'un de ses organismes ou avec une université, un établissement d'enseignement ou toute personne, des études économiques. Il peut coordonner ces études avec des travaux analogues poursuivis au Canada.

4. Dans le cadre des programmes ou des études économiques prévus par la présente loi,

use, wherever possible, of the services and facilities of other departments of the Government of Canada or of any agencies thereof.

le ministre recourt, dans la mesure du possible, aux services et installations dont disposent les autres ministères ou organismes fédéraux.

[26] In the light of the foregoing, I will analyze briefly the causes of action of the Applicants herein.

[27] The Applicants rely on agreements entered into between 1989 and 2002 by the Minister and their representatives pertaining to the resource management program, the issuance of fishing licences and the quotas of the crab fishers in fishing zone n° 12. In consideration of those privileges, they abandoned competitive fishing and made sure to finance conservation measures pertaining to that resource.

[28] En 1999, they agreed to allow the Minister to include aboriginal fishers. In 2003, the Minister unilaterally cancelled the agreements and reduced the TAC, which led to a decrease in the incomes of the Applicants. The Minister used that resource to finance his programs. In the Applicants' submissions, the Minister thus illegally cancelled the aforementioned agreements; hence, they suffered a damage for which they are seeking compensation.

[29] The Respondent argues that the Minister had the power, under the Act, to act as he did in order to protect the resource. He also argues that decision was one of policy and fully warranted and that the Applicants had no acquired right in a quota. The Respondent submits that there was no agreement between the parties since an agreement would have been a violation of the principle that the Minister cannot fetter his own discretion: *Pacific National Investments Ltd. v.*

Victoria, [2000] 2 S.C.R. 919. In issue in that case, was an agreement entered into by the City of Victoria, British Columbia, and a contractor whereby that municipality would not rezone before expiration of a certain period of time. The Supreme Court, in spite of that agreement, allowed the City to rezone. Now, the facts of that case have no similarity to the facts herein; in issue was the interpretation of a municipal provision, governed by a different legal framework. Therefore, that case is of no relevance in this proceeding.

[30] I prefer the reasoning of Martineau J. in *Arsenault*, above, where he relied on *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, to rule that a decision that is lawful in the sense that it had statutory authority could still constitute a breach of contract. He wrote as follows, at paragraph 53 :

. . . A decision that is lawful in the sense that it had statutory authority may still constitute a breach of contract. . . .

[31] Martineau J. then held that the case involved a mixed question of law and fact that could not be resolved by way of a motion to strike.

[32] At this stage, in view of the evidence of record, it is not possible to decide if that cause of action is well-founded, or not.

[33] For the same grounds as for the breach of contract issue, I am of the view that that cause of action cannot be dismissed at this stage of the proceedings.

[34] All other causes of action stated remain viable at this stage of the proceedings, the disposition thereof will turn on the evidence that will be filed at trial.

[35] Pausing there, it is necessary to consider the scope of the holding in *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, [2006] F.C.J. No. 985, where it was ruled by the Federal Court of Appeal that the Minister did not have the power to expropriate fishery resources for the purposes of funding the Crown's undertakings.

[36] There are cases where judicial review applications have been filed with respect to decisions made by the Minister; yet, in itself, that does not mean that all of his decisions must be challenged by way of judicial review where other remedies are available.

[37] As to the cause of action based on expropriation without compensation, apart from legislation, the common law itself recognizes a right to compensation (see *Canadian Pacific Railway Co. v. Vancouver*, [2006] 1 S.C.R. 227).

[38] The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with very different circumstances (*Pacific National Investments v. Victoria*, [2004] 3 S.C.R. 575).

[39] When a minister fails to abide by his fiduciary duties, that may also give rise to a legal remedy (*Guerin v. The Queen*, [1984] 2 S.C.R. 335). The proper avenue to seek a dismissal of that kind of cause of action is not a motion to strike. As was explained by the Supreme Court of

British Columbia in *Timberwest Forest Ltd. v. British Columbia*, [1999] B.C.J. n° 2842, at paragraph 55 :

. . . The content of a fiduciary duty that might be owed is a matter that requires factual investigation. . . .

[40] To conclude, I am of the view that it is not at all "plain and obvious" that the declaration discloses no reasonable cause of action; at this stage of the proceedings, nothing warrants the dismissal of the substantive action.

[41] For these reasons, already quite clear, it would not be appropriate to stay the proceedings so as to require arguments and a decision concerning allegedly illegal decisions made by a Minister.

[42] For all these reasons, the motion to strike the declaration or to stay the proceedings is dismissed, the whole with costs.

ORDER

The motion to strike the declaration or to stay the proceedings is dismissed, the whole with costs.

"Orville Frenette"

Deputy Judge

Certified true translation

François Brunet, Revisor

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1271-07

STYLE OF CAUSE: ROLAND ANGLEHART SR. ET AL. v. THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: November 5, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** FRENETTE, DJ

DATED: November 28, 2008

APPEARANCES:

Mr. Patrick Ferland and
Mr. David Quesnel FOR THE APPLICANTS

Ms. Ginette Mazerolle and
Mr. Paul Marquis FOR THE RESPONDENT

SOLICITORS OF RECORD:

HEENAN BLAIKIE FOR THE APPLICANTS
Montréal, Québec

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada