Federal Court of Appeal | Cour d'appel fédérale

**Date: 20110317**

**Docket: A-44-10**

**Citation: 2011 FCA 104**

**CORAM:** **BLAIS C.J.**
**PELLETIER J.A.**
**TRUDEL J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**GILDARD HACHÉ**

**Respondent**

Heard at Fredericton, New Brunswick, on February 9, 2011.

Judgment delivered at Ottawa, Ontario, on March 17, 2011.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: BLAIS C.J.
PELLETIER J.A.

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**REASONS FOR JUDGMENT**

**TRUDEL J.A.**

[1] Are the proceeds of the respondent's disposition of two commercial fishing licences taxable as a capital gain? The outcome of this appeal hinges on the answer to that question, which requires that the Court first determine whether these fishing licences are property within the meaning of subsection 248(1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (ITA).

[2] The Tax Court of Canada (TCC) judge who considered the issue found that fishing licences were not property (within the meaning of the ITA) that the respondent could dispose of and "that the

amount received thus [could not] give rise to a capital gain that must be included in his taxable income for the 2001 taxation year" (Reasons for Judgment at paragraph 1: 2010 TCC 10, January 7, 2010, Justice Lamarre).

[3] With respect, I cannot agree with those findings. I would therefore allow the appeal with costs in both Courts.

**Relevant Facts**

[4] In the TCC, the parties filed a statement of agreed facts (appeal book, tab F at page 40). For the purposes of this appeal, it is sufficient to know that the respondent, Gildard Haché, is a commercial fisher registered under the *Fisheries Act*, R.S.C., 1985, c. F-14 (FA). From 1996 to 2000, inclusively, he was the holder of two fishing licences issued by the Minister of Fisheries and Oceans (MFO), one for snow crab and the other for groundfish. He was also the owner of a fishing vessel and the equipment required for his fishing activities.

[5] Throughout the year 2000, in response to the Supreme Court of Canada's judgment in *R. v. Marshall*, [1999] 3 S.C.R. 456, the MFO implemented the Fisheries Access Program [the Program] to increase First Nations' participation in commercial fisheries by transferring to them quotas and the vessels, gear and equipment required for fishing.

[6] This access to commercial fisheries was implemented through a voluntary relinquishment program. The MFO offered fishing vessel owners and commercial fishing licence holders the opportunity to relinquish their interest in that property in exchange for payment.

[7] This is the context in which, in February 2001, the respondent decided to participate in the Program and, one month later, signed the agreement reproduced in the appendix, by which the MFO agreed to make a voluntary payment of $3,050,000 to him (article 9 of the agreement).

[8] In his income tax return for 2001, the respondent treated an amount of $2,825,000 as the proceeds from the disposition of an eligible capital amount. This amount represented the portion of the voluntary payment received from the MFO that the respondent allocated to the retirement of his fishing licences.

[9] In January 2004, following an audit of his 2000 and 2001 taxation years, the respondent received a notice of reassessment stating that the Minister of National Revenue (Minister) had determined that the proceeds of the disposition of the licences were in the amount of $2,583,465. The $466,535 allocated to the disposition of the fishing vessel and gear is undisputed.

[10] The appeal therefore concerns the tax treatment of the amount of $2,583,465 which, according to the TCC, should not be included in the respondent’s income for the 2001 taxation year.

**TCC judgment**

[11] To reach this conclusion, the judge relied on the decisions in *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166 [*Saulnier*] and *Manrell v. Canada*, 2003 FCA 128 [*Manrell*].

(a) *Saulnier*

[12] In this first decision, the issue was whether Mr. Saulnier's licence was "property" under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA) and the Nova Scotia *Personal Property Security Act*, S.N.S. 1995-96, c. 13.

[13] Although the benefits arising from the licence did not fully correspond to all of the rights required for a thing to be considered "property" at common law, the right to participate in exclusive fishing activities in accordance with the conditions of the licence and the proprietary right in the wild fish caught, including the resulting income from sales [the "bundle of rights"] was reasonably analogous to a common law *profit à prendre*, "which is undeniably a property interest" (*Saulnier*, at paragraph 47). The definition of "property" at section 2 of the BIA included "every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property", thus including Mr. Saulnier's licence.

[14] That being the case, the judge departed from *Saulnier* by distinguishing that decision from the case at bar, for two reasons. First, the passage above, drawn from the definition of "property" in

the BIA, does not appear in the definition of the same term in the ITA. Second, the judge noted that in *Saulnier*, the fisher held valid licences at the time of his bankruptcy, unlike, she concluded, the respondent, who, at the time of signing the agreement, "no longer possessed a 'bundle of rights' related to those licences that would have conferred on him a proprietary right that could have constituted property" (Reasons for Judgment at paragraph 21). Last, the respondent did not transfer his licence to anyone who could exercise his rights in his stead. Mr. Haché, unlike Mr. Saulnier whose property was seized by the trustee in bankruptcy, simply relinquished his right to apply for a fishing licence (*ibidem* at paragraph 23).

(b) *Manrell*

[15] Furthermore, the judge also referred to *Manrell*, a decision in which this Court found that a payment received under a non-competition agreement did not constitute the proceeds of a disposition of property within the meaning of the ITA.

[16] Drawing an analogy, the judge stated that:

> . . . In my opinion, giving up one's right to operate a business, and thus a right to income, by agreeing to sign a non-competition agreement may be considered analogous to giving up the right to apply for a fishing licence and thereby giving up any *profit à prendre* from that licence. As in *Manrell*, I do not believe there has been a disposition of property within the meaning of the ITA. (*ibidem* at paragraph 24).

**Analysis**

[17] The facts are not in dispute. The disagreement between the parties essentially concerns the interpretation to be given to the term “property” in the ITA, a question of law reviewable according to the correctness standard; and the application of the facts of this case to that definition, a mixed question of fact and law on which our Court will only intervene to correct a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[18] In this case, the judge did not make any error in identifying the analysis framework required in matters of capital gains. She considered whether the respondent’s abandonment of his fishing licences constituted a disposition of property - a condition precedent to realizing a capital gain. Moreover, it is clear that the issue of the validity of the respondent’s licences and this Court’s conclusion in *Manrell* were determinative for the judge. In my opinion, they should not have been so. The judge’s conclusion resulted in errors of fact and law requiring this Court’s intervention. First of all, the analogy with *Manrell* is infelicitous.

[19] The issue in *Manrell* was whether a payment made by a purchaser of shares as consideration for the seller’s promise not to compete for a specified period within a specified territory gave rise to a taxable capital gain. Her Majesty the Queen argued that the payment made in relation to the restrictive covenant was the proceeds of the disposition of the [TRANSLATION] “right to compete”, a right of “any kind whatever” within the meaning of subsection 248(1) of the ITA.

| PART XVII | PARTIE XVII |
|---|---|
| INTERPRETATION | INTERPRÉTATION |
| 248(1) In this Act, . . . | 248(1) Les définitions qui suivent s'appliquent à la présente loi : |
| "property" means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes | « biens » Biens de toute nature, meubles ou immeubles, corporels ou incorporels, y compris, sans préjudice de la portée générale de ce qui précède : |
| (*a*) a right of any kind whatever, share or a chose in action, | *a*) les droits de quelque nature qu'ils soient, les actions ou parts; |
| (*b*) unless a contrary intention is evident, money, | *b*) à moins d'une intention contraire évidente, l'argent; |
| (*c*) a timber resource property, and | *c*) les avoirs forestiers; |
| (*d*) the work in progress of a business that is a profession. | *d*) les travaux en cours d'une entreprise qui est une profession libérale |

[20] In *Manrell*, that argument having been made, this Court decided as follows:

> A general right to do something that anyone can do, or a right that belongs to everyone, is not the "property" of anyone. In this case, the only thing that Mr. Manrell had before he signed the non-competition agreement that he did not have afterward was the right he shares with everyone to carry on a business. Whatever it was that Mr. Manrell gave up when he signed that agreement, it was not "property" within the ordinary meaning of that word (at paragraph 25). [Emphasis added.]

[21] Relying on that statement, the respondent contends that the only thing he could have given up when he signed the agreement was the privilege he shared with everyone else who holds a

fishing licence, that is, a general, non-exclusive right that could not be “property” within the meaning of the ITA (respondent’s memorandum at paragraph 91).

[22] I cannot agree. First of all, the right in this case cannot be referred to as general and non-exclusive, but I will return to that. Foremost, the respondent’s situation cannot be compared to that of Mr. Manrell, who, subject to an ancillary stipulation in a share sale agreement, had cashed out his personal undertaking to the other contracting party not to do something. This negative obligation he had contracted certainly could not be “a right of any kind whatever,” or, according to *Manrell*, “property” entailing “some exclusive right to make a claim against someone else” (at paragraph 25).

[23] I am therefore of the opinion that the judge erred in concluding that the respondent’s voluntary abandonment of the licences allowing him to participate in a commercial activity subject to quota was analogous to Mr. Manrell’s obligation arising from a non-competition clause.

[24] That being said, I will address the issue of the validity of the respondent’s permits. To better grasp this issue, it is useful to have an understanding of the government policy applicable in this case. It is entitled the *Commercial Fisheries Licensing Policy for the Gulf Region*, Department of Fisheries and Oceans, and its objective is to “reduce capacity, improve the economic viability of participants in commercial fishing operations and prevent future growth of capacity in the commercial fishery” (appeal book at page 69).

[25] One of the approaches for reaching this objective was the implementation of a licensing strategy. According to the definition at section 5 of the Policy, a licence:

> . . . grants permission to do something which, without such permission, would be prohibited. As such, a licence confers no property or other rights which can be legally sold, bartered or bequeathed. Essentially, it is a privilege to do something, subject to the terms and conditions of the licence.

[26] More specifically, a fishing licence:

> . . . is an instrument by which the [MFO], pursuant to his discretionary authority under the *Fisheries Act*, grants permission to a person including an Aboriginal organization to harvest certain species of fish or marine plants subject to the conditions attached to the licence. This is in no sense a permanent permission; it terminates upon expiry of the licence. The licensee is essentially given a limited fishing privilege rather than any kind of absolute or permanent right or property.

[27] Furthermore, a fishing licence does not confer any vested rights on its holder (subsection 16(2) of the *Fishery (General) Regulations*, SOR/93-53) (Regulations) and may be suspended or revoked by the MFO if, among other reasons, he notes that its conditions have been breached (section 9 FA).

[28] There is no doubt that fishing licence holders are subject to the limits set out in the FA concerning the period during which, the location where and terms under which the licence may be exercised (together, the conditions of the licence), but the fact remains that the commercial reality in this industry is that licences will be renewed from one year to the next and that departmental policy will protect those who already hold licences. Indeed, as stated in *Saulnier*, the stability of the fishing

industry depends on the MFO's predictable renewal of licences year after year (*Saulnier* at paragraph 14).

[29] Moreover, that was how the respondent understood the situation. On cross-examination, he asserted that [TRANSLATION] "you would never apply for a permit" (transcript of the hearing before the TCC, at page 20, line 20). As a member of what the Policy calls the [TRANSLATION] "core" (appeal book at page 45), the respondent was part [TRANSLATION] "of this maximum number" of multi-licensed enterprises (a core enterprise is a commercial fishing unit composed of a fish harvester, registered vessels and the licences required by law) who could engage in commercial fishing in the Gulf region. It is necessary to know that it is not possible to join the "core" except by replacing an enterprise that is already a member of the core and being an accredited professional fisher (the Policy at sections 9(7) and 10). Therefore, not simply anyone who wants to may fish. The respondent had held his licences for 25 years (transcript of the hearing before the TCC at page 7, line 14).

[30] I am of the opinion that the judge would have agreed that these factors argue in favour of recognizing the respondent's commercial fishing licences as "property" within the meaning of the ITA, had she not deemed the licences invalid because they had expired or had no attached conditions. What was in fact the case?

(a) Groundfish

[31] The evidence shows that the respondent held licence #004384 authorizing him to harvest groundfish (appeal book at pages 46 and 142). Issued on April 19, 2000, the document attesting to this licence, which bears a separate number, indicates a validity period from January 1, 2000, to May 14, 2001, whereas the agreement was signed in March 2001. The document states that [TRANSLATION] "the use of this licence is subject to the conditions set by the MFO. The licence holder must ensure having received the licence conditions and must not engage in fish harvesting activities with this licence before having received the valid licence conditions and attached them to this licence".

[32] Section 22 of the Regulations provides that the MFO may specify in a licence one or more conditions ensuring the proper management and control of fisheries and promoting "the conservation and protection of fish". Among other conditions limiting the fishing activity authorized by the licence are the period during which the activity may be carried out, the vessel and the equipment that is permitted to be used for that activity and the geographic area and quantities of catches.

[33] However, the respondent never received the conditions attached to this licence, given that many groundfish stocks have been the subject of a moratorium since the 1990s. For that reason, the judge reached the following conclusion regarding the groundfish licence:

> …the Appellant never received the conditions attached to that licence, with the result that his licence was not valid for the 2000–2001 period shown on the very face of the licence filed in evidence (Reasons for Judgment at paragraph 21).

[34] I disagree. The licence authorizes its holder to engage in exclusive fishing activities in compliance with the conditions set out in the licence. The conditions attached to the licence merely provide the framework for and limitations on engaging in the authorized activity. The fact is that if the moratorium had been lifted, in whole or in part, between January 2000 and May 2001, once the respondent received the conditions for engaging in the activity, he could have put out to sea and fished for groundfish because he held a valid licence for that period.

[35] As the appellant argues, if the lack of conditions attached to the licence were to render it invalid, this licence could not have been issued on April 19, 2000, or during previous years when the moratorium was also in place. Moreover, why pay renewal fees for a licence that will in all likelihood be invalid if not because this licence gives its holder the exclusive right or authority to be part of the core and participate in commercial fishing activities? Both the legislative enactments and the evidence show that the fact that the respondent did not receive the conditions attached to the licence presented no obstacle to his holding a “bundle of rights” that he could have exercised once he received those conditions. The licence itself, not the conditions that were attached to that licence from time to time, is the source of the respondent’s rights to participate in an exclusive commercial fishing activity. This distinction, which I consider determinative, seems to have escaped the judge.

(b) Snow crab

[36] The respondent also held licence #004385, issued on December 16, 2000, which authorized him to harvest snow crab. The judge found that this licence was not valid at the time the agreement was signed because it "had expired at the end of 2000, as can be seen from the period indicated on the temporary licence" (Reasons for Judgment at paragraph 21). Consequently, the respondent no longer held a "bundle of rights" related to that licence. Again, I disagree.

[37] First, I note that the temporary licence was only issued to allow the respondent to harvest snow crab in accordance with the conditions attached to that licence for the period from April 15 to August 15, 2000, since he had not yet received the document attesting to his licence for that calendar year (appeal book at page 101). In fact, as I mentioned earlier, the respondent had held the fishing licences at issue in this case for 25 years.

[38] I also note that the appeal book contains the form entitled [TRANSLATION] "Registration and fishing licence application" to renew the [TRANSLATION] "core fisher" registration and fishing licences issued in the respondent's name for the 2001 calendar year (appeal book at page 144). The respondent states that for 2001, he did not pay the fees identified in the *Regulations* (section 5), which provide that the MFO, upon application for a licence and payment of the required fee, may issue that licence.

[39] However, the lack of proof of payment in this case is not determinative. For one thing, this registration application provides that [TRANSLATION] "[a]ll licences not renewed by December 31,

2001, at the latest, are subject to cancellation", whereas the agreement was signed in March 2001. From this, I understand that the respondent's right to his licence for the 2001 calendar year did not depend only on the payment of the prescribed fees. In other words, the validity of the licences is confirmed on the basis of more than receipt of a payment. In this regulated commercial field subject to quota, the expiry of the licence does not necessarily entail a finding of invalidity.

[40] Furthermore, according to section 19 of the agreement reproduced in the appendix, the respondent agreed and warranted that his licences were not subject to any penalty. He was counting on his licences' being renewed, but stated, [TRANSLATION] "Why would I have paid? I was getting rid of my licences" (transcript of the hearing before the TCC at page 12, lines 6–7). Moreover, to enter into this agreement, the respondent was the one who set the value of his licences, a fact that the judge does not discuss in her reasons.

[41] I acknowledge that the trial judge's principal role is to assess and weigh the evidence adduced by the parties; in this case, I am of the opinion that she should have given greater consideration to the statements the respondent made when he demonstrated his interest in participating in the Program. In his application for the 2000/2001 Fisheries Access Program (appeal book, tab G at page 145) [emphasis added], the respondent described his two licences (snow crab and groundfish). In the column marked [TRANSLATION] "Asking price for full licence packet," he asked $2,009,518.20 for the snow crab licence and $100,000 for the groundfish licence, without regard for any consideration whatsoever as to the validity of his licences. There is no doubt that the

respondent, in my opinion, was then negotiating on “property” within the meaning of the ITA and that he was claiming sums as consideration for the disposition of a “right of any kind whatever.”

[42] Consequently, I would allow the appeal with costs in both Courts.

“Johanne Trudel”
J.A.

“I agree.
Pierre Blais C.J.”

“I agree.
J.D. Denis Pelletier J.A.”

Certified true translation
Sarah Burns

## APPENDIX

[TRANSLATION]

### FISHERIES ACCESS PROGRAM

AGREEMENT BETWEEN THE BENEFICIARY
AND
HER MAJESTY THE QUEEN IN RIGHT OF CANADA
REPRESENTED BY THE MINISTER OF FISHERIES AND OCEANS;
AGREEMENT NB-70-2001

PART I: RETIREMENT AND ABANDONMENT OF LICENCES

1. I, Gildard Haché, SIN: _____ (hereinafter "the beneficiary"), holder of a commercial fishing licence for snow crab, being licence No. 4385, and a commercial fishing licence for groundfish, being licence No. 4384, (hereinafter "the licences"), hereby abandon all privileges and rights associated with the licences.

2. In consideration of the voluntary payments provided for in Part III, I hereby acknowledge, in my capacity as the beneficiary:

   (*a*) that this abandonment is irrevocable;

   (*b*) that I understand the provisions set out in Parts II and III of the present agreement;

   (*c*) that Parts II and III of the present document form part of the present agreement.

Signature of beneficiary: ___Gildard Haché_____

Date: _____February 26, 2001____

PART II: TRANSFER OF VESSEL AND GEAR

3. The beneficiary acknowledges that he is the owner of the vessel and the gear described in greater detail in the schedule to the present agreement (hereinafter "the property").

4. The beneficiary agrees and warrants that the property is not subject to any lien or other financial obligation or encumbrance, except those noted in the schedule to the present agreement.

5. **The beneficiary acknowledges that he has agreed to transfer to an Aboriginal community (hereinafter "the Aboriginal organization"), at his expense, the title to the property, being the fishing vessel and gear that is described in the present agreement, free and clear of all privileges, financial obligations and other encumbrances.** [Bolded in original]

6. The beneficiary agrees that DFO, the Aboriginal organization and any person whom DFO or the Aboriginal organization designates from time to time may examine the property at any reasonable time.

7. The risks related to the property shall be the responsibility of the beneficiary until title to the property is transferred to the Aboriginal organization.

8. The beneficiary agrees to maintain the property in a state of seaworthiness and good repair until it is transferred to the Aboriginal organization.

PART III: VOLUNTARY PAYMENT

9. DFO agrees to make to the beneficiary a voluntary payment in the amount of $3,050,000.00 (THREE MILLION AND FIFTY THOUSAND DOLLARS) as soon as:

(*a*) the beneficiary has signed the present agreement;

(*b*) the beneficiary has returned to DFO all the documents and plates issued with regard to the licences;

(*c*) the beneficiary has transferred title to the property to the Aboriginal organization;

(*d*) DFO is satisfied that the property is free and clear of all privileges, financial obligations and other encumbrances.

10. In either of the following cases:

(*a*) if the beneficiary provides false or misleading information to DFO with regard to the present agreement;

(*b*) if the beneficiary does not comply with a provision of the present agreement,

DFO may:

(*c*) terminate any obligation to make a payment to the beneficiary under the present agreement;

(*d*) require the beneficiary to pay back to DFO any payment it has made under the present agreement;

(*e*) exercise any other remedy authorized in law.

11. When, under subclause 10(*d*) above, DFO asks the beneficiary to pay back a payment, the amount shall be a debt owed to Her Majesty the Queen in right of Canada.

12. On request, the beneficiary shall allow DFO, or any person it designates from time to time, to audit the books and to examine the records, vouchers, reports and other documents having to do with the present agreement, the licences or the property that DFO considers it appropriate to examine, and to make copies and take extracts, and shall provide all the necessary assistance for the purposes of these audits and examinations.

13. The beneficiary shall retain the documents referred to in clause 12 for a period of at least two years following the date on which DFO pays to him the amount referred to in clause 9.

14. No member of the House of Commons shall be a party to, or derive benefit from, the present agreement.

15. The beneficiary shall release Her Majesty the Queen in right of Canada and her ministers, officials and employees from all claims, proceedings, actions and claims related to the licences, and shall save them harmless from all claims, damages and costs having to do with the licences or the property.

16. DFO may send any payments to the beneficiary at the following address:

**Gildard Haché**
**P.O. Box 2085**
**Shippagan, NB**
**E8S 3H3**

17. No payment shall be made under clause 9 of the present agreement until the transfer to the Aboriginal organization of title to a vessel forming part of the property has been registered.

18. Any obligation that DFO may be under to make a payment to the beneficiary under clause 9 of the present agreement shall be terminated six months following the date on which the parties sign the present agreement, unless the beneficiary has signed Part I of the present agreement, returned to DFO all the documents and plates issued with regard to the licences, transferred title to the property to the Aboriginal organization and fulfilled all the conditions of the present agreement before the expiry of that period.

19. The beneficiary agrees and warrants that the licences are not subject to any penalty, except those noted in the schedule to the present agreement.

20. Where DFO authorizes the retention of one or more licences, the licences shall not be issued or transferred to another fisher.

21. As regards any time periods set out in the present agreement, time is of the essence.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-44-10 |
| **STYLE OF CAUSE:** | Her Majesty the Queen v. Gildard Haché |
| **PLACE OF HEARING:** | Fredericton, New Brunswick |
| **DATE OF HEARING:** | February 9, 2011 |
| **REASONS FOR JUDGMENT BY:** | TRUDEL J.A. |
| **CONCURRED IN BY:** | BLAIS C.J.<br>PELLETIER J.A. |
| **REASONS DATED:** | March 17, 2011 |

**APPEARANCES:**

| | |
|---|---|
| Janie Payette<br>Catherine M.G. McIntyre | FOR THE APPELLANT |
| Gilles E. Bujold | FOR THE RESPONDENT |

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