Date: 20070830

Docket: A-240-05

Citation: 2007 FCA 273

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

BETWEEN:

THE MORESBY EXPLORERS LTD. and DOUGLAS GOULD

Appellants (Applicants)

and

THE ATTORNEY GENERAL OF CANADA and COUNCIL OF THE HAIDA NATION

Respondents (Respondents)

Heard at Vancouver, British Columbia, on March 26, 2007.

Judgment delivered at Ottawa, Ontario, on August 30, 2007.

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] In *Moresby Explorers Ltd. v. Canada (Attorney General)* 2006 FCA 144, [2006] F.C.J. No. 616, this Court noted that the appellants Moresby Explorers Ltd. and Douglas Gould (collectively Moresby) had advised that their challenge to the Haida Allocation Policy (as defined below) was based on Charter grounds only, so that this Court did not have to dispose of Moresby's argument that the Policy was void on grounds of administrative discrimination. Moresby subsequently advised that, in fact, it had not abandoned its argument with respect to administrative discrimination

and requested reconsideration of that part of the Court's decision. As a result, the parties were reconvened for argument on the question of whether the Haida Allocation Policy was invalid on the basis that the enabling legislation did not permit the Superintendent to discriminate between tour operators on the basis of race or size of business.

FACTS

[2] This dispute arises out of the management of the Gwaii Haanas National Park Reserve (the Park) by the Archipelago Management Board (the AMB). The AMB is a structure adopted to permit the Government of Canada and the Council of the Haida Nation to collaborate in the management of the Park without prejudice to either's position in the negotiation of the Haida land claim over a territory which includes the Park. For the details of the AMB's structure and its legal underpinnings, see *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2001 FCT 780, [2001] 4 F.C. 591 (T.D.) at paragraph 67.

[3] In the exercise of its mandate, the AMB has adopted a group of policies limiting access to the Park with a view to protecting its natural and cultural resources. The starting point for those policies was the determination that the Park's carrying capacity was 33,000 user-day/nights per year. The AMB then allocated those user-day/nights equally between three groups, namely, independent users, Haida tour operators, and non-Haida tour operators. As a result, a maximum allocation of 11,000 user-day/nights was available to each group. The AMB also adopted a "Business caps" policy to limit the maximum number of user-day/nights available to any tour operator: 22 client-

days per day, and 2,500 user-day/nights per year. This policy is designed to prevent any single operator from monopolizing Park resources.

[4] The difficulty with the policies adopted by the AMB is that there are no Haida tour operators, while the non-Haida quota of user-day/nights is oversubscribed. Moresby alleges that the 11,000 user-day/nights limitation on non-Haida tour operators is unlawfully restricting the growth of its business.

MORESBY'S SUBMISSIONS

[5] Moresby attacks the Haida Allocation Policy and the Business caps on the ground of administrative discrimination, that is "delegated powers exercised by a subordinate authority (*e.g.* a National Parks superintendent) must be exercised strictly within the ambit of the empowering legislation, particularly where they restrict employment or the right to work.": Moresby's Memorandum, at para. 27.

[6] This argument is succinctly summarized at paragraph 31 of Moresby's Memorandum where the following appears:

> 31. There is nothing in either the *Canada National Parks Act* or *Businesses* Regulations that remotely authorizes a power to discriminate based on race or business size. The *Act*, in s. 4, expressly refers to all the people of Canada. The *Businesses* Regulations, ss. 4.1 and 5, proscribe the licensing discretion in relatively restrictive terms. All statutory provisions focus on the Park and none on the personal characteristics of the licensee. The most that can be said is that a subordinate licensing authority may, by necessary implication, assess the merits and qualifications of individual licence applicants with respect to their competence to carry out the purposes of the legislation. However, the legislation nowhere indicates an intention to allow the Superintendent to fence out or restrict a whole class of applicants on

> the basis of their race or the size of their businesses. This is not within the ambit of this legislation. The purposes of the *Competition Act* cannot be imported into this *Act*.

ANALYSIS

[7] Some preliminary observations are in order.

[8] Moresby's argument is based on administrative law concepts of even-handedness and jurisdiction and not on human rights or equality grounds. Thus, the question of prohibited grounds of discrimination does not arise, in the sense that Moresby's argument is that discrimination between businesses on any basis, including race, is *ultra vires* the enabling legislation, not that it is contrary to the *Charter* or the *Canadian Human Rights Act*. Moresby's *Charter* arguments were considered in our original decision. The only issue before us is whether the AMB, acting through the authority of the Superintendent, was authorized by the governing legislation to regulate the tour operator industry as it has.

[9] It is necessary at this stage to define more precisely what is at issue in the Haida Allocation Policy. In our original decision, we drew a distinction between the Business caps and the Haida Allocation Policy. Business caps were dealt with separately and were found to be legitimate. The allocation of quota between Haida and non-Haida tour operators was referred to as the Haida Allocation Policy. It is this Policy only which we did not analyze on grounds of administrative discrimination. Because the legitimacy of the basis of distinction is not in issue, the question is simply whether the Superintendent has the legislative mandate to distinguish between, or to create, classes of businesses for licensing and regulatory purposes.

[10] While Moresby's arguments focus on the allocation of quota between Haida and non-Haida tour operators, the Haida Allocation Policy deals with three groups: independent visitors, Haida tour operators and non-Haida tour operators. Thus, the Policy fits within a broader policy of managing tourist access to the Park territory so as to preserve its natural and cultural heritage. The Park's carrying capacity is not a function of the availability of tour operators. It is the AMB's best assessment of the extent of the Park's ability to receive visitors without suffering degradation of its natural and cultural resources. To that extent, the fixing of the Park's carrying capacity is not a matter of the *National Parks of Canada Businesses* Regulations, S.O.R./98-455 (the Regulations), but a matter of the management of the Park itself.

[11] The allocation of the Park's total carrying capacity between three groups is an allocation of Park access; in that sense, it is not an allocation of business capacity. The one-third share of the Park access reserved for independent tourists is clearly a reservation of park access for those who choose not to rely upon tour operators for their access to the Park. The allocation of the remaining two-thirds of the Park's carrying capacity between two kinds of tour operators does draw a distinction between tour operators. It is the Superintendent's ability to draw that type of distinction which Moresby challenges.

[12] Moresby's Memorandum puts its position as follows:

> 8. These Appellants do not challenge the "park use" restrictions represented by the overall annual visitor cap of 33,000 user-day/nights, the daily visitor cap of 300 visitors, and the group size per site cap of 12 visitors. These are rationally connected with park preservation purposes. However, the Appellants do challenge other restrictions which are aimed at the personal characteristics of the licensee, namely the restrictions on size of the licensee's business and the race or ancestry of the licensee.

[13] At paragraph 11 of Moresby's Memorandum, the effect of the Haida Allocation Policy is described as follows:

> … In 1999, however, Parks Canada (through the AMB) established the Haida Allocation Policy which segregated the quota by barring access by non-Haida persons to the 11,000 user-days/nights which was reserved for Haida persons. The immediate effect of this was that non-Haida persons were no longer permitted to grow their business, whether by increased allotments or by pooling, until the total "non-Haida" quota allotments fell below 11,000. As the Court below held, since the total "non-Haida" quota allocation for 2004 was 13,778 there was no possibility for business growth if the licensee were a "non-Haida." Haida ancestry became a pre-condition to the allotment of new or increased quota. No sharing of Haida quota with non-Haida persons is allowed.

[14] In essence, Moresby is restricted in its ability to grow to the point of utilizing the full 2,500 user-day/nights cap by the fact that non-Haida operators must share the 11,000 user-day/nights quota allocated to them. If all tour operators were sharing the 22,000 user-day/nights reserved for tour operators, there would be excess capacity and Moresby could expand up to the 2,500 user-day/nights Business cap.

[15] The problem raised by Moresby is simply one of competition for a limited resource. Any quota system carries within it the seeds of the problem of which Moresby complains. At some point, the demand for the subject of the quota system exceeds the total available quota. This, in and of itself, does not give rise to any remedy. If the quota system is lawful – we found that it is – then the resulting competition for user-day/nights is simply a normal consequence of a quota scheme.

[16] In this case, the problem is exacerbated by the fact that while there is unused quota reserved for non-existent businesses (Haida tour operators), the existing tour operators cannot expand their

businesses because the quota reserved for them is oversubscribed. The elimination of the Haida/non-Haida distinction would provide some immediate relief for non-Haida tour operators but the same problem will recur when demand for park access exceeds the quota allocated to tour operators.

[17] Furthermore, once Moresby reaches the individual Business cap of 2,500 user-day/nights per year, it will not benefit from the availability of additional quota for non-Haida tour operators. Its growth will be constrained by the 2,500 user-day/nights Business cap which we have also found to be valid.

[18] Seen in this light, Moresby's complaint about discrimination on the basis of business size is without merit. The 2,500 user-day/nights Business cap ensures that all businesses will remain small businesses even though some will be larger and more successful than others. Every successful tour operator business in the Park will eventually run up against the 2,500 user-day/nights Business cap. There is no discrimination on the basis of business size. The growth of all tour operators, Haida and non-Haida alike, is constrained by the 2,500 user-day/nights Business cap.

[19] The only question remaining is whether the Superintendent has the legislative authority to distinguish between, or to create, different classes of businesses. An analogous issue was raised in *Sunshine Village Corp. v. Canada (Parks) (F.C.A.)*, 2004 FCA 166, [2004] 3 F.C.R. 600 (*Sunshine Village Corp.*), where Sunshine Village argued that setting building permit fees in Banff and Jasper National Parks at a higher rate than in other national parks was unlawful discrimination as it was

ultra vires the Governor in Council. The Trial Division of the Federal Court of Canada (as it then was) accepted Sunshine Village's argument and held that the differential setting of business fees was discriminatory (in the administrative law sense) and was not authorized expressly or by necessary implication by the governing legislation: see *Sunshine Village Corp. v. Canada (Parks) (T.D.)*, 2003 FCT 546,[2003] 4 F.C. 459.

[20] This Court allowed the Crown's appeal on the basis that the legislation authorizing the making of the Regulations which were allegedly discriminatory was broad enough to permit the Governor in Council to draw distinctions between users of different national parks. The Court distinguished the situation before it from the usual rule in municipal law cases, where discriminatory by-laws are prohibited, as follows:

> 18. Unlike the historic practice of the provinces granting specific powers to municipalities, these words, on their face, confer broad authority on the Governor in Council. There is no indication that they are subject to any limitation. The Court must take the statute as it finds it. In the absence of limiting words in the statute, the Court will not read in limitations.
>
> …
>
> 22. The courts have historically required express or necessarily implied authorization in municipalities' governing statutes before the municipalities will be allowed to enact discriminatory by-laws. Conversely, when Parliament confers regulation-making authority on the Governor in Council in general terms, in respect of fees for Crown services, the courts approach the review of such regulations in a deferential manner. That is simply a matter of interpreting, in context, the words Parliament has used in accordance with their ordinary and grammatical meaning.
>
> [*Sunshine Village Corp. v. Canada (Parks) (F.C.A.)*, at para. 18 and 22.]

[21] Since there was no limitation in the governing legislation restricting the Governor in Council's power to set different scales for building fees in different parks, the Court was not

prepared to read them in. The situation is therefore the exact opposite of that which prevails in municipal law where discrimination is prohibited unless it is expressly allowed. In the context of legislation conferring broad regulation making power on the Governor in Council, discrimination (in the administrative law sense) is permitted unless it is expressly prohibited.

[22] Similar views were expressed in *Aerlinte Eireann Teoranta v. Canada (Minister of Transport)*, [1990] F.C.J. No. 170 (F.C.A.), (1990) 68 D.L.R. (4th) 220 (*Aerlinte Eireann Teoranta*) where the issue was landing fees at airports. Higher fees were charged at some airports than at others. This Court upheld the Governor in Council's right to charge different fees at different airports. In the course of upholding the trial judge's decision, Heald J.A. said:

> … I also agree with him that: The power to make regulations prescribing charges for use of facilities and services without further fetter, is the power to establish categories of users.
>
> [*Aerlinte Eireann Teoranta (F.C.A.)*, at p. 228.]

[23] In this case, we are not dealing with a challenge to the Governor in Council's regulation making power, but rather with the exercise of the power conferred upon the Superintendent by those Regulations. The respondent alleges (at para. 46 of the Attorney General's factum) that because the object of Moresby's challenge is a policy adopted pursuant to the Regulations rather than the Regulations themselves, the application cannot succeed, since mere policies (as opposed to decisions based on policies) are not subject to review.

[24] The grounds on which a policy may be challenged are limited. Policies are normally afforded much deference; one cannot, for example, mount a judicial challenge against the wisdom

or soundness of a government policy (*Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, at 7-8). This does not, however, preclude the court from making a determination as to the legality of a given policy (*Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at 751-752; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at 140). Because illegality goes to the validity of a policy rather than to its application, an illegal policy can be challenged at any time; the claimant need not wait till the policy has been applied to his or her specific case (*Krause v. Canada (C.A.)*, [1999] 2 F.C. 476, at para. 16).

[25] Turning to the merits, section 16 of the *Canada National Parks Act* authorizes the Governor in Council to make regulations as follows:

16. (1) The Governor in Council may make regulations respecting	**16.** (1) Le gouverneur en conseil peut prendre des règlements concernant :
…	…
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;

[26] The Regulations deal with the control of business through the licensing process. The material provisions are as follows:

4.1 The superintendent may, on application by a person in accordance with section 4, and having regard to the matters to be considered under subsection 5(1), issue a licence to that person to carry on the	4.1 Le directeur peut, sur présentation d'une demande conforme à l'article 4 et après avoir pris en considération les éléments mentionnés au paragraphe 5(1), délivrer un permis visant l'exploitation du commerce

business indicated in the application.

mentionné dans la demande.

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 persons visiting or residing in the park;

b) la sécurité, la santé et l'agrément des 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.

(2) The superintendent must set out as terms and conditions in a licence

(2) Le directeur doit indiquer à titre de condition dans le permis :

(*a*) the types of goods and services that will be offered by the business; and

a) les types de biens et services qu'offrira le commerce;

(*b*) the address, if any, at which, or a description of the area in the park in which, the business is to be carried on.

b) l'adresse du commerce, le cas échéant, ou une description des lieux du parc où il sera exploité.

(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. DORS/2002-370, art. 10(F).

[27] The regulation making power found in the *Canada National Parks Act* contains no limitation which would prohibit the drawing of distinctions between various classes of businesses. The Regulations promulgated pursuant to that power deal with the regulation of business by means of the licensing power. That power is very broad. The Regulations do not contain any explicit limitation on the Superintendent's power to distinguish between classes of businesses. In fact, subsection 5(3) permits the Superintendent to impose conditions on a business license which depend upon the type of business. Those conditions include matters related to "the preservation, control and management of the park." I have no difficulty concluding that the legislation and the regulations are sufficiently broad to permit the Superintendent to impose conditions on business licenses which vary with the kind of business.

[28] Moresby's argument is that it is one thing to distinguish between a hardware store and a restaurant but quite another to distinguish between a Haida owned business and a non-Haida owned business. The nature of the business being regulated may require special conditions to be imposed; the personal characteristics of the owner of the business do not impose a similar requirement. In fact, given human rights legislation and the equality provisions of the *Charter*, conditions or limitations based on race are generally contrary to public policy.

[29] In my view, the question of administrative discrimination resolves itself as follows. The regulation making power conferred upon the Governor in Council by the *Canada National Parks Act* is not limited so as to prohibit discrimination between classes of business. Thus the Governor in Council is competent to promulgate regulations which authorize discrimination (in the administrative law sense) between individuals and businesses. This, in itself, sets the present case apart from the municipal law cases relied upon by Moresby where the delegated authority, the municipal council, lacks the power to discriminate unless it is specifically conferred by the legislation.

[30] The Regulations passed by the Governor in Council contemplate distinctions being drawn between businesses, but not, says Moresby, the type of distinction being drawn in this case. As noted earlier, administrative law discrimination deals with drawing distinctions, as opposed to the basis on which such distinctions are drawn. Unless the distinction drawn by the Superintendent can be shown to be contrary to public policy, there is nothing in the Regulations which would preclude the type of distinction being drawn here. In the end the question is whether the allocation of access to the Park between Haida and non-Haida tour operators is contrary to public policy.

[31] Public policy takes its color from the context in which it is invoked. Discrimination on the basis of race is contrary to public policy when the discrimination simply reinforces stereotypical conceptions of the target group. However, there is legislative support for the proposition that discrimination designed to ameliorate the condition of a historically disadvantaged group is acceptable. See, for example, section 16 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6,

where Parliament authorizes the adoption of special programs designed to prevent or reduce disadvantages suffered by groups when those disadvantages are based on prohibited grounds of discrimination. See also the *Employment Equity Act*, S.C. 1995, c. 44, which mandates programs designed to increase the representation of visible and other minorities in the workplace. Even the *Charter of Rights and Freedoms* contains a reservation at subsection 15(2) to the effect that the constitutional guarantee of equality "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". Consequently, the proposition that discrimination based on race is contrary to public policy is too broad. Discriminatory provisions designed to ameliorate the condition of the historically disadvantaged are not contrary to public policy.

[32] The rationale given for the Haida Allocation Policy is found at paragraph 45 of the affidavit of Anna Gadja, sworn March 28, 2004, (Tab 6 – Compendium of Evidence of the Respondent Attorney General of Canada) where the following appears:

> 45. One of the principal reasons for setting aside a portion of the overall allocation for Haida commercial tour operators was that Haida businesses had been "frozen out" of the Park Reserve by the AMB following the introduction of the business licensing system in 1996 and the decision not to license any new businesses. That was not the case in 1993, at the time the Gwaii Haanas Agreement was created, and the Agreement does not speak to that issue directly. Given the spirit of the Gwaii Haanas Agreement, under which both parties share and cooperate in the planning, operation, and management of the Archipelago, it was decided by the AMB to correct this inadvertent circumstance whereby the Haida had been "frozen out" of opportunities to participate in commercial tour operations in Gwaii Haanas by creating a separate Haida allocation pool.

[33] The "freezing out" of Haida businesses to which Ms. Gadja refers was the result of the AMB decision to freeze tour operations in the Park at the time that the business licensing system was introduced. As there was only one Haida tour operator at the time (which subsequently lost its license for inactivity), the Haida were effectively precluded from acquiring tour operator licenses by the AMB's own policy.

[34] A further consideration in the decision to allocate one-third of the available quota to Haida tour operators appears in the affidavit of Ernie Gladstone, sworn April 1, 2004 (Tab 15 – Compendium of Evidence of the Attorney General of Canada):

> 11. Given the importance of Haida culture to the Park Reserve and to the visitor experience, the AMB considered the possibility of a complete lack of Haida participation in the conducting of commercial tours in the Park Reserve to be unacceptable, as this would have resulted in a considerable void in the interpretation of the area's natural and cultural heritage.

[35] This is squarely within the mandate given to the Superintendent by subsections 5(1)(*a*) and (*d*) of the Regulations.

[36] In the end result, I conclude that the Regulations authorize the Superintendent to discriminate between classes of businesses and that the distinction drawn on the racial or ethnic origin of the owners of commercial tour businesses is not a distinction which is void on public policy grounds.

[37] It follows from this that Moresby's argument with respect to administrative discrimination fails. As a result, I would dismiss Moresby's appeal.

CONCLUSION

[38] In conclusion, I am of the view that the distinction drawn by the Superintendent, acting through the AMB, between Haida and non-Haida tour operators is not *ultra vires* the Superintendent on the basis that it results in discrimination between classes of businesses which is not authorized by the governing legislation. In my view, the Regulations are wide enough to include the power to draw such distinctions or, following this Court's decision in *Sunshine Village Corp.*, there is nothing in the Act or the Regulations which would prohibit such a distinction.

[39] I would therefore dismiss this aspect of the appeal. This decision, taken with our decision with respect to the balance of the issues, would lead me to dismiss the whole of Moresby's appeal.

"J.D. Denis Pelletier"
J.A.

"I agree
M. Nadon J.A."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Christopher Harvey, Q.C.	FOR THE APPELLANTS
Sean Gaudet	FOR THE RESPONDENT, AGC
Louise Mandell, Q.C. and Mary Locke Macaulay	FOR THE RESPONDENT, Council of the Haida Nation

SOLICITORS OF RECORD:

MacKenzie Fujisawa Vancouver, British Columbia	FOR THE APPELLANTS
John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT, AGC
Mandell Pinder Vancouver, British Columbia	FOR THE RESPONDENT, Council of the Haida Nation