Date: 20090811

Docket: A-124-08

Citation: 2009 FCA 242

CORAM: **NADON J.A.**
BLAIS J.A.
PELLETIER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ROBERT ARSENAULT, JOSEPH AYLWARD, WAYNE AYLWARD, JAMES BUOTE, RICHARD BLANCHARD, EXECUTOR OF THE ESTATE OF MICHAEL DEAGLE, BERNARD DIXON, CLIFFORD DOUCETTE, KENNETH FRASER, TERRANCE GALLANT, DEVIN GAUDET, PETER GAUDET, RODNEY GAUDET, TAYLOR GAUDET, CASEY GAVIN, JAMIE GAVIN, SIDNEY GAVIN, DONALD HARPER, CARTER HUTT, TERRY LLEWELLYN, IVAN MACDONALD, LANCE MACDONALD, WAYNE MACINTYRE, DAVID MCISAAC, GORDON MACLEOD, DONALD MAYHEW, AUSTIN O'MEARA AND BOYD VUOZZO

Respondents

Heard at Charlottetown, Prince Edward Island, on June 10, 2009.

Judgment delivered at Ottawa, Ontario, on August 11, 2009.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NADON J.A.
BLAIS J.A.

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Respondents

REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from the decision of Mr. Justice Martineau of the Federal Court (the Motions Judge), reported as *Arsenault v. Canada*, 2008 FC 299, 330 F.T.R. 8, in which the Motions Judge set aside a decision of Prothonotary Morneau. The issue in the appeal is the application of this Court's decision in *Grenier v. Canada*, 2005 FCA 348, [2006] 2 F.C.R. 287

(*Grenier*), to the facts pleaded in the respondents' statement of claim and, in particular, whether the claim should be stayed until the respondents have challenged certain decisions of the Minister of Fisheries and Oceans (the Minister) by way of judicial review.

[2] The respondents are fishermen and residents of Prince Edward Island. Their allegations against the Minister are concisely set out in the Crown's memorandum of fact and law as follows:

> 4. According to the statement of claim, the Respondents allege that between 1990 and 2002 they entered into a series of agreements with the Minister (the Individual Quota Agreements) that provided them each with a certain quota out of the total allowable catch ("TAC") for Prince Edward Island for snow crab fishing.
>
> 5. In addition to the Individual Quota Agreements, the Respondents also claim to have entered into an agreement with the Minister pursuant to which First Nations would be brought into the fishery through a voluntary licence buy-back and that no increase in the number of fishing licenses or in the actual fishing effort would result from the integration of the aboriginal fishery (the "Marshall Agreement").
>
> 6. The Respondents claim that both the Individual Quota Agreements and the Marshall Agreement contained implicit promises that the appellant would compensate them for any breach of the agreements.
>
> 7. The Respondents claim that as a result of various measures taken by the Minister in May 2003, which were continued or repeated from 2004 to 2006, the agreements were broken. They claim that the Minister reallocated a portion of the snow crab quota, to which they were entitled under the Agreements, for other purposes in each of these years.

[3] The respondents do not contest this statement of the facts.

[4] The respondents claim that they are entitled to be compensated for the loss of quota, either as damages for breach of contract, or, if no enforceable contract is found, as damages for negligent misrepresentation. In addition, the respondents raise a number of other potential heads of recovery, but insist that their claim is first and foremost a claim for compensation from the Minister in

accordance with his contractual undertaking to compensate them for loss of their share of the Total Allowable Catch (TAC).

[5] The respondents do not allege that the Minister's reallocation of the TAC was unauthorized or otherwise unlawful. They agree that the Minister was entitled to exercise his discretion under the *Fisheries Act*, R.S.C. 1985, c. F-14, as he did, but say that if the exercise of that discretion caused them a loss, then they were entitled to be compensated in accordance with their agreement with the Minister.

[6] In the Crown's view, the respondents' claim is, in essence, an attack upon the validity of the various decisions that the respondents claim have caused them a loss. As a result, the Crown brought a motion seeking to have the respondents' claim struck, or, in the alternative, for an order staying the respondents' claim until such time as the validity of the ministerial orders had been determined in an application for judicial review. The Prothonotary ordered that all those portions of the respondents' pleadings that assert their claim in contract were to be struck out on the ground that they disclosed no reasonable cause of action since the Minister could not, by means of contract, fetter his discretion to award fishing quota. As for the balance of the claims, the Prothonotary ordered that they be stayed and gave the respondents time to file a motion seeking an extension of time to commence an application for judicial review.

[7] The Prothonotary's decision was appealed to the Federal Court. The Motions Judge set aside the Prothonotary's decision striking the portions of the pleadings asserting a claim in contract, on the

basis that this was a complex issue of fact and law which should not be resolved on a motion to strike. With respect to the other claims asserted by the respondents, the Motions Judge was not prepared to find that it was plain and obvious that those claims would fail.

[8] The Crown appeals from the Motions Judge's decision on two grounds. The first is that he erred in applying the "plain and obvious" test articulated in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, as this test is not appropriate when the issue is whether to strike a claim for want of jurisdiction. The second is that, notwithstanding the respondents' protestations to the contrary, their claim is a collateral attack on the Minister's licensing decisions whose legality must first be established by means of an application for judicial review.

[9] The Crown's argument with respect to the "plain and obvious" test is simply that the Court either has jurisdiction or it does not, therefore the Court must make a positive finding on that issue rather than relying on the "plain and obvious" test. The Crown says that in order to do so, the Court is entitled to look past the causes of action pleaded by the respondents and to determine the "essence" or the "substance" of the respondents' claim. In point of fact, the two arguments advanced by the Crown are but two aspects of the same argument, namely that when one looks past the words of the respondents' claims to their true nature, the respondents are mounting a collateral attack on the Minister's decisions, as a result of which the Court is in a position to make a positive finding on the jurisdictional issue.

[10] In my view, for the purposes of Rule 221(1) of the *Federal Courts Rules*, SOR/98-106, the moving party must take the opposing party's pleadings as they find them, and cannot resort to reading into a claim something which is not there. The Crown cannot, by its construction of the respondents' claim, make it say something which it does not say.

[11] The Crown's preoccupation with jurisdiction, at this preliminary stage, is, it seems to me, misplaced. This Court's decision in *Grenier* makes it clear that a party cannot attack the legality of an administrative decision except by means of an application for judicial review. A party derives no advantage by commencing an action based on the illegality of an administrative decision without first having had the decision declared illegal because, eventually, *Grenier* will have to be dealt with. No one has an interest in spending thousands of dollars on an action which cannot succeed. If the pleadings do not raise illegality, the Court should not strive to find it for the purposes of forcing litigants into a judicial review application which is inconsistent with the position they have taken in their action.

[12] Since the respondents accept that the Minister's decisions were validly made pursuant to the *Fisheries Act*, the action should be allowed to proceed on that basis. Should it become apparent later that the respondents must rely upon the illegality of the Minister's decisions in order to succeed, the issue of the application of *Grenier* can be dealt with at that time.

[13] I would dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

“I agree
M. Nadon J.A.”

“I agree
Pierre Blais J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-124-08
(APPEAL FROM AN ORDER OF MR. JUSTICE MARTINEAU DATED MARCH 5, 2008, DOCKET NUMBER T-378-07)	
STYLE OF CAUSE:	*Her Majesty The Queen and Robert Arsenault et al.*
PLACE OF HEARING:	Charlottetown, Prince Edward Island
DATE OF HEARING:	June 10, 2009
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	NADON J.A. BLAIS J.A.
DATED:	August 11, 2009

APPEARANCES:

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