Federal Court  Cour fédérale

Date : 20081128

Docket: T-1271-07

Citation: 2008 FC 1324

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 filed on appeal from a decision of Prothonotary Richard Morneau (the Prothonotary), pursuant to Rules 3, 51, 107 and 259 of the *Federal Court Rules*, SOR/98-106.

[2] The Applicants are asking the Court to reverse a decision rendered on July 23, 2008 by the Prothonotary who was managing the case. On the one hand, he ordered that the case be subdivided in two phases: in the first phase were to be gathered all issues common to the claim of all the Applicants and, in the second phase, all issues pertaining to the individual claims of each Applicant; on the other hand, the Applicants were allowed to serve one affidavit only for documents pertaining solely to the first phase, provided that said affidavit should refer to the whole of the documents that are in the personal possession of any Applicants or that are still under the control of their solicitors or of third parties.

[3] The issues common to the claim raised by all Applicants are as follows :

A. The history of snowcrab fishing in the south of the Gulf of St. Lawrence;

B. The negotiations conducted between the Applicants and the Minister of Fisheries and Oceans (the Minister) between 1990 and 2003 and the validity of the agreements entered into by the Minister and the traditional crab fishers in zone 12;

C. The acts and failures of the Minister during the relevant period.

[4] The issues pertaining to the individual claims of each Applicant are as follows :

A. Whether each of the Applicants relied on the Minister's representations;

B. Whether each of the Applicants has suffered a loss or a prejudice caused by the acts and failures of the Minister during the relevant period; and

C. The measure of damages suffered by each of the Applicants or the appropriate relief.

The facts

[5] In 1989, 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 certain ministerial measures pertaining to the management of the resource.

[6] In 1999, after the Minister had announced that he would allow Aboriginal fishers to have access to that zone, the Applicants agreed with that decision under certain conditions.

[7] In 2003, The Minister unilaterally and effectively reneged on his undertakings by reducing the traditional fishers' share of the Total Allowable Catch without compensation and by using part of the resource to finance his programs.

[8] The Applicants, who number 95, are traditional fishers who commenced this action in 2007 to seek compensation for past and future financial losses; there are seven causes of action.

[9] Prothonotary Morneau was appointed as [TRANSLATION] "judge responsible for the management of this proceeding" by Chief Justice Lutfy.

[10] On July 11, 2007, the Applicants commenced this action to seek substantial damages invoking several causes of action, on the basis of alleged acts and failures on the part of the

Minister with respect to the management of fisheries. This dispute raises complex issues pertaining to the history of snowcrab fishing in the South of the Gulf of St. Lawrence.

[11] On June 17, 2008, pursuant to Rule 107 of the *Federal Court Rules*, the Applicants filed a motion seeking severance on the issues of liability and the quantum of damages.

[12] On July 2008, the Applicants filed an amended motion seeking, under Rule 107, that the issues be tried separately according to the elements common to all the applicants and according to the elements specific to individual claims.

[13] The Applicants have sought to be exempted from the requirement to serve affidavits of documents pertaining to the issue of the quantum of damages.

[14] On July 23 2008, the Prothonotary rendered his decision on the abovementioned motion. He granted the motion and ordered that the proceeding be subdivided into two phases. In the first phase would be examined the general issues involving all of the Applicants and in the second phase would be examined the issues pertaining each of the Applicants. He also allowed the Applicants to serve only one affidavit of documents concerning the first phase.

[15] The causes of action can be summarized as follows :

1. There have been violations of agreements entered into with the Applicants between 1990 and 2002.

2. There have been false representations or negligent misrepresentations and a breach of the duty of due diligence.
3. The Applicants have been deprived of certain rights, which amounts to expropriation without compensation.
4. There has been unjust enrichment.
5. The Minister has acted in breach of his fiduciary duty.

[16] The Prothonotary, in a ten-page decision, analyzed the arguments of the parties, the nature of the dispute as well as the objects of Rules 3, 51, 107 and 359 of the *Federal Court Rules* and the conditions set out therein:

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	**3.** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.
51. (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	**51.** (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.
[. . .]	[. . .]
107. (1) The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.	**107.** (1) La Cour peut, à tout moment, ordonner l'instruction d'une question soulevée ou ordonner que les questions en litige dans une instance soient jugées séparément.
(2) In an order under subsection (1), the Court may give directions regarding the procedures to be followed, including those applicable to examinations for discovery and the discovery of documents.	(2) La Cour peut assortir l'ordonnance visée au paragraphe (1) de directives concernant les procédures à suivre, notamment pour la tenue d'un interrogatoire préalable et la communication de documents.

359. Except with leave of the Court, a motion shall be initiated by a notice of motion, in Form 359, setting out
(*a*) in respect of a motion other than one made under rule 369, the time, place and estimated duration of the hearing of the motion;
(*b*) the relief sought;
(*c*) the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and
(*d*) a list of the documents or other material to be used at the hearing of the motion.

359. Sauf avec l'autorisation de la Cour, toute requête est présentée au moyen d'un avis de requête établi selon la formule 359 et précise :
a) sauf s'il s'agit d'une requête présentée selon la règle 369, la date, l'heure, le lieu et la durée prévue de l'audition de la requête;
b) la réparation recherchée;
c) les motifs qui seront invoqués, avec mention de toute disposition législative ou règle applicable;
d) la liste des documents et éléments matériels qui seront utilisés à l'audition de la requête.

[17] He stated that, in a proceeding involving "some 96 Applicants" and involving complex issues of facts and of law, the Applicants had shown, according to the preponderance of the probabilities that, by granting the relief sought, the Court would [TRANSLATION] "make it possible to save time and money and to resolve the litigation fairly"; hence, the severance motion was well founded. Therefore, he examined the objects of Rules 3 and 107 referred to above and the criteria set out therein in order to choose a remedy so as to secure the just, most expeditious and least expensive determination of the dispute, as required by the Act and the relevant case law.

Issues

1. What is the standard of review or of appeal with respect to an order of a prothonotary?
2. What is the standard of review with respect to an order of a prothonotary under Rule 51 of the *Federal Court Rules*?

[18] All parties to this litigation agree that the standard of review of a discretionary order of a prothonotary is set out in *Merck & Co. v. Apotex Inc.*, [2004] 2 F.C.R. 459, where it was held that it may not be disturbed by the Court, except in two cases: : (a) it bears on issues vital to the final disposition of the case and (b), it is clearly wrong as based upon a wrong principle or misapprehension of facts.

[19] In this case, according to the order, the issues to be addressed in a first trial can only be resolved by the production of evidence "common" to the claim of the applicants.

[20] The Respondent submits that the order will preclude an examination by the Court of his challenge of the very existence and the validity of each alleged agreement as well as the alleged acts and failures of the Minister. He also alleges that severance will preclude a prior full examination of the evidence pertaining to each individual applicant relevant to the resolution of the issues raised in the first trial. The Respondent submits that there are some authorities in the case law that stand for the proposition that severance under Rule 107 does not have a determinate influence on the main object of the dispute. He cites *Microfibres Inc. v. Annabel Canada Inc.*, 2001 FCT 1336, 214 F.T.R. 256.

[21] The Applicants reply that the Court must show greater restraint where decisions are made by a prothonotary in the management of cases (*Merck & Co. v. Apotex Inc.*, *supra*, at paragraphs 17 to 19; *Sano Fi-Aventis Canada Inc. and Schering Corporation v. Apotex Inc.*, 2008 FC 628, at paragraph 8).

[22] Such is the case herein (*Montana Band v. Canada*, 2002 FCA 331, *Remo Imports Ltd. v. Jaguar Cars Ltd.*, 2003 FCT 74). The Applicants also submit that the Court should not review a severance order, unless there is a clear error, and there is none in this case. They argue that severance will, according to the preponderance of the evidence, save time and money (*Illva Saronno S.p.A. v. Privilegiata Fabbrica Maraschino*, [1999] 1 F.C. 146).

[23] The complexity of the issues to be tried may also warrant severance (*J.J. MacKay Canada Ltd. v. Société en commandite Stationnement de Montréal*, 2005 FC 985).

[24] The Respondent submits that the issues addressed in the first and second phases are connected and that the Prothonotary has failed to ascertain that the chosen remedy is "just".

Analysis

[25] This will be a complex trial, involving "some 96" applicants, a great number of causes of action, several issues of law; the determination of considerable individual damages. Finally this will be a long trial.

[26] There is a general principle that a decision of a prothonotary must stand, unless erroneous in law or unless the facts have been misapprehended; in addition it must inquired if the decision, in view of the circumstances, is "just" or reasonable.

[27] Now, in this case, I am of the view that the decision of the Prothonatory satisfies all the relevant requirements applicable to a severance. Hence, the order is well founded in law, and it must stand.

[28] The Prothonotary's order dated July 23, 2008 as to the discovery of documents was rendered pursuant to Rule 107 of the *Federal Court Rules*, that allows the Court to give directions regarding examinations for discovery and the discovery of documents. That discretion is essentially derived from the economy of time and money that is made possible by examinations for discovery and the discovery of documents in view of safegarding documents and the complexity of the litigation (*Merck et Cie v. Brantford Chemicals Inc.* (2004), 262 F.T.R. 147, 35 C.P.R. (4th) 4, affirmed (2005), 39 C.P.R. (4th) 524).

[29] The Respondent submits that examinations for discovery serve to secure admissions that make it easier to prove disputed facts (*Apotex Inc. v. Merck & Co.*, 2004 FC 1133, 271 F.T.R. 1).

[30] The Respondent submits that the order pertaining to affidavits of documents will impede the disclosure and production of relevant evidence, including documents pertaining to individual applicants with respect to matters to be examined during the first trial.

[31] The Respondent submits that he will not be able to make a full defence and answer and that Rule 107 does not give this Court the power to restrict the exercise of his rights, as is done in the aforementioned order.

[32] The Applicants submit that this argument is not cogent; they also seek a vindication of the Prothonotary's discretion.

Conclusion

[33] Having analyzed the alleged facts, causes of action, the number of applicants, the complexity of the issues, the time and the costs involved in a trial, my decision is ineluctable: the Prothonotary's order is proper in the light of the circumstances.

[34] The relief granted appears to me just, equitable; it should lead to an expeditious and inexpensive resolution of the litigation at the first phase, where it can be expected to be uniform as between applicants.

[35] Therefore, the Prothonotary's order must stand.

[36] Counsel have not discussed, at the hearing, a motion seeking the filing of a defence at the latest thirty (30) days after the final decision pertaining to the motion herein; however, having read the pleadings, I am of the view that that motion is well founded.

ORDER

The Court orders that the motion in appeal from the order of Richard Morneau, Prothonotary, dated July 23, 2008 in this case be dismissed.

The Court allows the Respondent to file a defence thirty (30) days at the latest following the final decision that will be rendered with respect to this motion and appeal.

Costs are awarded from the Respondent.

« 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 6, 2008
REASONS FOR ORDER AND ORDER:	FRENETTE, DJ
DATED:	November 28, 2008

APPEARANCES:

Mr. Patrick Ferland and Mr. David Quesnel	FOR THE APPLICANTS
Mr. Paul Marquis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

HEENAN BLAIKIE Montréal, Québec	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT