Federal Court of Appeal  Cour d'appel fédérale

Date: 20161114

Docket: A-352-15

Citation: 2016 FCA 280

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

100193 P.E.I. INC., 100259 P.E.I. INC., 100412 P.E.I. INC., ROBERT ARSENAULT, JOSEPH AYLWARD, WAYNE AYLWARD, B & F FISHERIES LTD., BERGAYLE FISHERIES LTD., JAMES BUOTE, BULLWINKLE FISHERIES LTD., C.D. HUTT ENTERPRISES LTD., CODY-RAY ENTERPRISES LTD., DALLAN J. LTD., RICHARD BLANCHARD, EXECUTOR OF THE ESTATE OF MICHAEL DEAGLE, PAMELA DEAGLE, BERNARD DIXON, CLIFFORD DOUCETTE, FISHING 2000 INC., KENNETH FRASER, FREE SPIRIT INC., TERRANCE GALLANT, BONNIE GAUDET, DEVIN GAUDET, NORMAN GAUDET, PETER GAUDET, RODNEY GAUDET, TAYLOR GAUDET, GAVCO FISHING ENTERPRISES INC., CASEY GAVIN, JAMIE GAVIN, LEIGH GAVIN, SIDNEY GAVIN, GRAY LADY ENTERPRISES LTD., DONALD HARPER, HARPER'S FISH HOLDINGS LTD., JAMIE HUSTLER, CARTER HUTT, KRISTA B FISHING CO. LTD., LAUNCHING FISHERIES INC., TERRY LLEWELLYN, IVAN MacDONALD, LANCE MacDONALD, WAYNE MacINTYRE, DAVID McISAAC, GORDON L. MacLEOD, DONALD MAYHEW, MEGA FISH CO. LTD., AUSTIN O'MEARA, PAMELA RICHARDS and TRACEY GAUDET, ADMINISTRATORS OF THE ESTATE OF PATRICK ROCHFORD, TWIN CONNECTIONS INC., W.F.M. INC., WATERWALKER FISHING CO. LTD. and BOYD VUOZZO

Respondents

Heard at Charlottetown, Prince Edward Island, on November 7, 2016.

Judgment delivered at Ottawa, Ontario, on November 14, 2016.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

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Respondents

REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] This is an appeal and a cross-appeal from an order dated July 30, 2015 of the Federal Court (*per* Boswell J.) allowing in part the appellant's motion for summary judgment in an action brought by the respondents.

[2] In their action, the respondents claimed damages for breach of fiduciary duty, negligence, expropriation without compensation, breach of contract, unjust enrichment and misfeasance in public office. The appellant moved for summary judgment. In response to the motion, the respondents stated that they would not advance their claims for breach of fiduciary duty and negligence.

[3] The Federal Court granted summary judgment on the claim for breach of contract, dismissing it. It also dismissed the respondents' claims concerning contributions to research conducted by the Department of Fisheries and Oceans (at paras. 88-90), the integration of Crab Fishing Area 18 into Areas 12, 25 and 26 (at paras. 80-81 and 91) and part of the unjust enrichment claim (at paras. 88-91). The Federal Court dismissed the rest of the motion for summary judgment, finding that the remaining claims—expropriation without compensation (at paras. 62-65), unjust enrichment (paras. 92-94) and misfeasance in public office (at paras. 75-79)—raised genuine issues for trial.

[4] In this Court, the appellant submits that the Federal Court should have granted summary judgment on all issues. The respondents cross-appeal. They ask this Court to resurrect their claims for breach of contract and those relating to the integration of Crab Fishing Area 18 and allow them to proceed to trial.

[5] For the reasons that follow, I would allow the appeal in part. The claims founded on expropriation and unjust enrichment should be dismissed. I would dismiss the cross-appeal. In light of this proposed disposition, part of the respondents' action will proceed to trial. Accordingly, these reasons shall be brief and shall recount the facts only to the extent necessary to appreciate the issues raised in this appeal.

B. The background to the respondents' action

[6] The individual respondents are residents of Prince Edward Island. They have held licences to fish snow crab for all or part of the last 12 years. The corporate respondents are companies that operate or have operated fishing enterprises of some of the individual respondents.

[7] The snow crab fishery, like all fisheries, is regulated. The Minister of Fisheries and Oceans sets a total allowable catch (TAC). Snow crab fishers are granted licences to fish in designated crab fishing areas (CFA). In the early 1990's the Minister implemented an individual quota system, whereby each licence-holder was allocated a percentage share of the TAC.

[8] Before the 1990's 30 Prince Edward Island fishers held licences to fish for snow crab in CFAs 25 and 26; 130 fishers from New Brunswick, Quebec and Nova Scotia held licences to fish for snow crab in CFA 12. In 1997 CFAs 25 and 26 were integrated into CFA 12. At this time the 30 licences awarded to fishers from Prince Edward Island allegedly entitled them to a combined share of about 5.325% of the TAC.

[9] In 1999 the Supreme Court of Canada ruled that some First Nations in Atlantic Canada had treaty rights to engage in the fishery (*R v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513). Following the *Marshall* decision, the Minister sought to free up TAC quota through voluntary agreements with licence holders in an attempt to introduce First Nations to the commercial fishery. The Minister subsequently bought out two of the 30 licences. The respondents, collectively, have interests in almost all of the remaining licences.

[10] The dispute giving rise to the action arises from the Minister's approval and administration in 2003 of a three-year management plan. According to the respondents, the plan reduced each licence holder's share in TAC in three ways: (1) by integrating CFA 18 with CFAs 12, 25 and 26; (2) by allocating approximately 15.8% of the TAC to First Nations, even though only about 5% of that quota had been freed up through voluntary agreements between the Minister and existing licence holders; and (3) by reserving an additional 15% of the TAC for new entrants, thereby further reducing each licensees share of snow crab.

[11] Between 2003 and 2006, the Minister also set aside part of the snow crab resource to finance research activities. Fifty tonnes were set aside in 2003; approximately one-thousand

tonnes were set aside in 2006. The Minister's legislative authority to do this was challenged. The Federal Court of Appeal upheld the challenge: *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, 270 D.L.R. (4th) 552.

[12] Broadly speaking, the respondents' action seeks compensation for loss they say they suffered as a result of the Minister's conduct. As mentioned above, the appellant moved for summary judgment, dismissing the action and the Federal Court granted that motion in part.

C. Analysis

[13] In my view, the Federal Court should have dismissed the claim for compensation arising from expropriation.

[14] I accept that the allocation of fishing quota does impact the economic interests of the respondents. But here, the respondents claim compensation for fishing quota that has not been allocated to them. This is not the sort of interest sufficient to maintain a cause of action for expropriation as described in the cases. This is a question of law. If there is "no legal basis" to the claim based on the law or the evidence brought forward, there can be "no genuine issue": *Burns Bog Conservation Society v. Canada*, 2014 FCA 170 at paras. 35-36. A trial is not necessary to determine whether the claim of expropriation can succeed; as a matter of law, it cannot.

[15] The law does not recognize a proprietary interest on the part of fishers in uncaught fish or the fishery, nor does the law recognize a right to compensation for a reduction in quota: *Kimoto v. Canada (Attorney General)*, 2011 FCA 291, 426 N.R. 69 at para. 12. This is mainly because Canada's fisheries are a "common property resource" belonging to all the people of Canada and the Minister has a wide discretion to manage Canada's fisheries: *Comeau's Sea Foods Ltd v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 at pp. 25-26; *Fisheries Act*, R.S.C. 1985, c. F-14, s. 7; *Canada (Attorney General) v. Arsenault*, 2009 FCA 300 at para. 57 (concurring reasons of Pelletier J.A.), quoted with approval in *Malcolm v. Canada (Fisheries and Oceans)*, 2014 FCA 130.

[16] In support of their position, the respondents seek to rely on cases such as *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166 and *Canada v. Haché*, 2011 FCA 104, 417 N.R. 321. However, these cases arose in specific statutory contexts such as taxation and bankruptcy legislation and involved fishing licences that had been granted—not unallocated fishing quotas. In *Kimoto*, above (at para. 12), this Court distinguished *Saulnier* and cases like it as follows:

> [T]he appellants claim they have a property right in the fish that will now remain uncaught. This, they say, renders the program an expropriation… In our view, this argument is ill-founded. The appellants' proposition is the antithesis of fisheries being the common property of all, a principle deeply ingrained in Canadian law. Moreover, *Saulnier* does not advance the appellants' argument. *Saulnier* addressed the question whether a fishing licence could fall within the statutory definition of "property" in the *Bankruptcy and Insolvency* Act, R.S.C. 1985, c. B-3 and the Nova Scotia *Personal Property Security Act*, S.N.S. 1995-96, c. 13. In holding that it could, Justice Binnie, at paragraph 48, specifically cautioned that the ruling did not expand the nature of a licence holder's interest as defined in the *Fisheries Act*, R.S.C. 1985, c. F-14 beyond the particular statutory context before the court. Consequently, this prong of the appellants' argument must fail.

[17] For reasons of judicial comity, the Federal Court was inclined (at paras. 62-65) to follow another decision of the Federal Court that declined to dismiss an expropriation claim on a motion for summary judgment: *Anglehart Sr. v. Canada*, 2012 FC 1205. In my view, it should have applied the above authorities according to their terms and dismissed this aspect of the respondents' claim. I conclude that the respondents' claim based on an alleged expropriation does not raise a genuine issue for trial.

[18] In this Court, the respondents submitted that the granting of quotas to them year after year meant that the Department would be liable if the quotas were changed. This submission is inconsistent with the above authorities. It also smacks of a submission that the Court should enforce the respondents' substantive expectations that the past state of affairs would continue, a submission barred by jurisprudence of the Supreme Court: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at p. 557; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 97. The doctrine of legitimate expectations cannot be used to enforce substantive expectations.

[19] Turning to the respondents' unjust enrichment claim, the Federal Court examined the respondents' pleading and defined the unjust enrichment claim set out in the pleadings (at paras. 88-90). On this, I see no reviewable error.

[20] The Federal Court found that the unjust enrichment claim, as it defined it, should proceed to trial. It linked this finding (at para. 92) to its earlier finding that the expropriation claim could

succeed in law. It rejected the appellant's legal submission that the respondents were not deprived of any TAC because they had no right to it.

[21] Given my findings above—the appellant's legal submission in fact is correct—the Federal Court's finding on the unjust enrichment claim must also be quashed. The respondents, as a legal matter, did not suffer a deprivation that benefitted the appellant. In order for the respondents to prove deprivation they must necessarily assert a proprietary interest in unallocated quota and in law they do not have such an interest. There is no genuine issue for trial.

[22] As mentioned above, the Federal Court found that the respondents' claims based on the tort of misfeasance in public office should proceed to trial. On this, I see no basis upon which I can interfere with the Federal Court's finding.

[23] The Supreme Court summarized the elements of the tort of misfeasance in public office as follows (at para. 32):

> … the tort of misfeasance in public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

(*Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263.)

[24] On the record before it, the Federal Court found that the respondents could plausibly maintain at trial that the Minister was reckless as to his legal authority or knew he did not have the legal authority to set aside portions of the TAC to finance departmental programs. Similarly, the respondents could plausibly maintain at trial that the snow crab sold to finance these programs might have been part of the TAC otherwise available to them. Assessing the evidentiary record before it and considering the requirements for liability under this tort, the Federal Court found that there was a genuine issue for trial.

[25] I see no ground for interfering with this finding. There is no error of law. The Federal Court properly charged itself on the law governing this tort and summary judgment principles. And in its application of the governing law to the evidence before it, it did not commit palpable and overriding error. In particular, on the issue of the *mens rea* for the tort, the Federal Court had evidence before it showing that the Minister had conflicting legal opinions on the matter and warnings from the Auditor General. I do not pass judgment on whether this evidence actually makes out the *mens rea* necessary to establish the tort; indeed, the appellant identifies evidence suggesting otherwise (see para. 93 of the appellant's memorandum). I merely suggest that the nature of the evidence before the Federal Court allowed it to conclude that there is a genuine issue for trial on this point, a finding of mixed fact and law suffused by factual appreciation. This finding is not vitiated by palpable and overriding error.

[26] In its memorandum, the appellant submitted that the failure of the respondents to demonstrate a proprietary interest in unallocated fishing quota barred the claim for misfeasance in public office. During argument, however, the appellant fairly conceded that the existence of a

proprietary interest forms no part of the elements of the tort and that damages for the tort can legally embrace economic matters beyond proprietary interests. The appellant agreed that the damages would be based on what would have happened had the tort not been committed. The appellant did not maintain that there was no genuine issue for trial in this regard. I find no ground to interfere with the Federal Court's finding that a trial is necessary to determine that issue.

[27] The appellant submitted that the misfeasance in public office claim must fail because it either cannot succeed in law as pleaded or the claim is not pleaded. In paragraph 70 of the Third Amended Statement of Claim, the respondents plead (among other things) that the tort is based on the Department of Fisheries and Oceans deprivation of the respondents of "the part of the TAC which belonged to them" and "by using a part of the TAC to finance its activities and the obligations it believed it had towards other groups of fishermen." I agree that the former allegation cannot succeed in law: for the reasons set out above, the TAC did not "belong" in law to the respondents. But the latter allegation is broad enough to embrace the respondents' misfeasance in public office claim.

[28] On their cross-appeal, the respondents argue that the Federal Court erred in law in dismissing the respondents' claim in breach of contract. They further argue that the Federal Court made a palpable and overriding error in dismissing the claims based on the integration of CFA 18.

[29] The respondents submit that the Federal Court ought to have found that the Minister's statements could be construed as an offer that, if accepted, would form a "unilateral contract." In particular, the Minister stated at a meeting on December 6, 1999 that "this problem will not be resolved on the backs of traditional commercial fishermen and their families" (Appeal Book Tab 155, p. 1642). The fatal obstacle to this submission is that this could not be construed as an offer capable of acceptance. The Federal Court found that the Minister was merely expressing a policy objective. It also noted (at para. 52) that there was no contemporaneous documentation which would suggest that any fisher or official of the Department of Fisheries and Oceans thought they had a binding agreement following the December 6, 1999 meeting, or that they intended for there to be a binding agreement. Further, it noted (at para. 53) that a federal representative reminded participants at a meeting with the snow crab co-management committee on March 8, 2000 that the Minister had an obligation to provide First Nations with access to the snow crab fishery, regardless of whether or not the department was successful in acquiring quotas. Accordingly, the Federal Court concluded (at para. 55) that the evidence was not reasonably capable of proving that the Minister ever made an offer saying that the only way quota would be freed up would be by buy-backs, or that the respondents accepted any such offer, or that either party ever intended to enter into a binding agreement. On this, I find no legal error or palpable and overriding error.

[30] One must keep front of mind that palpable and overriding error is a high standard: "[w]hen arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing," but rather "[t]he entire tree must fall." See *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38, citing *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46. The respondents have shown no reason for this Court to interfere.

[31] In their cross-appeal, the respondents also submit that they have suffered damages as a result of the integration of CFA 18 into CFA 12 in 2003. Following this integration, the respondents say that the CFA 18 fishers received an inordinately high percentage share of the TAC in the integrated area. The respondents argue that the award of the percentage share of TAC to CFA 18 fishers was irrational and arbitrary.

[32] The Federal Court found (at para. 81) that the respondents did not prove that the integration of CFA 18 caused them any damage; in particular, on the evidence it was not persuaded that the integration reduced the respondents' share of TAC. In this Court, the respondents submit that the Federal Court erred in its analysis by focusing upon an abnormally low catch in 2002, rather than placing more weight on the longer-term, average catch. However, absent an extricable legal principle—and there is none here—this Court, as an appellate court, can only interfere with the weight the Federal Court placed on the evidence if it is satisfied that the Federal Court, when weighing the evidence, committed palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. As mentioned above, this is a difficult standard to meet. In my view, the respondents have not persuaded me that the Federal Court committed palpable and overriding error in weighing and assessing the evidence.

[33] At paragraphs 109-110 of their memorandum, the respondents submit that the Federal Court did not consider some of the evidence before it in making these findings of fact. I reject the submission. Unless persuaded otherwise, an appellate court must presume that a first-instance court has considered all of the evidence placed before it: *Housen*, above at para. 46. The respondents have not persuaded me to the contrary.

[34] None of the parties before us submitted that the Federal Court erred in failing to order a summary trial on any of issues it said were genuine issues for trial. For completeness, I find that the misfeasance in public office claim should not be tried by way of summary trial substantially for the reasons set out at paras. 95-96 of the Federal Court's reasons.

D. Proposed disposition

[35] For the foregoing reasons, I would allow the appeal and set aside the Federal Court's order. Making the order the Federal Court should have made, I would grant the summary judgment motion on all claims except for the claim in misfeasance in public office. I would dismiss the cross-appeal. Overall, the appellant has been largely successful on the summary judgment motion, but under the disposition I propose, part of the action will proceed to trial; in a sense, success is somewhat divided. I would award the appellant a total of $5,000 in costs here (for the appeal and cross-appeal, taken together) and below.

"David Stratas"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-352-15
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE BOSWELL DATED JULY 30, 2015, NO. T-378-07	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. 100193 P.E.I. INC *et al.*
PLACE OF HEARING:	CHARLOTTETOWN, PRINCE EDWARD ISLAND
DATE OF HEARING:	NOVEMBER 7, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	PELLETIER J.A. WEBB J.A.
DATED:	NOVEMBER 14, 2016

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