

Date: 20080221

Docket: A-287-06

Citation: 2008 FCA 71

**CORAM: DESJARDINS J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

Aurélien Haché, Lucien Chiasson, Sylvie Chiasson, Armand Fiset, Jeannot Guignard, Héliodore Aucoin, Gildard Haché, Guy Haché, Rhéal Haché, Robert F. Haché, Greg Hinkley, Vincent Jones, Solange Lanteigne, Jean-Pierre LeBouthillier, Rhéal H. Mallet, André Mazerolle, Eddy Mazerolle, Albanie Noël, Alphé Noël, Serge C. Noël, Gilles Noël, Joseph A. Noël, Lévi Noël, Lorenzo Noël, Martin Noël, Mathurin Noël, Nicolas Noël, Onésime Noël, Paul Noël, Raymond Noël, Renald Noël, Robert Ross, Bruno Roussel, Jean-Camille Roussel, Valmi Roussel, Donat Vienneau, Fernand Vienneau, Rhéal Vienneau, Mathias Roussel, Serge Blanchard, Robert Boucher, Elide Bulger, Jean-Gilles Chiasson, Roméo G. Cormier, Bernard Duguay, Thomas Duguay, Donald Duguay, Edgar Ferron, Wilbert Godin, Aurèle Godin, Valois Goupil, Euclide Guignard, Florent Guignard, Jacques E. Haché, Jean-Pierre Haché, Robert G. Haché, Donald R. Haché, Ulysse Haché, Gaetan H. Haché, Gabriel Jean, Jean-Victor Larocque, Dassisse Mallet, Delphis Mallet, Albert A. Noël, Gilles A. Noël, Domitien Paulin, Sylvain Paulin, Alma Robichaud, Administrator of the Estate of Jean-Pierre Robichaud, Sylva Haché, Mario Savoie, Les Pêcheries Jimmy L. Ltée, Eric Gionet, Administrator of Allain O. Gionet Trust, Les Produits Belle-Baie Ltée, Olivia Roussel, E. Gagon et Fils Ltée, Bernard Arseneault, Gérard Cassivi, Jacques Collin, Raymond Collin, Robert Collin, Marc Couture, Les Crustacées de Gaspé Ltée, CIE 2973-1288 Québec Inc., CIE 2973-0819 Québec Inc., Bruno Duguay, Charles-Aimé Duguay, Alban Hautcoeur, Fernand Hautcoeur, Jean-Claude Hautcoeur, Robert Huard, Christian Lelièvre, Elphège Lelièvre, Jean-Élie Lelièvre, Jules Lelièvre, Jean-Marc Marcoux, Douglas McInnis, Roger Pinel, Jean-Marc Sweeny, Michel Turbide, Rhéal Turbide, Pêcheries Denise Quinn Syvrais Inc., Steven Roussy, Geneviève Allain, Francis Parisé, Martial LeBlanc, Daniel Desbois, Rolland Anglehart, Jacques Langis, Jean-Pierre Huard, Claude Gionet, Carol Duguay, Denis Duguay, Paul Chevarie, Thérèse Vigneau, Administrator of the Estate of Benoît Poirier, Denis Éloquin, Claude Poirier, Henry-Fred Poirier, Robert Thériault and Raynald Vigneau,

Appellants

and

Her Majesty the Queen in Right of Canada as represented by the Department of Fisheries and Oceans and the Department of Human Resources Development Canada,

Respondents

Hearing held at Fredericton, New Brunswick, on February 21, 2008.

Judgment delivered from the bench at Fredericton, New Brunswick, on February 21, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

DESJARDINS J.A.

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Appellants

and

Her Majesty the Queen in Right of Canada as represented by the Department of Fisheries and Oceans and the Department of Human Resources Development Canada,

Respondents

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Fredericton, New Brunswick, on February 21, 2008)

DESJARDINS J.A.

[1] The appellants are appealing the judgment of a Federal Court judge dismissing their action

[2006] F.C.J. No. 1188 (QL), 2006 FC 940.

[2] The appellants are asking the Court to order a new trial. They maintain that the trial judge's refusal to grant them an adjournment for a reasonable period of time to enable their new counsel to adequately prepare amounts to a denial of natural justice or a breach of procedural fairness.

[3] In his reasons, the trial judge describes the history of the proceedings that are the basis of this dispute.

[4] For purposes of this appeal, it is sufficient to point out that the trial dates had been fixed by order of the Court Administrator in accordance with the directions of the Chief Justice of the Federal Court more than a year earlier, on April 1, 2005. The three-week trial was scheduled to begin on April 3, 2006.

[5] This order complied with the order of Mr. Justice Hugessen dated November 26, 2004, to the Court Administrator, which specified that the trial should not take place during May and June 2006.

[6] Then, in a letter dated March 27, 2006, to the Court Administrator, the appellants asked that the trial judge recuse himself. This request, which was subsequently made on motion, was dismissed by the trial judge on April 4, 2006.

[7] The appellants subsequently filed a notice of change of solicitor. Ms. Sivret described the circumstances surrounding this change of solicitor to the trial judge as follows: (see Appeal Book, vol. I, tab 6, pp. 169 to 170, transcript of April 5, 2006):

[TRANSLATION]

MS. SIVRET: Well, I may be using the wrong words, but Mr. Rogers and Mr. Delaquis, from what I understood, they found themselves in a conflict of interest with their clients, and there was, I don't know if it was a discontinuance or a- a- a withdrawal of services or a breakdown of the solicitor-client relationship, but I was asked to-to-if I wanted to meet with the lawyers. And knowing very little about it, I was contacted by Mr. Rogers who simply informed me of, of the status of the case, and I agreed to issue a notice of change of solicitor, perhaps prematurely. I, I admit this, but the people involved in this proceeding are also clients-

MR. JUSTICE DE MONTIGNY: Hm-hmm.

MS SIVRET: - of my firm in other, in other proceedings. So, you will understand that at a purely business level, I acted as a-as a- practising lawyer in business when I said to myself if I can, if I can represent these clients - in an unusual situation, then I, I decided to issue a notice of change of solicitor. Because I was advised, I was advised that the solicitor-client relationship had broken down between the, the clients and the, Mr. Rogers and Mr. Delaquis. So, by using a notice of discontinuance, I did not want to mislead the Court. . . .

[Emphasis added.]

The appellants had therefore decided to change solicitors even though the trial was about to start.

Ms. Sivret, the new solicitor of record, then asked for an adjournment to familiarize herself with the case. This first adjournment, *sine die*, was granted on April 5, 2006.

[8] The trial judge explained at paragraph 17 of his reasons that, after hearing the parties again on April 18, 2006, he concluded that an adjournment should be granted in the circumstances, out of fairness, but that it would not be appropriate to adjourn the hearing to the fall, as Ms. Sivret was requesting. Considering that this action had been commenced more than four years earlier, that the trial date had been fixed more than a year earlier, that the plaintiffs had voluntarily decided to change solicitors, that Ms. Sivret had accepted this mandate with full knowledge of the situation, and that two months seemed to the judge to be sufficient for counsel to familiarize herself with the case and prepare for the hearing, he ordered that the trial commence on June 19, 2006.

[9] This order of the trial judge was not appealed.

[10] On June 14, 2006, Ms. Sivret advised the Court Registry of the list of her witnesses as well as the date, duration and contents of their testimony as follows (see Appeal Book, vol. II, tab 10, pp. 456-458):

[TRANSLATION]

Bathurst, June 14, 2006

Ms. Marie Chalifoux
Registry Officer
Federal Court
82 Elgin Street
Ottawa, Ontario K1A 0H9

Re: Aurélien Haché et al. –v. Her Majesty the Queen of Canada
et al. - Docket: T-2263-01

Dear Ms. Chalifoux,

Pursuant to the request made by Mr. Justice De Montigny on Friday, June 9, 2006, I am enclosing the list of witnesses whom I intend to call at trial along with a short summary of the anticipated testimony of each of these witnesses.

The length of time indicated for the testimony is only an estimate, calculated by taking into account the possibility of cross-examinations.

Date	Name	Summary
June 19, 2006	Rhéal Vienneau, Regional Director, DFO, Gulf Region	Mr. Vienneau will be called as an opposing witness under Rules 4 (Federal Court) and 55 (New Brunswick). He will be asked to identify a number of documents prepared by DFO employees. He will also testify about the relationship and the exchanges between the DFO and the plaintiffs from 1994 to 2003, including the negotiation of the 1996 agreement and the imposition of the 1997 Multi-Year Management Plan, which included the plaintiffs' contribution to the Solidarity Fund.
June 20, 2006	Rhéal Vienneau	Continuation of his testimony and cross-examination.
June 20, 2006	Robert Haché	Commencement of his testimony about the relationship and the exchanges between the DFO and the plaintiffs. He will explain the context in which the DFO imposed the 1997 agreement on the plaintiffs.
June 21, 2006	Robert Haché	Continuation of his testimony and cross-examination.
June 21, 2006	Douglas McGinnis	Fisherman from the Gaspé Peninsula who will testify as to how the DFO imposed the 1997 Multi-Year Management Plan on the plaintiffs. He will also explain how the Solidarity Fund operated in the Gaspé Peninsula.
June 21, 2006	Daniel Desbois	Fisherman from the Gaspé Peninsula who will testify about his relationship with the DFO and corroborate

		Douglas McGinnis' testimony regarding the DFO's imposition of the Solidarity Fund on the plaintiffs.
June 22 2006	Valois Goupil	Fisherman from New Brunswick who will testify about his relationship with the DFO and the DFO's imposition of the Solidarity Fund. He will also talk about his experiences with the operation of the Fund in N.B.
June 22, 2006	Bernard Duguay	Fisherman from New Brunswick who will testify regarding his involvement in the joint economic study by the industry and the DFO regarding the DFO's imposition of the Fund and its impact on the relationship between the fishers and the factory workers.
June 22 2006	Wilbert Godin	Fisherman from the DFO who will testify as to his relationship with the DFO and the imposition of the Solidarity Fund in 1997 and its impact on the relationship between the crabbers and the factory workers.
June 22, 2006	Marc Couture	Fisherman from the Gaspé Peninsula who will testify about his relationship with the DFO and the DFO's imposition of the Solidarity Fund.
June 23, 2006	Georgio Gaudet, former Chief of Staff for Premier Frank McKenna	Will testify about the negotiations between the province of New Brunswick and the federal Ministers regarding the 1997 Management Plan and the measures that were taken to force the fishers and other industry stakeholders to support the creation of the Solidarity Fund in order to resolve the Employment Insurance problem created by the 1996 resource sharing and the January 1997 amendments to the Employment Insurance Act.

June 23, 2006	The Honourable Frank McKenna, former Premier of New Brunswick	He will corroborate Georgio Gaudet's testimony.
June 23 to June 26, 2006	The Honourable Douglas Young	Will testify about the strategy used by the DFO and HRDC to impose a solution on the plaintiffs of a problem created by the DFO's 1996 decision on resource sharing and the HRDC's decision on employment insurance.
June 26, 2006	André Gauvin	Expert in accounting who will testify about what he said in his affidavit regarding Mr. Gilles Thériault's statement as to the proposed benefits (evidence to refute Gilles Thériault's statement).
June 26, 2006	Peter Dysart	Will testify about the New Brunswick processors' position on the creation and imposition of the Solidarity Fund.

The Honourable Frank McKenna, witness for the plaintiffs, will testify in English. I intend to question him in English. Simultaneous translation services will only be required for the plaintiffs during the cross-examinations of the Anglophone witnesses for the defendants, i.e., Jim Jones, Douglas Cameron and Ted Gale, whom I will be cross-examining in French.

I trust the above is satisfactory.

Yours truly

Brigitte Sivret

c.c. Patterson Palmer

[11] Other developments took place: in particular, two witnesses were subpoenaed, the Honourable Douglas Young, former federal cabinet minister at the relevant time, and Mr. Frank McKenna, Premier of New Brunswick during the same period. The trial judge described the

developments in detail at paragraphs 18 to 24 of his reasons. The order that he subsequently issued is under appeal in docket A-265-06. Finally, on June 19, 2006, after requesting an adjournment, which was refused, Ms. Sivret stated that, under the circumstances, she had no evidence to adduce. The judge dismissed the action.

[12] We note that the new solicitor of record was well aware of the Court's timetable. According to the affidavit of Michel Audet, Regional Director, Policy and Economics Branch, Department of Fisheries and Oceans, Gulf Region, an affidavit which was not contradicted (Appeal Book, vol. II, p. 276), following the appellants' change of solicitor, the trial judge, at a meeting with counsel in his chambers on April 5, 2006, had clearly indicated to Ms. Sivret [TRANSLATION] "that a two-month adjournment would be the maximum he could grant and that if Ms. Sivret could not comply with this timetable because of other professional commitments, she should consider not taking the case." When the trial judge refused the adjournment requested at the hearing on June 19, 2006, the trial judge said the following to Ms. Sivret: (Appeal Book, vol. II, tab 10, p. 409 to 412):

JUSTICE MONTIGNY: I have read your affidavit, Ms. Sivret, and I also consulted the, the Sgayias text on the Rules of Court as well as the jurisprudence and, interestingly, I also read the order that I made in the month of April, the 18th, and I must say that, for all practical purposes, I could rewrite the same order today. There are several factors that prompt me to dismiss your motion for a stay. First, the fact that again and at the risk of repeating myself, the trial had been scheduled to start on April 3, as you know, and that date was fixed more than a year ago. The action was commenced almost five years ago now. The plaintiffs chose, it was their prerogative to change solicitors in April and of course the lawyer, in this case you, Ms. Sivret, you agreed to take the case. It was your choice. I understand and you know I've said this many times already but I repeat it here today, I sympathize because I know it isn't easy, especially when a lawyer is a sole practitioner and has many files to manage. I understand the situation perfectly, but nonetheless when the plaintiffs, your clients, approached you, it was your choice to accept the file and you did so with full knowledge of the situation because – you remember we spent some time in my chambers exploring various options to give you, of course, the chance to prepare, which was completely legitimate. But, at the same time, I indicated to you at the

time that it appeared to me to be out of the question to adjourn the hearing of this case beyond the month of June because that would realistically bring us into the month of December at the latest, since I had other cases on my calendar until then. So, I thought that two months was completely reasonable, and, and you accepted this proposal at the time. And, again, I think that there would be serious prejudice in not proceeding today for the witnesses who have been subpoenaed, some of them are here, for the defendants, for the plaintiffs also, I think it's in everyone's interests that this case proceed as quickly as possible. And clearly the Court would also be prejudiced because my time has been set aside for these three weeks. I agreed to a stay in the month of April despite the inconvenience caused to the Court because I had also been scheduled for three weeks then. Therefore, for all these reasons, Ms. Sivret, I am going to dismiss your stay motion. Having said that, I can assure you that the Court will show indulgence and co-operation and understanding, and I'm sure that your colleagues also understand your situation. I'm aware that this will probably mean some long hours for the next few weeks but if it's any consolation, I think I also told you this on Friday, you will not be the only one. Accordingly, the motion is dismissed. It is already 11:35 a.m. I'm aware that a relatively short timeframe has been set aside for this case. By the same token, I don't know which is more appropriate, to begin immediately or to adjourn until perhaps 1:00 this afternoon to really begin. I, I – I'm in your hands, Ms. Sivret, on this issue. I don't have any particular preference.

[Emphasis added.]

[13] We also note that the appellant clients themselves decided on April 5, 2006, to change solicitors just as the trial was about to begin and that, on June 19, 2006, they gave instructions to Ms. Sivret to advise the Court that, under the circumstances, they did not intend to adduce any evidence.

[14] Ms. Sivret said the following to the Court (Appeal Book, vol. II, tab 10, pp. 412-414):

MS. SIVRET: Well, your Honour, since you've just made a decision to dismiss the request for an adjournment, I have instructions from my clients to advise the Court that, under these circumstances, no, that there is no evidence. There is – there is – I believe that there is a lot of evidence that would allow my clients to establish the cause of action and I am doing this in – for the first time, I, in my twenty years of, of practice, I am advising the Court that the plaintiffs will not adduce any evidence in this context and because of the circumstances. I was, I was able to adequately

prepare it. So, you will have to, will have to decide the case without evidence from the plaintiffs, Your Honour. Perhaps that will make your job easier and that of, of my colleagues.

JUSTICE DE MONTIGNY: Not, not necessarily. On the contrary.

MS. SIVRET: But, I have, I have instructions to, to advise the Court. So, I want to advise the Court at the earliest opportunity. We, for us, it's impossible to adduce evidence in the situation that we were in, that we got ourselves into, because I, I accept part of the responsibility. The plaintiffs will not be presenting any evidence because they've been unable to prepare, and we'll see what the result will be.

JUSTICE DE MONTIGNY: So you only intend to make submissions at the end –

MS. SIVRET: Since we're not –

JUSTICE DE MONTIGNY: - on the merits.

MS. SIVRET: - adducing any evidence, I will not have any submissions to, to make on the merits, Your Honour.

JUSTICE DE MONTIGNY: So, you will not be making any submissions –

MS. SIVRET: But –

JUSTICE DE MONTIGNY: - either written or oral. That is what I understand.

MS. SIVRET: Without any evidence, I can't – You know, usually we make submissions on how the law applies to the evidence that we've adduced. I can't do, present evidence on behalf of my clients. So, what I've been instructed to do is to advise the Court that they will not be presenting any evidence. So- I know that this is difficult but those are my instructions, Your Honour, so – Under the rules, you have, as you know, the power to, to close my, my presentation of my evidence.

JUSTICE DE MONTIGNY: Yes, but in fact, that is not what I would like to do. I would prefer to, to have evidence of the facts from both parties but –
[Emphasis added.]

[15] The judge believed in good faith that the trial could proceed, and the letter from Ms. Sivret dated June 14, 2006, listing her witnesses for the week of June 19 to 26, 2006, made this very clear.

[16] The situation was certainly not ideal for Ms. Sivret, but the judge obviously did not believe that the lawyer was about to withdraw. When Ms. Sivret told the judge that she would not be adducing any evidence after he refused the adjournment, his comments reveal his great surprise, faced with this unexpected dénouement. However, it was too late; the judgment refusing the adjournment had already been rendered and he could not reverse it.

[17] Under the circumstances, he had no choice but to dismiss the action. He did not err in so doing.

[18] We want to be very clear: in our view, the judge was misled by the appellants when they requested an adjournment, knowing that regardless of the judge's decision the case would not proceed. In these circumstances, the judge cannot be held responsible in any way for ending the trial by refusing the adjournment because he had no idea of the appellants' real intentions.

[19] The appeal will be dismissed with costs.

“Alice Desjardins”

J.A.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-287-06

STYLE OF CAUSE: Aurélien Haché et al. v. Her Majesty
the Queen et al.

PLACE OF HEARING: Fredericton, N.B.

DATE OF HEARING: February 21, 2008

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Noël J.A.
Trudel J.A.

DELIVERED FROM THE BENCH BY: Desjardins J.A.

APPEARANCES:

Bernard Jolin For the appellants
Patrick Ferland

Michel Doucet For the respondents
Christian Michaud

SOLICITORS OF RECORD:

Heenan Blaikie For the appellants
Montréal, QC

Cox & Palmer For the respondents
Moncton, N.B.