Date: 20060420

Docket: A-240-05

Citation: 2006 FCA 144

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

BETWEEN:

THE MORESBY EXPLORERS LTD. and DOUGLAS GOULD

Appellants

and

THE ATTONREY GENERAL OF CANADA and COUNCIL OF THE HAIDA NATION

Respondents

Heard at Vancouver, British Columbia, on March 13-16, 2006.

Judgment delivered at Ottawa, Ontario, on April 20, 2006.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] This is an appeal from a decision of Heneghan J. dismissing the appellants' application for judicial review of the conditions attached to their tour operator licence by the Archipelago Management Board (AMB). The conditions in question are said to be discriminatory, *ultra vires*, and in the case of the Haida Allocation Policy, an infringement of the appellant Douglas Gould's rights under section 15 of the *Canadian Charter of Rights and Freedoms*

(the *Charter*). For the reasons which follow, I would dismiss the appeal with costs to the respondents.

FACTS

Procedural History

[2] This appeal is but the latest instalment in a long-running dispute between Mr. Gould, his company Moresby Explorers Ltd., and the AMB. The details can be found in paragraphs 1 to 29 of the application judge's decision and in an earlier decision *Moresby Explorers Ltd. v. Canada (Attorney General)*, [2001] 4 F.C. 591 (*Moresby No. 2*). For present purposes, I propose to set out only a very summary version of the facts.

[3] In 1993, the Government of Canada and the Council of the Haida Nation (CHN) entered into an agreement for the joint management of a national park reserve covering a substantial portion of the Queen Charlotte Islands, over which the CHN asserted a land claim. Under the terms of that agreement, the Gwaii Haanas/South Moresby Agreement (the Agreement), the parties established the AMB as the forum within which they would cooperate in the management of the park reserve. The peculiar nature of the Agreement is described in more detail in the following passage from *Moresby No. 2*, at paragraph 67:

> …*The Gwaii Haanas Agreement* is a solution to the problem of competing claims over the same territory. Both Canada and the Haida Nation claim competence to manage the Gwaii Haanas area. Canada relies upon the *National Parks Act* and the legislation specific to the Gwaii Haanas Park Reserve. The Haida Nation relies upon its claim of Aboriginal rights in its ancestral territory. It is in the interests of both parties to join in a structure which permits decisions to be made without having to decide by whose authority they come to be made. The requirement that consensus be sought on all decisions is a device for allowing decisions to be made without allocating jurisdiction for the subject-matter of the decision to one party or the other. It is fundamental to the interests of both parties to be able to say that a particular decision was made by their authority. For that reason, it would be contrary to the logic which lead to the creation of the AMB, for either party to delegate, or be seen

> to delegate, their authority to the AMB. Each must be seen to act under the authority which it claims.

[4] In 2004, the appellants received their tour operator licence for that season. That licence, in common with every other tour operator licence issued by the AMB, incorporated the AMB's 22 tour clients per day policy. Under that policy, a tour operator cannot put more than 22 clients per day upon the territory of the park reserve. The appellants' licence was not endorsed to reflect the AMB's companion policy, which is that no operator would be granted more than 2,500 user-days/nights of quota per year. One of the objectives of the Haida Allocation Policy is to prevent any single operator from monopolizing park facilities by the sheer volume of its clientele. The policy seeks to ensure the availability of a range of services to park visitors by encouraging the survival of the existing mix of businesses and providing an opportunity for the development of small local businesses.

[5] Under the AMB's licensing scheme, operators are allocated a quota based upon their historical usage of park facilities. The appellants' current quota is 2,372 user-days/nights but they have never used more than some 1,850 of those quota units. Consequently, because the appellants' quota is below the 2,500 cap, it was not necessary to invoke the Haida Allocation Policy in the issuance of their licence. That fact, however, has not prevented them from challenging that policy as well.

[6] Finally, the appellants also challenge the Haida allocation policy according to which one third of the total available quota is allocated to Haida controlled businesses. The AMB has

established the carrying capacity of the park reserve at 33,000 user-days/nights per year. It has allocated that usage equally between independent users of the park reserve, non-Haida tour operators and Haida tour operators. The result is that the 11,000 user-days/nights reserved for non-Haida tour operators are oversubscribed while there are no candidates for the Haida operators' quota. Mr. Gould claims that the Haida set-aside is a violation of his section 15 equality rights.

[7] In *Moresby No. 2*, the Federal Court decided that for the purposes of the *Canada National Parks Act*, S.C. 2000, c. 32 (the Act) and the *National Parks of Canada Business Regulations*, SOR/98-455 (the Regulations), the decisions of the AMB were the decisions of the Park Superintendent. The AMB policies in question must therefore be assessed in that light.

[8] The application judge dismissed the appellants' application for judicial review on the basis that the Act and Regulations authorized the Superintendent to impose the 22 client days quota and the 2,500 user-days/nights quotas in order to advance the "ecological integrity and preservation of a positive visitor experience at Gwaii Haanas." (paragraph 83 of the Reasons). While the appellants had argued that the quotas were discriminatory in the administrative law sense, in that they did not apply equally to all who were subject to them, the application judge did not directly address this argument.

[9] The appellant Douglas Gould challenges the Haida Allocation Policy on the ground that it infringes his right to equality under section 15 of the *Charter*. It does so, he says, because it results in a difference in treatment between him and members of the Haida First Nation in relation to the allocation of licences to do business in the park and the allocation of quota. He says that this difference is based on an enumerated ground, either race or ethnic origin, as it is founded on membership, or the absence of membership in Mr. Gould's case, in the Haida First Nation. Finally, Mr. Gould says that this discriminatory treatment is an affront to his human dignity.

[10] The application judge dismissed this claim on the ground that Mr. Gould lacked standing to raise the issue. She referred to subsection 18.1(1) of the *Federal Court Act* which reads as follows:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[11] The application judge held that since Mr. Gould conceded both that he and his company had received their business licence and that their quota was correctly calculated, neither Mr. Gould nor his company had been deprived of anything and were therefore not directly affected by the decision in question. On that basis, the application judge found that Mr. Gould and his company did not come within subsection 18.1(1) and therefore lacked status to bring the application for judicial review on the ground of breach of equality rights.

[12] The application judge then considered whether the appellants could claim public interest standing. She applied the tripartite test set out in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, and concluded that while the appellants' claim raised a serious and justiciable issue, they were not directly affected by the issue, and that there were other reasonable and effective ways to get the matter before the Court. The application judge held that this matter could be raised when a non-Haida applicant was refused a licence and quota on the basis that no quota remained for non-Haida applicants as a result of the Haida Allocation Policy.

[13] Notwithstanding her conclusion with respect to standing, the application judge went on to consider the appellants' claim on the merits. She referred to the three step process adopted by the Supreme Court in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (*Law*), and concluded that Mr. Gould did not satisfy the third step of the test, that is, he had suffered no loss of human dignity. See paragraph 97 of the application judge's reasons.

[14] Finally, the application judge dealt with the CHN's argument, which was raised in the alternative in the event that the appellants' section 15 argument succeeded, that even if the appellants' section 15 rights were infringed, section 25 of the *Charter* protected the Haida allocation scheme as a "right" acquired by land claims agreements or otherwise. The application judge was not persuaded that the Haida Allocation Policy met the threshold qualification of being a "right" within the meaning of section 25.

STANDING

[15] As a preliminary matter, the Attorney General for Canada (Canada) raises the issue of the appellants' status to challenge two of the three policies in issue. With regard to the 2,500 user-days/nights policy, Canada says that the appellants lack standing because this policy was not applied to their licence. Since the appellants concede that their quota 2, 372 user-days/nights is properly calculated, the 2,500 user-days/nights cap does not apply to them and therefore they lack standing. Similarly, Canada says that since they have a licence and a quota, they are not in a position to argue that the Haida Allocation Policy has affected them. Contrary to the assertion in the appellants' memorandum, the appellants have not acquired standing by reason of having been refused a request for additional quota, since they concede that no such request was made in relation to their 2004 licence.

[16] I do not agree that the appellants lack standing to raise the question as to whether the 2,500 user-days/nights policy is *ultra vires* simply because they cannot show that the Haida Allocation Policy has been applied against them in an adverse manner. The evidence discloses that the Haida Allocation Policy is intended to limit the growth of individual operators to the point where they could unfairly monopolize park resources to the detriment of other operators, and ultimately to the detriment of the range of services available within the park reserve boundaries. The appellants are clearly within the intendment of the Haida Allocation Policy. They do not have to wait until it causes them a loss to challenge it on jurisdictional grounds.

[17] Standing is a device used by the courts to discourage litigation by officious inter-meddlers. It is not intended to be a pre-emptive determination that a litigant has no valid cause of action. There is a distinction to be drawn between one's entitlement to a remedy and one's right to raise a justiciable issue.

[18] In *Canada (Attorney General) v. Vincent Estate*, 2005 FCA 272, (2005), 257 D.L.R. (4th) 268, I summarised a learned author's view of the various ways in which the concept of standing is employed. I repeat that summary here for ease of reference:

> [12] In his book, *Locus Standi: A Commentary on the law of Standing in Canada* (Carswell, Toronto, 1986), T.A. Cromwell (now a judge of the Nova Scotia Court of Appeal) identifies a number of different uses of the term "standing". In some cases, the term is used to refer to the plaintiff's entitlement on the merits. In others, "standing" is a reference to the person's legal capacity to sue. More commonly, the question of standing calls for an inquiry into "the required nature and extent of the plaintiff's 'interest' in the question submitted for adjudication." (Cromwell, at p. 4). Another use of the expression "standing" is found in cases such as *Thorson v. A.G. Canada* (1974), 43 D.L.R. (3d) 1 (S.C.C.) where it is used to refer to the "suitability for judicial determination of the question posed by the plaintiff." (Cromwell, at p. 6). For the purposes of his analysis, Cromwell defines standing as the "entitlement to seek judicial relief apart from questions of the substantive merits and the legal capacity of the plaintiff."

[19] It is clear that the appellants are within the intendment of the policies which they challenge, even if those policies have no application to them at the moment. They raise a question which is suitable for judicial determination and in respect of which they have an interest of "the required nature and extent".

[20] Insofar as the challenge to the Haida Allocation Policy is concerned, the challenge is brought by the appellant Gould in his personal capacity since corporations do not enjoy equality rights. See *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at paragraph 101. Moreover, Mr. Gould is limited to bringing his challenge on the basis of his circumstances. He cannot invoke a breach of someone else's rights in support of the *Charter* argument. See *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358:

> [78] It now appears to be settled law that a party cannot generally rely upon the violation of a third party's Charter rights: *R. v. Edwards*, [1996] 1 S.C.R. 128, at p. 145; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 367…

[21] To the extent that he is someone who is subject to the Haida Allocation Policy, in the sense that it could eventually result in the curtailment of his quota, he has, in my view, the necessary standing to challenge the Haida Allocation Policy. Whether he can succeed in that challenge is another matter.

ADMINISTRATIVE DISCRIMINATION

[22] The appellants first challenge to the 22 tour clients per day policy and the 2,500 user-days/night policy (collectively, the "business caps") is that they are discriminatory in the sense in which that term is used in administrative law. In making this argument, the appellants rely upon a body of municipal law to the effect that the power to discriminate between different classes must be specifically conferred by legislation. This argument is closely allied with the appellants' second argument, which is that the governing legislation does not permit the Superintendent to make distinctions between businesses on the basis of size.

[23] Discrimination, in the administrative law sense, occurs when subordinate legislation is "partial and unequal in operation between different classes." See *Montréal (City) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at page 405.

[24] This argument cannot succeed with respect to the business caps for two reasons. First, these policies apply to all business, Haida and non-Haida alike, and for that reason are not partial or unequal in operation. Secondly, the limits were deliberately chosen so as not to affect current operations. In other words, no operator was forced to reduce its current levels of operation as a result of the imposition of these caps. (A.B., vol. 12, p. 3747, lines 13 to 42)

[25] The appellants argued that these caps distinguished between large and small businesses and were thus discriminatory in the administrative law sense. Given the evidence that no operator was forced to curtail its operations by reason of the business caps, they cannot have discriminated between those who were forced to curtail their business and those who were not. I take this to mean that for the purposes of the caps, all businesses were effectively small businesses. Further, all businesses will be subject to the same limitation on their growth potential. (A.B., vol. 1, p. 164)

[26] At the argument of the appeal, counsel for the appellants advised that the Haida Allocation Policy was being challenged on *Charter* grounds only.

***ULTRA VIRES* SUBORDINATE LEGISLATION**

[27] The appellants next argued that the business caps were not authorized by the Act and the Regulations. Relying upon the earlier decision of *Moresby Explorers Ltd. v. Canada (Attorney General) (T.D.)*, 2001 FCT 780, [2001] 4 F.C. 591, the appellants argue that while the legislation permits the Superintendent to control businesses operating in the park reserve for the purpose of protecting the park environment, it does not permit the Superintendent (acting through the AMB) to control businesses for other reasons, such the prevention of monopolies or to ensure a diversity of services.

[28] Paragraph 16(1)(*n*) of the Act authorizes the Governor in Council to make regulations respecting:

(*n*) the control of businesses, trades, occupations, amusements, sports and other activities or undertakings, including activities related to commercial ski facilities referred to in section 36, and the places where such activities and undertakings may be carried on;	*n*) la réglementation des activités — notamment en matière de métiers, commerces, affaires, sports et divertissements —, telles que, entre autres, les activités relatives aux installations commerciales de ski visées à l'article 36, y compris en ce qui touche le lieu de leur exercice;

[29] The Governor in Council has exercised the right given to her by the Act and has promulgated the Regulations which, in their material parts, provide as follows:

5. (1) In determining whether to issue a licence and under what terms and conditions, if any, the superintendent shall consider the effect of the business on	5. (1) Le directeur doit, pour décider s'il y a lieu de délivrer un permis et, le cas échéant, en déterminer les conditions, prendre en considération les conséquences de l'exploitation du commerce sur les éléments suivants :
(*a*) the natural and cultural resources of the park;	*a*) les ressources naturelles et culturelles du parc;
(*b*) the safety, health and enjoyment of	*b*) la sécurité, la santé et l'agrément des

persons visiting or residing in the park;	visiteurs et des résidents du parc;
(*c*) the safety and health of persons availing themselves of the goods or services offered by the business; and	*c*) la sécurité et la santé des personnes qui se prévalent des biens ou services offerts par le commerce;
(*d*) the preservation, control and management of the park.	*d*) la préservation, la surveillance et l'administration du parc.
…	…
(3) Depending on the type of business, the superintendent may, in addition to the terms and conditions mentioned in subsection (2), set out in a licence terms and conditions that specify	(3) Compte tenu du type de commerce visé, le directeur peut, en sus des conditions visées au paragraphe (2), assortir le permis de conditions portant sur ce qui suit :
(*a*) the hours of operation;	*a*) les heures d'ouverture;
(*b*) the equipment that shall be used;	*b*) l'équipement à utiliser;
(*c*) the health, safety, fire prevention and environmental protection requirements; and	*c*) les exigences visant la santé, la sécurité, la prévention des incendies et la protection de l'environnement;
(*d*) any other matter that is necessary for the preservation, control and management of the park.	*d*) tout autre élément nécessaire à la préservation, à la surveillance et à l'administration du parc.

[30] Before us, counsel for the Attorney General argued that the business caps were consistent with the regulation making power found at paragraph 16(1)(*n*) of the Act. That may be so, but that disposition deals with the Governor in Council's powers, not those of the Superintendent. The business caps represent policies adopted by the Superintendent, acting through the AMB. Consequently, the power to adopt the policies, and to make the appellants' tour operator's license subject to those policies must be found in the Regulations.

[31] The same argument applies with respect to the Agreement. While the Agreement represents the understanding between Canada and CHN as to the means by which they will

exercise joint control of the park reserve, the Agreement cannot give the Superintendent powers beyond those conferred in the Regulations, at least in so far as the issue is framed in administrative law terms. Different considerations may apply if the issue is viewed from the perspective of section 25 of the *Charter*.

[32] The Regulations must be interpreted in context and purposively. *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at paragraphs 97-102. The Regulations are designed to deal with the licensing and control of business in all of Canada's National Parks. Since the park administration does not provide all of the services which park visitors require, it is left to private industry to supply to satisfy the demand for those services. The park administration has an interest in the kind and quality of services available to park visitors. One would not expect that, apart from its interest in preserving the ecological integrity of the park, the park administration's authority would be limited solely to issues of public health and safety, important as they are.

[33] At the risk of being repetitive, I note that the Regulations are made under the authority of section 16 of the Act, and in particular, paragraph 16(1)(*n*) which authorizes the Governor in Council to make regulations in relation to the "*control* of businesses…". It is significant that the Act authorizes more than mere licensing but extends to control, which can only refer to control of the activities of the regulated businesses. The notion of control is carried forward in the opening words of subsection 5(1) of the Regulations:

5. (1) In determining whether to issue a license and under what terms and conditions, if any, the superintendent shall consider *the effect of the business* on: …	5. (1) Le directeur doit, pour décider s'il y a lieu de délivrer un permis et, le cas échéant, en déterminer les conditions, prendre en considération *les conséquences de l'exploitation* du commerce sur les éléments suivants :
[Emphasis added.]	[Non souligné dans le texte.]

[34] The legislator's focus on the effect of the business on the elements enumerated in paragraphs 5(1)(*a*) to (*d*), coupled with the power to issue licenses on terms and subject to conditions indicates a broader discretion than simply to accept or to decline to issue a licence. The Superintendent may issue a licence on terms, and subject to conditions, which are relevant to elements enumerated in the succeeding paragraphs of the section. Counsel for the Attorney General of Canada defended the business caps on the basis that they were designed to protect "the natural and cultural resources of the park" (paragraph (*a*)) and "the preservation, control and management of the park" (paragraph (*d*)). There is a clear connection between the business caps and the control and management of the park in that they seek to foster the preservation of existing services for park visitors and to assure a continuing diversity of services by encouraging the development of small locally based service providers. This is an aspect of the management and control of the park and is sufficient, in and of itself, to justify these two policies. The business caps are also ancillary to the issue of access to and enjoyment of "the natural and cultural resources" of the park in that they incorporate a strategy for assuring continued access to those resources by park visitors.

[35] The application judge came to the same conclusion on the basis that the business caps, limiting the impact of visitors on the park as they did, were justified on the grounds of ecological integrity and preservation of a positive visitor experience. This is a conclusion which was reasonably open to her.

[36] As a result, I am satisfied that the business caps are not *ultra vires* the Superintendent so that this ground of review must fail.

SECTION 15 OF THE *CHARTER*

[37] The application judge, as noted above, dismissed this claim both on the basis of standing and on substantive grounds. In my view, she erred on the issue of standing for the reasons I have set out earlier in these reasons. I believe that the application judge came to the correct conclusion on the substantive issue, though I would not come to that conclusion in the way she did.

[38] In *Law*, the Supreme Court set out the three conditions which must be satisfied in order to make out a claim under section 15 of the *Charter*. The claimant must establish that the law imposes differential treatment between the claimant and others. The differential treatment must be on the basis of an enumerated or analogous ground. Finally, the difference in treatment must be one which affects the human dignity of the claimant "by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise

has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?" *Law*, at paragraph 88.

[39] The difficulty with Mr. Gould's claim is that he is unable to establish that he has been the object of differential treatment because he has his licence and his quota. Consequently, the Haida Allocation Policy does not result in differential treatment between him and a person of Haida ancestry seeking to obtain a licence to do business in the park.

[40] As for the third element of the Law analysis, section 15 does not respond to feelings of injury to dignity arising from a profound disagreement with the object and purpose of a law or other enactment. The loss of dignity must be the result of the loss of an advantage or the imposition of a burden on enumerated or analogous grounds. Since Mr. Gould has everything to which he is entitled, he cannot show a loss of dignity resulting from discriminatory treatment.

[41] As a result, Mr. Gould's challenge to the Haida Allocation Policy under section 15 of the *Charter* fails. The application judge came to the same conclusion on the basis that Mr. Gould had suffered no loss of dignity. As I am of the same view, I see no reason to interfere with her decision on this point.

[42] Whether the Haida Allocation Policy could withstand a section 15 challenge by a non-Haida person seeking to start a new business in the park is a question which we do not

have to answer. Whether the members of the Haida First Nation are a historically disadvantaged group, or suffer from the stereotypical application of presumed group characteristics is a matter of evidence. But, it is clear that the fact that a measure is designed to assist a group with such characteristics does not, in and of itself, shelter it from a section 15 challenge:

> [70]…The fact that the legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee.
>
> [*Law*.]

CONCLUSION

[43] The applicants have failed to show that the application judge erred in finding that the measures which they challenge are not discriminatory, either in the administrative law sense of the term, or, as it relates to Mr. Gould, in the substantive sense of the term under section 15 of the *Charter*. Nor have the appellants established that the application judge came to an erroneous conclusion when she held that the business caps are not *ultra vires* the Superintendent and the Regulations.

[44] I would therefore dismiss this appeal from the application judge's dismissal of the appellants' application for judicial review with costs to the respondents.

"J.D. Denis Pelletier"

J.A.

"I agree
K. Sharlow J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-240-05
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