Cour d'appel fédérale

Federal Court of Appeal

Date: 20091020

Docket: A-289-08

Citation: 2009 FCA 299

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

Jean-Gilles Chiasson, Marc Couture, Pêcheries Jean-Yan II Inc., Aurélien Haché, Robert F. Haché, Estate of Richard Allain, Roland Anglehart Jr., Bernard Arseneault, Héliodore Aucoin, Albert Benoît, Robert Boucher, Élide Bulger, Gérard Cassivi, Ludger Chiasson, Martin M. Chiasson, Lucien Chiasson, Jacques Collin, Robert Collin, Roméo G. Cormier, 2973-0813 Quebec Inc., Les Crustacées de Gaspé Ltée, 2973-1288 Quebec Inc., 3087-5199 Quebec Inc., Lino Desbois, Donald Duguay, Denis Duguay, Carol Duguay, Marius Duguay, Charles-Aimé Duguay, Randy Deveau, Cyrenus Dugas, Edgar Ferron, Livain Foulem, Simon J. Gionet, Jocelyn Gionet, Claude Gionest, Aurèle Godin, Gregg Hinkley, Jean-Pierre Huard, Donald R. Haché, Guy Haché, Jacques E. Haché, Jean-Pierre Haché, Jacques A. Haché, Jason-Sylvain Haché, Estate of Sylva Haché, Gaétan Haché, Rhéal Haché, Alban Hautcoeur, Fernand Hautcoeur, Jean-Claude Hautcoeur, Vincent Jones, Réjean LeBlanc, Christian Lelièvre, Elphège Lelièvre, Jean-Elie Lelièvre, Jules Lelièvre, Dassise Mallet, Delphis Mallet, Francis Mallet, Odile Mallet, Jean-Marc Marcoux, André Mazerolle, Eddy Mazerolle, Gilles A. Noël, Lévis Noël, Serge Noël, Onésime Noël, Nicolas Noël, Martin Noël, Raymond Noël, Francis Parisé, Domitien Paulin, Sylvain Paulin, Claude Poirier, Les Pêcheries Serge-Luc Inc., Pêcheries Ray-L. Inc., Pêcheries FACEP Inc., Les Pêcheries Denise Quinn Syvrais Inc., Pêcheries François Inc., Pêcheries J.V.L. Ltée., Pêcheries Jimmy L. Ltée., Bell Bay Products Ltd., Roger Pinel, Estate of Jean-Pierre Robichaud, Adrien Roussel, Jean-Camille Roussel, Mathias Roussel, Steven Roussy, Mario Savoie, Jean-Marc Sweeney, Michel Turbide, Réal Turbide, Donat Vienneau, Fernand Vienneau, Livain Vienneau, Rhéal Vienneau

Respondents

Heard at Halifax, Nova Scotia, on May 25, 2009.

Judgment delivered at Ottawa, Ontario, on October 20, 2009.

REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	PELLETIER J.A. TRUDEL J.A.

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Respondents

REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision by Justice Harrington of the Federal Court dated May 16, 2008, 2008 FC 616, who allowed, in part, the respondents' application for judicial review. More specifically, the judge declared that the Minister of Fisheries and Oceans (the "Minister") had (a) in 2006, illegally used or sold a fishing licence for 1000 metric tons of snow crab to finance departmental research activities; and (b) was illegally holding the proceeds of the 2006 sale of 1000 metric tons of snow crab.

[2] The appeal of the Attorney General of Canada (the "Attorney General" or the "appellant") concerns only the second declaration made by Justice Harrington. According to the Attorney General, Justice Harrington erred in law in making this declaration.

Facts

[3] The following summary of facts will assist in understanding the issue before us.

[4] On March 30, 2006, the Minister approved the 2006 Snow Crab Management Plan ("Management Plan") for certain crab fishing areas in the in the southern Gulf of St. Lawrence, according to which, among other things, the total allowable catch ("TAC") of snow crab was set at 25 869 metric tons if certain enhanced management activities ("management activities") were put in place. If these activities did not proceed, the TAC would be set at 20 862 metric tons.

[5] On the same day that he approved the details of the Management Plan, the Minister, through a public news release, announced the details of the 2006 Management Plan. This plan, as announced in the news release, was as follows:

> March 30, 2006
>
> **Moncton** - The Honourable Loyola Hearn, Minister of Fisheries and Oceans (DFO), today announced the 2006 Snow Crab Management Plan for Snow Crab Fishing Areas (CFAs) 12, 18, 25, and 26, in the southern Gulf of St. Lawrence.
>
> The total allowable catch (TAC) will be set at 25,869 tonnes (t) if enhanced management activities are in place. "I am aware that industry was looking for a higher level of TAC. However, I believe it is important to apply a prudent approach, as the biomass is currently decreasing and a more cautious approach is likely in 2007," stated the Minister.
>
> The Department is presently reviewing proposals received for enhanced management activities. If these activities do not proceed, the TAC will be set at 20,862 t. The Department's review will be completed in the coming days and further information will be provided to industry.
>
> Further to the provision of new "permanent" access to this fishery and the stabilisation of the levels until 2009, the available TAC is allocated as follows: First Nations receive 15.816%; the traditional fleets receive 65.182%; CFA18 fishers receive 4.002% and new access receives 15%. The distribution of the TAC takes into account a permanent solution to the quota shortfall required for First Nations and financial assistance of $37.4M to the traditional fleets. When added to the voluntary licence retirement programs, traditional fishers have received payments of over $55 million for quota provided to First Nations under the Marshall Response Initiative.
>
> The management measures from 2005 will be rolled over in 2006. They include dockside monitoring, 30% at-sea observer coverage, Vessel Monitoring System (VMS), and the Irving Whale exclusion zone. The implementation of the comprehensive soft shell crab protocol will be in place if enhanced management activities proceed. The requests from industry for changes to the management measures will be discussed in the context of a future multi-year plan.
>
> The Department will turn its attention to consultations with stakeholders, after the fishery, on the development of a long-term management strategy with a preference for establishing a co-

> management approach with all of the key harvester groups. Discussions could include such issues as the conduct of joint scientific research, the concept of TAC decision rules, development of a strategy for managing the fishery which takes into account fishing effort in the context of a decreasing biomass and funding for enhanced management of the fishery.
>
> The opening date will be set by DFO taking into consideration operational requirements and a recommendation from the industry-led Ice Committee. The last day of fishing will be July 15, 2006.
>
> [Emphasis added]

[6] Because of the signing on April 5, 2006, of a "Joint Project Agreement" (the "JPA" or the "Agreement") between the Minister and the Association des Pêcheurs de Poissons de Fond Acadiens (the "APPFA"), the Management Plan condition that a management activity be put in place in order to set the TAC at 25 869 tons was met. Under the Agreement, the purpose of which was to enhance the management of the snow crab fishery, the APPFA had to implement various projects and pay the Minister $1 500 000, which he was to spend on activities provided for by the Agreement, namely, the controlling and monitoring of soft shell crab, a scientific trawl survey, scientific analysis and increased monitoring of the catch. In exchange for the payment made by the APPFA, the APPFA was to be issued a fishing licence with an allocation of 1000 metric tons of snow crab.

[7] On June 23, 2006, after the APPFA had paid the money to the Minister, this Court disallowed a similar arrangement for the 2003 fishing season. In *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, Justice Décary cited the Supreme Court of Canada's words at paragraph 37 of its reasons in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and*

Oceans), [1997] 1 S.C.R. 12, when he stated at paragraph 13 that "Canada's fisheries are a 'common property resource', belonging to all the people of Canada" and that "it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest". In addition, Justice Décary wrote the following at paragraph 13 of his reasons:

> [13] . . . They [Canada's fisheries] do not belong to the Minister, any more than does their sale price. Also, when the Minister decided to pay a contracting party with the proceeds of sale of the snow crab, he was paying with assets that did not belong to him. Paying with the assets of a third party is, to say the very least, an extraordinary act that the Administration could not perform unless so authorized by an act or by duly enacted regulations. Such an act, on its very face, is like an expropriation of fishery resources or a tax on them for the purposes of funding the Crown's undertakings.

[8] This led Justice Décary to conclude as follows at paragraphs 26 and 27 of his reasons:

> [26] In short, I determined that the Minister financed his scientific research program without first appropriating the funds necessary and by misappropriating, for all intents and purposes, resources that do not belong to him. He confused public funds and the public domain. Without appropriating public funds he appropriated public domain. This cannot be.
>
> [27] I would allow the appeal, I would set aside the judgment by the Federal Court, I would allow the application for a declaratory order and I would declare that the Minister of Fisheries and Oceans did not have the power to finance his Department's scientific research by issuing licences to fish and sell snow crab. I would award costs to the appellant in this Court and in Federal Court.

[9] When this Court's decision in *Larocque*, above, was made on June 23, 2006, the Minister had spent $477 326 of the $1 500 000 received from the APPFA, with a remaining balance of $1 022 674. The Department completed the remaining activities under the Agreement by funding them from the departmental operating budget.

[10] Following *Larocque*, above, the applicants contacted the Department, arguing that the amount received from the APPFA in exchange for an allocation of 1000 metric tons of snow crab did not belong to him, and that it consequently should be distributed among the licence-holders for the 2006 fishing season, given the reduction in their share of the TAC.

[11] The respondents filed an application for judicial review in the Federal Court, seeking (a) declarations that the Minister illegally used or sold 1000 metric tons of snow crab to finance departmental research activities and that he was illegally holding the proceeds of the sale of snow crab; (b) a writ of *mandamus* forcing the Minister to return the illegally held money to the applicants in proportion to the percentage of the TAC allocated to each applicant according to the distribution formula set out in the Management Plan announced on March 30, 2006; and (c) if necessary, an order for an extension of time.

[12] On May 16, 2008, Justice Harrington allowed their application for judicial review in part.

Decision of the Federal Court

[13] First, Justice Harrington granted the respondent an extension of time for filing their application for judicial review. Second, noting that, in light of *Larocque*, above, the Minister rightly admitted that his 2006 decision to sell a fishing licence for 1000 metric tons of snow crab was illegal, the judge made two declarations sought by the respondent, namely, that the Minister had illegally used or sold a fishing licence for 1000 metric tons of snow crab to finance departmental

research activities (the "first declaration"), and that the Minister was illegally holding the proceeds of the 2006 sale of 1000 metric tons of snow crab (the "second declaration"). At paragraphs 31 and 32 of his reasons, the judge wrote as follows:

> [31] In this case, I am prepared to declare that the Minister illegally used or sold 1000 metric tons of snow crab to finance departmental research activities and is illegally holding the proceeds of the 2006 sale.
>
> [32] The significance of such a declaration, stating that the Minister acted in excess of his authority, should not be underestimated. We can safely assume that once a statute, regulation or particular course of conduct has been declared *ultra vires*, the Minister will respect the state of law and that further proceedings such as applications for judicial review will not be necessary.

[14] Lastly, the judge refused to issue the writ of *mandamus* sought by the respondents, arguing as follows at paragraph 30 of his reasons:

> It follows that the writ of *mandamus* is not applicable in this case. In any case, I am not satisfied that the criteria for ordering a writ of *mandamus* have been met (*Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FC 742, [1993] F.C.J. No. 1098 at paragraph 42; aff'd [1994] 3 S.C.R. 1100). One of the criteria is that the applicant [*sic*] have no other recourse. In my opinion, such recourse exists, namely, a tort action seeking damages; indeed, many of the applicants have commenced such an action (*Anglehart*, T-2171-07).

Parties' submissions

Appellant's submissions

[15] The appellant is only contesting Justice Harrington's second declaration, namely that the Minister was illegally holding the proceeds of the sale of 1000 metric tons of snow crab. The appellant argues that the judge exceeded his jurisdiction in making this declaration.

[16] The appellant concedes that the Minister acted beyond his powers by authorizing the use of snow crab resources to fund his department's additional research and management activities. However, it submits that it never conceded that the agreement the Minister had concluded with the APPFA was invalid. In the appellant's opinion, the judge erred in holding that the invalidity of the Minister's decision to use these resources to finance his activities meant that the Agreement was automatically invalid.

[17] The appellant submits that the rights resulting from a contract must be demonstrated in a proceeding under section 17 of the *Federal Courts Act* and not as part of a judicial review instituted under section 18.1. The appellant also argues that the respondents are not parties to the agreement between the APPFA and the Minister.

[18] Moreover, the appellant argues that the Minister cannot illegally hold the money received from the APPFA if he has spent that money as part of his contractual obligations. The appellant is therefore asking this Court to set aside the judge's declaration that the Minister was illegally holding the proceeds of the 2006 sale of 1000 metric tons of snow crab, and to order the respondents to pay costs, at trial and on appeal.

Respondents' arguments

[19] The respondents argue that the appellant's interpretation of the judgement is wrong, since Justice Harrington held that he could not rule on the issue as to who was entitled to the money received by the Minister. Contrary to the appellant's arguments, the respondents submit that the

judgement does not rule on the rights of the parties to a contract, that is, the rights arising from the agreement concluded between the Minister and the APPFA. According to the respondents, whether or not there was a contract does not change the nature of the debate: the money received by the Minister was collected as payment for the illegal sale of fishery resources, and the Minister did not have the legal authority to collect such a sum.

[20] Moreover, the respondents argue that the judge's declaration was consistent with this Court's decision in *Larocque*, above.

Issue

[21] The sole issue to be determined is whether Justice Harrington erred in declaring that the Minister was illegally holding the proceeds of the 2006 sale of 1000 metric tons of snow crab. More specifically, could the judge determine the Minister's rights arising from the agreement entered into with the APPFA?

Analysis

Standard of review

[22] Relying on the decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, the appellant submits that the appropriate standard of review in this case is correctness, since the judge's decision to declare that the Minister was illegally holding a sum of money is a question of mixed fact and law, which requires the application of the law to all the facts.

The appellant argues that the standard of correctness applies here because the error was made in the application of the law to a correctly decided set of facts and the question of law is easily extricated.

[23] The respondents have not submitted any arguments on the applicable standard of review.

[24] In my opinion, the issue is a pure question of law: despite this Court's decision in *Larocque*, above, according to which the Minister could not finance his Department's scientific research by issuing a licence to fish and sell snow crab, could the judge determine whether the Minister was illegally holding the sum of $1 500 000, which the APPFA had paid him under the agreement?

Did Justice Harrington err in declaring that the Minister was illegally holding the proceeds of the 2006 sale of 1000 metric tons of snow crab?

[25] The following excerpts from the reasons for the decision by Justice Harrington explain why he declared that the Minister was illegally holding 1000 metric tons of snow crab.

> [21] As the illegality of the Minister's action is no longer an issue, a decision must be made regarding what is to be done with the amount of $1,500,000. There are three possibilities: a) that the money remain in the hands of the Department; b) that all or part of the money be returned to the APPFA; or c) that the money be distributed proportionally among those who had their allocations reduced to enable the Minister to issue a fishing licence to the APPFA for 1000 metric tons of snow crab.
>
> [22] I am of the view that the applicants who are part of the traditional midshore fleet (Quebec and New Brunswick) have successfully made their case. The Minister publicly announced that they would receive 65.182% of the TAC, which they received. However, the TAC was reduced by about 4% to accommodate the contract signed with the APPFA.
>
> . . .

> [24] . . . In this case, the applicants did not pay directly, but it is arguable that they paid indirectly through the reduction of their allocations.
>
> [25] An examination of the applicants' record was necessary because it is one of the criteria to be considered in determining whether the Court should grant the extension. However, it would be inappropriate for me to make any comment beyond my finding that they have made their case, since I would be getting into the area of damages, and this Court lacks jurisdiction to order such a remedy in the context of an application for judicial review.
>
> [26] The Minister did not specifically argue that the Crown should retain the fees charged for the fishing licence. However, the logical conclusion of the argument that the applicants had not applied within the time limit is that the amount must remain in the hands of the Crown. Based on *Larocque*, supra, I do not hesitate to find that the Crown has no right to an amount belonging to a third party. It is analogous to the concept of escheat.
>
> [27] Nor did the Minister argue that the amount should be returned to the APPFA. He expressed concern about the possibility that the APPFA might begin legal proceedings. The APPFA was not a party in these proceedings, so it would be inappropriate to comment on any rights it may have. However, it should be noted that the Minster may "refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court" under section 18.3 of the *Federal Courts Act* and rules 320 and following of the *Federal Courts Rules* regarding references from a federal board, commission or other tribunal.
>
> [Emphasis added]

[26] The first observation that must be made about the judge's comments is that, as appears from the excerpts above, the judge was of the opinion that the share of the TAC that the respondents were to receive for the 2006 season was reduced by about 4% because of the agreement signed between the Minister and the APPFA.

[27] Based on the evidence, there can be no doubt that the judge erred in this regard. One has only to recall that the TAC had to be set at 20 862 metric tons unless there were management activities, in which case the TAC was to be set at 25 869 tons. Consequently, had it not been for the

agreement with the APPFA, the respondents' 65.182% share of the TAC would have resulted in one or more fishing licences for 13 598.3 metric tons. Moreover, because of the agreement with the APPFA, the respondents' 65.182% share of the TAC was calculated on a TAC of 25 869 tons less the 1000 tons allocated to the APPFA. As the Attorney General points out at paragraph 11 of his factum, [TRANSLATION] "Ironically, the respondents thus benefited from the 1000 ton licence being issued to the APPFA, since they were able to catch more crab and, as a result, make more money".

[28] In any event, it is important to emphasize that the respondents were not entitled to a specific percentage of the TAC. It is now well accepted that the Minister has absolute discretion regarding the issuance of fishing licences (see *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, paragraphs 36, 37, 40 and 49).

[29] Another observation about Justice Harrington's comments concerns our decision in *Larocque*, above. At paragraph 26 of his reasons, Justice Harrington writes, relying on this decision, "that the Crown has no right to an amount belonging to a third party". I understand from Justice Harrington's remarks that he was of the opinion that the Minister could not validly claim the payment of the sum of $1 500 000 because "a third party" was entitled to receive this amount. In other words, according to the judge, because the Minister did not have the power to use fishery resources to finance some of his department's management and research activities, it follows that the Minister was illegally holding the sum of $1 500 000 received from the APPFA since he was not entitled to claim it.

[30] In my view, there is no doubt that our decision in *Larocque*, above, in no way supports Justice Harrington's second declaration. The only conclusion reached by this Court in *Larocque*, above, is that the Minister cannot finance his Department's research programs by issuing fishing licences and selling fishery resources. With respect, I see nothing in *Larocque*, above, that could allow the judge to declare that the Minister was illegally holding the sums he received from the APPFA.

[31] I am of the opinion that Justice Harrington's second declaration is not one that he could make on an application for judicial review filed under section 18.1 of the *Federal Courts Act* (the "Act"). In fact, the second declaration concerns the Minister's contractual rights arising from the agreement with the APPFA. A close reading of paragraphs 21 and 26 of the judge's reasons satisfies me that when he made his second declaration, the judge was mindful of not only the Minister's contractual rights, but also those of the APPFA and any that the respondents might have, considering that the TAC of 25 869 tons (from which their percentage was to be calculated) was reduced by 4% because of a permit for 1000 tons issued to the APPFA.

[32] Even though the judge ultimately avoided commenting on the rights of the APPFA and the respondents regarding the sum paid to the Minister by the APPFA, he undoubtedly ruled on the Minister's rights. According to the judge, the Minister was illegally holding the sum received from the APPFA, and, consequently, this sum had to be returned to the APPFA or the respondents.

[33] As I have just said, it is clear that the judge took for granted that the Minister was illegally holding the sum received from the APPFA because he could not fund his department's scientific research from the sale of snow crab. This explains why, at paragraph 26 of his reasons, the judge stated that his conclusion relied on this Court's decision in *Larocque,* above.

[34] At paragraph 27 of his reasons, the judge states that given the fact that the APPFA was not a party in the case before him, he could not comment on its rights, which are necessarily contractual in my opinion, resulting from the agreement with the Minister.

[35] Concerning the respondents' rights, the judge writes at paragraph 22 of his reasons that the respondents "have successfully made their case" because of the reduced quantity of snow crab allocated to them. At paragraph 25 of his reasons, the judge reiterates his view that the respondents "have made their case", adding, however, that he cannot go beyond this observation since the remedy available to the respondents is an action in damages over which he lacks jurisdiction in the context of the proceedings before him.

[36] Yet the judge commented without hesitation on the Minister's rights to keep the sums received from the APPFA. At paragraph 26 of his reasons, he stated that "the Crown has no right to an amount belonging to a third party". In other words, since the Minister received $1 500 000 from the APPFA because of an agreement the purpose of which was to finance his department's scientific research programs, a process found to be invalid by this Court in *Larocque*, above, it follows, according to the judge, that the Minister was not entitled to keep that money.

[37] With respect, the judge could not reach such a conclusion in the context of an application for judicial review filed under section 18.1 of the Act. In doing so, the judge determined the Minister's contractual rights arising from the agreement with the APPFA. In my view, the judge erred in law in making his second declaration.

[38] Section 17 of the Act gives the Federal Court concurrent jurisdiction in any action against the Crown concerning any "contract entered into by or on behalf of the Crown". Consequently, if the respondents wish to claim all or part of the amount paid to the Minister by the APPFA, they must institute proceedings against the Crown under section 17 of the Act. In such proceedings, the Court will have to consider the rights of the Minister, the APPFA, the respondents and any other person who believes that he or she is entitled to receive, in whole or in part, the sum paid to the Minister by the APPFA. In addition, the Court will have to analyse the validity of the contract between the Minister and the APPFA and the effect of this contract on third parties alleged to be adversely affected by the transaction.

Disposition

[39] Consequently, I would allow the appeal, set aside Justice Harrington's second declaration that the Minister was illegally holding the proceeds of the 2006 sale of 1000 metric tons of snow crab, and order the respondents to pay costs, at trial and on appeal.

"M. Nadon"
J.A.

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

I agree.
Johanne Trudel J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-289-08
STYLE OF CAUSE:	A.G.C v. JEAN-GILLES CHIASSON ET AL.
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CONCURRED IN BY:	PELLETIER J.A. TRUDEL J.A.
DATED:	October 20, 2009

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