Federal Court of Appeal | Cour d'appel fédérale

Date: 20230727

Docket: A-257-21

Citation: 2023 FCA 170

CORAM: **GAUTHIER J.A.**
RIVOALEN J.A.
ROUSSEL J.A.

BETWEEN:

THE OWNERS, CHARTERERS AND ALL OTHERS INTERESTED IN THE SHIP M/V "INUKSUK I" AND INUKSUK FISHERIES LTD. AND BAFFIN FISHERIES COALITION
and
THE OWNERS, CHARTERERS AND ALL OTHERS INTERESTED IN THE SHIP M/V "SIVULLIQ" AND REMOY FISHERIES LTD. AND BAFFIN FISHERIES COALITION

Appellants

and

SEALAND MARINE ELECTRONICS SALES AND SERVICES LTD

Respondent

Heard at Ottawa, Ontario, on December 8, 2022.

Judgment delivered at Ottawa, Ontario, on July 27, 2023.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: RIVOALEN J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] The appellants are contesting a decision of the Federal Court (2021 FC 887) (the Federal Court Decision) granting the respondent its two actions *in rem* and in *personam* against them (as owners of the vessels sued *in rem*) for the payment of goods and services provided to the M/V "SIVULLIQ" ($171,396.46) (T-1837-17) and the M/V "INUKSUK I" ($13,368.06) (T-1836-17).

[2] In its decision, the Federal Court also held that the appellants had not established that they were entitled to rely on equitable set-off as a defence to the respondent's claim. This so-called "cross-claim" (a term used in these reasons to refer to the claim at the basis of the defence of equitable set-off and not in the traditional sense of a cross-claim against a co-defendant), that the appellants raised in their amended statements of defence, dated October 30, 2020, was substantially the same as what had been raised in their prior counterclaims against the respondent, which were discontinued on September 24, 2020. The cross-claim relates to an alleged fraudulent scheme by the respondent in collusion with at least the former Fleet Manager and the former CEO of Baffin Fisheries Coalition (Baffin) to facilitate the purchase of non-marine goods and services on the account of Baffin, goods that were misdescribed on some of the respondent's invoices as marine electronics and related equipment for Baffin's vessels.

[3] Before us, the appellants do not contest the Federal Court's conclusion that the respondent had met its burden of establishing its claim for the supply of the marine equipment and services provided under the three invoices on which it based its claim (respondent's invoices #103366, 103367, and 103386).

[4] There is no issue that, in respect of those marine goods and services, the Fleet Manager had both the ostensible and actual authority to bind the owners of the two vessels.

[5] The appellants did not contest the Federal Court's findings that they had failed to establish their allegation of conspiracy and conversion or any factual findings leading to the conclusion that they had also failed to establish fraud, conspiracy or conversion. The appellants only contest what they allege to be two errors of law by the Federal Court (found in the Federal Court Decision at paragraphs 240 and 264) which, in their view, are sufficient to justify the intervention of this Court to either render the judgment that should have been rendered or order a new trial.

[6] Before the hearing of this appeal, the panel had directed the parties to be prepared to address the issue of the jurisdiction of the Federal Court to deal with the appellants' defence of equitable set-off. At the hearing, the appellants advised that they needed more time to respond to this Court's Direction. It was agreed that written submissions could be submitted after the hearing.

[7] For the following reasons, I find that the Federal Court erred in concluding that it had jurisdiction to deal with the cross-claim raised as a substantive equitable defence. I thus propose to dismiss the appeal on that basis.

[8] This appeal was heard together with the appeal in file number A-195-22, relating to the Federal Court's Order dealing with the costs. This second appeal was filed purely to preserve the

appellants' right to have the costs award set aside should they be successful in the present appeal. No other argument was raised with respect to the merits or quantum of the costs granted by the Federal Court. There is no need to issue a distinct set of reasons. As these two appeals were not formally consolidated, I propose that a separate judgment dismissing the appeal in file A-195-22 be issued without costs.

I. Background

A. *The Parties and the Procedural Context*

[9] Inuksuk Fisheries Ltd. and Remoy Fisheries Ltd. are bodies corporate and, together with Baffin Fisheries Coalition, were respectively the owners of the M/V "INUKSUK I" and M/V "SIVULLIQ" when the actions began (Federal Court Decision at paras. 7–8).

[10] At some point before October 30, 2020, it appears that both Inuksuk Fisheries Ltd. and Remoy Fisheries Ltd., which were subsidiaries of Niqitaq Fisheries Ltd., and others, were amalgamated to "form the amalgam Niqitaq Fisheries Ltd." (Federal Court Decision at para. 19).

[11] Baffin Fisheries Coalition (Baffin) was a not-for-profit corporation registered under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. It was owned by five Hunting and Trapping Organizations (HTOs), each associated with a community in Nunavut. The five communities are Pond Inlet, Pangnirtung, Clyde River, Kimmirut and Iqaluit. Although the exact corporate structure is not in evidence, it appears that Niqitaq was the operating arm of Baffin.

Mr. Chris Flanagan, the current CEO of Baffin, testified that they have essentially the same financial statements (Federal Court Decision at para. 109; Appeal Book, Vol. 4, p. 985).

[12] The respondent provides and installs marine electronic equipment and other shipboard equipment to vessels. It has been in business for more than 20 years, while its sole owner has worked in the field of marine electronics for more than 30 years. It has been providing Baffin and its related companies with marine material and services since about 2007 (Federal Court Decision at paras. 6, 245, 253).

[13] The two actions were instituted by the respondent on November 30, 2017. Warrants of arrest were issued and the two defendant ships were arrested to obtain security for the respondent's claims. Such security was filed by the *in personam* defendants on December 29, 2017 and January 3, 2018, in the amounts of $188,536.11 ("INUKSUK I") and $14,704.86 ("SIVULLIQ") respectively. During that period, the respondent also instituted proceedings before the General Division of the Supreme Court of Newfoundland and Labrador against the *in personam* appellants in respect of the non-marine equipment it supplied to Baffin. Baffin filed counterclaims and initiated a proceeding based on the same alleged fraudulent scheme (case numbers 2017 01G 7709, 2017 01G 8186, 2020 01G 0704).

[14] On December 18, 2017, the appellants filed their statements of defence and counterclaim in the two actions before the Federal Court seeking payment of an amount of $512,840.00. In the said counterclaims, the defendant essentially alleged a fraudulent scheme perpetrated by the

respondent, together with Baffin's Fleet Manager and its then CEO, to obtain non-marine items for the sole use and benefit of persons other than Baffin.

[15] The two actions before the Federal Court were consolidated by an order from Prothonotary Morneau on February 8, 2018. A pre-trial conference with the case management judge was held on July 21, 2020. It appears that the respondent was asked whether it still intended to bring a preliminary motion to strike the counterclaim on the basis that the Federal Court had no jurisdiction and, if so, the parties were requested to clarify their intention. Notices of discontinuance for the appellants' counterclaims were filed on September 24, 2020.

[16] On October 30, 2020, the appellants filed amended statements of defence, in which they advanced a defence of equitable set-off based on substantially the same allegations of fraud and unlawful conversion as they had argued in their discontinued counterclaims; however, although this was not made clear until the closing arguments, the quantum of the equitable defence was reduced to the amount of $264,084.00 (Appeal Book, Vol. 5, p. 1139). In its closing submissions before the Federal Court, the respondent objected to the appellants' calculation of the quantum of equitable set-off for several reasons, including that the calculations contained errors, did not accurately reflect mark-ups, and did not include the amounts recovered by Baffin for non-marine items and resold by it or that Baffin collected from the former CEO. In the respondent's view, the quantum included in the closing submissions was not supported by the actual evidence presented at trial.

[17] Before trial, the parties submitted the following list of issues to be determined at trial.

> (a) Did the Plaintiff and Defendants have a valid and enforceable contract for the supply of equipment and services for and on account of each of the vessel *M/V "INUKSUK I"* (T-1836-17) and the vessel *M/V "SIVULLIQ"* (T-1837-17)?
>
> (b) Did the Plaintiff supply the contracted equipment and services to the Defendants for each of the vessel *M/V "INUKSUK I"* (T-1836-17) and the vessel *M/V "SIVULLIQ"* (T-1837-17)?
>
> (c) What is the amount owing to the Plaintiff, if any, for the work performed on the vessel *M/V "INUKSUK I"* (T-1836-17) and the vessel *M/V "SIVULLIQ"* (T-1837-17)?
>
> (d) Has the Plaintiff participated in a fraud or converted the property of the Defendants' corporations?
>
> (e) Are the Defendants entitled to claim an equitable set-off in each of the files T-1836-17 and T-1837-17, and if so what is the amount of their entitlement?

(Federal Court Decision at para. 129)

[18] In addition to this, the respondent had filed a motion challenging the jurisdiction of the Federal Court to deal with the defence of equitable set-off.

[19] The respondent's claims related to the services and parts described in the following three invoices:

i. Invoice #103367 dated August 8, 2017 (M/V "SIVULLIQ"), in the amount of $155,502.31, relates solely to marine equipment supplied to the vessel (Federal Court Decision at paras. 32, 149–59);

ii. Invoice #103386 dated September 12, 2017. The only amount sought by the respondent was $15,894.15, which relates to marine equipment actually provided to the vessel. Although this invoice does include a chainsaw and two ATVs (Federal

Court Decision at paras. 34, 195), no amount relating to these non-marine supplies are included in the main claim or in the quantum of the cross-claim of the appellants (Federal Court Decision at paras. 34, 166–70);

iii. Invoice #103366 dated August 7, 2017. The amount for which the respondent was seeking judgment against the vessel *in rem* was $13,368.06. Again, although this invoice actually included four dirt bikes, no amount was claimed in respect of these items by the respondents in the main claim or the appellants in the cross-claim (Federal Court Decision at paras. 36–37, 160–65).

[20] Although, as mentioned above, none of the non-marine items misdescribed in the two invoices referred to above are part of the appellants' cross-claim, the appellants submit that these invoices are part of their documentary evidence establishing fraud against Baffin.

[21] It is worth mentioning that, although the two ATVs and dirt bikes were generally described as recreational equipment, such equipment may be viewed differently by Inuit communities living in Nunavut and carrying out their traditional activities. The evidence before the Federal Court indicated that the equipment ordered (including some snowmobiles on other invoices) was to be "suitable for heavy snow conditions, or for hauling heavy loads, or … equipped for hunting and fishing activities", "suitable for deep snow", and "suitable for mud and snow, capable of hauling heavy loads" (Federal Court Decision at paras. 62, 226–27). The evidence before the Federal Court also indicated that these items were either destined for the North, for the operations of Baffin in the North, as employee benefits to compensate for reduced salaries, or as a bonus and signing incentive (Federal Court Decision at paras. 233–34).

[22] The appellants presented five witnesses, including the former Fleet Manager and the former CEO of Baffin. The Federal Court found that, because these two witnesses were not declared hostile or adverse witnesses, their evidence formed part of the appellants' case (Federal Court Decision at paras. 218–19). The Federal Court accepted that the Fleet Manager and the CEO acted on the direction of the former CFO of Baffin (Federal Court Decision at paras. 192, 197, 220, 238). The Federal Court also noted that the appellants didn't produce any internal financial documents, such as the forensic audit and the business analyst's report prepared after the suspension of the Fleet Manager, the CEO and the then CFO, nor did they call the former CFO as a witness (Federal Court Decision at paras. 215–16, 278).

[23] No evidence was offered from board members, either to explain the objectives of the corporation or how, despite the knowledge of its CFO, CEO and Fleet Manager, the corporation would have been deceived by the misdescription on the invoices relied upon by the appellants for their cross-claim. No evidence contradicted the testimonies of the witnesses that indicated that many non-marine items were purchased on the account of Baffin for the benefit of board members, including the president of the board, the vice-president, and another member of the board (Federal Court Decision at paras. 99, 193).

[24] Apart from the proceedings commenced by the respondent in Newfoundland and Labrador for the payment of non-marine items, it appears that there are other proceedings closely related to the financial turmoil at Baffin during the period in question, including a default judgment in the amount of $544,049.17 against the former CEO (Federal Court Decision at para. 84; Appeal Book, Vol. 2, p. 433) Although this judgment had not yet been set aside, it appeared

that there was still a dispute about several items included therein. What was before the Federal Court is thus only a little part of a bigger story involving the management of the appellants' business.

II. The Federal Court Decision

[25] In its 281-paragraph decision, the Federal Court dealt with many issues that are not contested. I have already referred to some findings in the background section of these reasons. I will focus here on the two paragraphs that were the subject of the appeal, as well as those where the Federal Court dealt with its jurisdiction.

[26] At paragraph 240, the Federal Court found:

> [240] In these circumstances, where two executive officers of the Defendant company knew what was on the Work Orders and Invoices, there was no deception.

[27] This statement comes after the Federal Court had concluded that the financial operations of Baffin at the time were lax, sketchy and unorthodox, with no policy about spending and no limit on the CEO's and Fleet Manager's spending. It had also found that the CEO was following the CFO's instructions as to how to bill the snowmobiles, dirt bikes and ATVs described otherwise on the work orders signed by the Fleet Manager and on the respondent's invoices. The Federal Court held that laxity and sketchiness did not establish fraud (Federal Court Decision at paras. 236–38).

[28] The second alleged error, which will be discussed shortly, relates to paragraph 264 of the Federal Court Decision, where the Federal Court states:

> [264] The Plaintiff is entitled to rely on the "Indoor Management Rule", as it relates to Mr. Young's interactions with both Mr. Fowler and Mr. Reid, to defeat the allegations of fraud.

[29] This statement is included under section "IX. CONCLUSION" of the Federal Court Decision. It deals with a matter raised by the respondent in response to the allegations of fraud. It comes after the Federal Court had concluded at paragraph 263 that the appellants had not established their defence of equitable set-off, which rested upon allegations of civil fraud, conspiracy and conversion for the benefit of persons other than Baffin.

[30] At paragraph 185, the Federal Court described the Indoor Management Rule as follows:

> [185] The meaning and scope of the Rule is that a party dealing with a corporation, acting in good faith and unaware of any defect in authority, is entitled to assume that the corporation's internal policies have been followed and adhered to. …

[31] Turning now to the question of jurisdiction, the Federal Court first dealt with the subject matter of the respondent's claim in its *in rem* and *in personam* proceedings and found it "clearly falls within the maritime jurisdiction of the Court pursuant to paragraphs 22 (2)(m) and (n) of the *Federal Courts Act*" (Federal Court Decision at para. 144).

[32] After determining that the respondent had properly established its claim against the two vessels and their owners, the Federal Court turned to the defence of equitable set-off at paragraph 171 and noted that the language of paragraphs 22(2)(*m*) and (*n*) of *Federal Courts Act*, R.S.C.

1985, c. F-7 was "broad enough for the Court to entertain the defence of equitable set-off if the Defendants can show fraud, or another equitable ground, for denial of the Plaintiff's claim" (Federal Court Decision at para. 172).

[33] The Federal Court then referred to the test for equitable set-off set out in *Federal Commerce and Navigation Ltd. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066 at 974, [1978] Q.B. 927 (C.A. C.D. U.K.) [*Fed. Commerce*, also known as *The Nanfri*], which was applied by our Court in *Atlantic Lines & Navigation Co. Inc. v. Didymi (The)* (1987), 39 D.L.R. (4th) 399 at 410–11, [1988] 1 F.C. 3 (F.C.A.) (*The Didymi*). The Federal Court then specified that it was not assuming jurisdiction over the tort of civil fraud on which the appellants were relying. It only referred to the test for civil fraud as a means of assessing whether the defendants had succeeded in establishing fraud as the basis of their defence of equitable set-off (Federal Court Decision at para. 178). At paragraph 179, the Federal Court concluded that, in its opinion, they had not.

[34] As a result, it appears that the Federal Court never considered the other elements of the test it referred to for assessing whether a defence of equitable set-off was available.

III. The Issues and Standard of Review

[35] There is no debate that the standard of review enunciated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 applies in this matter.

[36] However, there are some issues with how one characterizes the alleged errors made by the Federal Court.

[37] At the hearing before us, the appellants limited their arguments to two errors of law alleged in their notice of appeal. They can be described as follows:

1. Did the Federal Court err in law by concluding, at paragraph 264 of its decision, that the respondent could rely on the Indoor Management Rule, considering that it did not make an express conclusion with respect to the good faith of the respondent?

2. Did the Federal Court err in law by attributing the CEO's and the Fleet Manager's knowledge to the appellants' corporation when it concluded, at paragraph 240 of its decision, that because two executive officers of the appellants' company knew what was on the work orders and the invoices, there was no deception?

[38] In addition, as mentioned, the jurisdiction of the Federal Court to deal with the cross-claim of the appellants is a key preliminary issue. Parties cannot consent to the court having jurisdiction. It follows that their non-contestation on a question regarding the jurisdiction over a subject matter cannot confer jurisdiction on a court which it does not have. If the Federal Court did not have such jurisdiction, it does not matter whether it erred in the manner alleged by the appellants.

[39] As mentioned, the appellants characterized the errors made as errors of law to which the standard of correctness applies. However, the Federal Court was using the appropriate test with respect to the Indoor Management Rule (see paragraph 185 of the Federal Court Decision, reproduced at paragraph 30 above). One would normally understand that it was implicit that the Federal Court was satisfied that the respondent met that test (which included good faith) when it

concluded as it did at paragraph 264 that the respondent could rely on the Indoor Management Rule. In such circumstances, the only error that the appellants could rely upon was whether, in making this finding of fact or mixed fact and law, the Federal Court made a palpable and overriding error, which could justify this Court's intervention.

[40] Apart from putting forth their view that the respondent could not benefit from the Indoor Management Rule because of the admitted misdescription of the non-marine goods on the invoices, the appellants did not attempt to establish that there was no evidence on which the Federal Court could conclude as it did. Having reviewed the evidentiary record and considered the evidence clearly accepted by the Federal Court as credible, I have not been persuaded that there was no basis for the Court to conclude that the respondent met the Indoor Management Rule test. It is not for this Court to substitute its own evaluation of the evidence to that of the trier of fact.

[41] More importantly, at paragraph 264, the Federal Court was making a conclusion in respect of a matter raised as a defence to the appellants' cross-claim. This, after it had already concluded at paragraph 263 that the appellants had failed to establish their allegation of civil fraud, conspiracy and conversion—that is, the very basis of their cross-claim.

[42] At the hearing before this Court, the appellants submitted that they were prepared to live with the finding that fraud had not been established. But, they argued that it was still important to deal with the application of the defence because, in their view, this would somehow be sufficient to prevent the respondent from recovering for the marine goods and services that were actually

provided to the two vessels. It is difficult to follow that reasoning considering that there was no question that the Fleet Manager had actual authority to order and purchase the marine supplies claimed in the two actions. The Indoor Management Rule was irrelevant in respect of those supplies.

[43] The panel asked the appellants how the error could be conclusive of the appeal, for if they were prepared to live with the findings that fraud, conspiracy and conversion had not been established, there would be no equitable ground to support the defence of equitable set-off.

[44] After a brief recess designed to enable the appellants to reflect on this, the appellants' only answer was that their second ground of appeal was sufficient to determine the appeal. In their view, the error in attributing the knowledge of the CEO and Fleet Manager (including that of the former CFO) to the appellant corporation would be sufficient to vitiate the Federal Court's conclusion that there was no fraud. They also added that the Federal Court failed to deal with another equitable ground they had raised: unjust enrichment.

[45] With respect to unjust enrichment, I note that this was not an issue raised in the notice of appeal. It was not part of the issues to be determined at trial (see paragraph 17 above). The respondent properly objected to this being raised at this time. It is obvious that the appellants could not add to the relief sought in their notice of appeal by including a request for such relief in their representations submitted after the hearing before this Court on December 22, 2022.

[46] Turning to the error alleged in paragraph 240 of the Federal Court Decision, it is far from clear that this involves a finding of law, as opposed to a finding of fact, considering the evidence and the arguments before it.

[47] However, there is no need to determine the nature of this alleged error because, as mentioned, this appeal can be determined solely on the basis of jurisdiction over the subject matter. Whether the court has jurisdiction is a question of law to which the standard of correctness applies.

IV. Analysis

[48] In their post-hearing submissions, the appellants took the following position with respect to the Federal Court's jurisdiction in respect of their defence of equitable set-off:

i. Having considered the decision of the Supreme Court of Canada in *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228 [*Wärtsilä*], they admitted that the Federal Court's reliance on subsections 22(2)(*m*) and (*n*) of the *Federal Courts Act* to establish its jurisdiction over the defence of equitable set-off was insufficient, but in their view, this did not provide a full answer to the case before the Court.

ii. They argued that the Federal Court was continued as a court of equity (*Federal Courts Act*, ss. 3–4) and this equitable jurisdiction is sufficiently broad to capture the defence of equitable set-off as per Rule 186 of the *Federal Courts Rules*, S.O.R./98-106.

iii. They say that, based on its history as an Admiralty Court, the Supreme Court of Canada confirmed that the Exchequer Court (the predecessor to the Federal Court) had jurisdiction in deciding cases properly within its jurisdiction to exercise the said jurisdiction in "equity and upon equitable principles" (*Montreal Dry Docks and Ship Repairing Co. v. Halifax Shipyards*, [1920] 60 S.C.R. 359 at 371, [1920] 3 W.W.R. 25).

iv. Thus, even though the Federal Court is a statutory court, when the parties (jurisdiction *in personam*) are otherwise properly before it on the basis of a matter within its jurisdiction, and where equitable principles are applicable, the Federal Court has jurisdiction over any cross-claim raised as an equitable defence, even if not otherwise coming within its maritime law or admiralty jurisdiction. Thus, in their view, it was not useful to consider whether, on its own, the cross-claim in this case is sufficiently connected to marine activities to fall within Parliament's power over navigation and shipping.

v. The appellants acknowledged that there were no cases that had decided this question, but they relied on three decisions: *Innovation and Development Partners /IDP Inc. v. Canada* (1992), 53 F.T.R. 69, [1992] F.C.J. No. 203 (F.C.T.D.); *Castlemore Marketing Inc. v. Intercontinental Trade and Finance Corp. et al*, 108 F.T.R. 306, 66 C.P.R. (3d) 147 (F.C.T.D.); *Apotex Inc. v. Sanofi-Aventis*, 2010 FC 182, 364 F.T.R. 131, to say that their position is at least arguable if (and only if) their cross-claim meets their jurisprudential criteria to qualify as a defence of equitable set-off as outlined in *Holt v. Telford*, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385 [*Telford*].

[49] The respondent took the opposite view, which can be summarized as follows:

i. They acknowledged that the Federal Court has equitable jurisdiction in respect of matters otherwise properly construed as within its jurisdiction;

ii. They say that to adopt the appellants' extreme position that the Federal Court has unlimited jurisdiction to consider equitable defences misses the entire point of courts with specialized jurisdiction.

[50] Although the parties invited us to define more generally how the Federal Court's jurisdiction in equity should be assessed, I do not believe that this is the proper case to do so. There is no point to be gained by discussing the issue at large. One would have to speculate how equitable remedies and principles, which have been applied regularly by the Exchequer Court and the Federal Court, would raise similar subject-matter jurisdictional issues. The basis for the Federal Court's subject-matter jurisdiction varies greatly depending on the subject matter. I note that the representations before us were quite limited. Finally, it would be especially inappropriate to make broad general statements because, in my view, whatever approach one adopts in this case, there is only one possible answer: the Federal Court had no jurisdiction.

[51] *Wärtsilä* made it clear that the Federal Court has jurisdiction over services and parts supplied to a commercial vessel. There is no issue that the respondent's claim was properly before the Federal Court.

[52] In my view, there can also be no issue that how one describes an item on an invoice cannot be determinative of whether the Federal Court has jurisdiction. One may call a house a ship in a sale contract, but this will not be sufficient to ground the Federal Court's jurisdiction over the sale of that house.

[53] Even when one only considers the language of section 22 of the *Federal Courts Act per se* (which is not itself determinative), it has always been the position of this Court that one cannot construe this provision in such a way as to convert what is not a maritime claim into a maritime claim (*Harry Sargeant III v. Al-Saleh*, 2014 FCA 302, 468 N.R. 205 at para. 94).

[54] What is at issue here is the validity of transactions that have absolutely nothing to do with the operations of the two defendant vessels in the actions *in rem*. Whether the purchase of non-marine equipment through an alleged fraudulent scheme caused a loss to the appellants has no integral connection *per se* to navigation and shipping. The fact that it may have an integral connection to the operations of Baffin or the other defendants *in personam* is neither here nor there. The commercial activities or the non-for-profit activities of the parties are not a sufficient connection. It is in fact undisputable that, but for the equitable nature of the defence relied upon by the appellants, the cross-claim, whether presented as a defence or by way of a counterclaim, is entirely within the jurisdiction of the Newfoundland and Labrador courts, where these matters are currently being litigated. It is for this very reason that the respondent instituted its action in respect of non-marine items before the Newfoundland and Labrador courts.

[55] However, this does not mean that the respondent could not exercise its statutory rights *in rem* pursuant to section 43 of the *Federal Courts Act*. This is especially so when one considers that such proceedings are not available before the Newfoundland and Labrador courts.

[56] I conclude that, using the approach put forth by the respondent, the Federal Court had no jurisdiction over the cross-claim.

[57] I now turn to the appellants' thesis. They argue that the principles of equity are so broad and foundational that they allow the Federal Court to consider this equitable defence—which, on its own, is not integrally connected to navigation and shipping—as long as the Federal Court has jurisdiction on the main claim. As argued, equity would be a distinct source of substantive principles.

[58] The issue with the appellants' argument is that they do not explain how it relates to the broader Canadian constitutional context. A matter that falls outside the federal powers identified in the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 cannot be within the jurisdiction of the Federal Court. It is worth repeating again that the appellants conceded that the substantive grounds at the foundation of their defence of equitable set-off would not normally come within the power of navigation and shipping. They have not explained how the subject matter of their defence of equitable set-off would come within any federal power identified in the *Constitution Act, 1867*.

[59] Equity, in itself, cannot confer to the Federal Court jurisdiction over a matter that does not come within the federal powers identified in the *Constitution Act, 1867*. In my opinion, the only way the appellants' argument can fit in the existing constitutional context is if they argue that equitable principles somehow bring the character of their cross-claim within the federal power because it becomes a matter integrally connected to navigation and shipping.

[60] For equitable set-off to apply, it requires a close connection between the cross-claim on which the defence is based and the plaintiff's claim. Because of this close connection, it may be arguable that the cross-claim would be characterized as integrally connected to the federal power over navigation and shipping. Despite my serious reservations about this argument, I will simply follow the reasoning proposed by the appellants as they recognized that it was essential to their thesis that the jurisprudential criteria for establishing equitable set-off be met.

[61] In *Telford*, in the context of assignment of mortgages, the Supreme Court of Canada endorsed the test for equitable set-off outlined by the British Columbia Court of Appeal in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31, 20 D.L.R. (4th) 689 (C.A.) [*Coba Industries*]:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt* (U.K.) Ltd., [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: . . . [*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].

> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.
>
> 5. Unliquidated claims are on the same footing as liquidated claims: *Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.)].

(*Telford* at 212, citing *Coba Industries*) [underline added]

[62] In *The Didymi*, our Court, exercising its jurisdiction over a maritime matter, adopted the same approach a few months before *Telford*. This Court applied the principles from *Fed. Commerce*, also known as *The Nanfri* (particularly in passages later expressly referred to in *Telford* at pp. 213-214), which, in its view, were in harmony with the principles set out in *Coba Industries*.

> On the authorities already referred to, a right of equitable set-off relies on much more than the mere existence of a cross-claim. As Lord Denning put it in *The Nanfri* in a passage already recited, it is only "cross-claims that arise out of the same transaction or are closely connected with it" and "which go directly to impeach the plaintiff's demands" such as to render it "manifestly unjust to allow him to enforce payment without taking into account the cross-claim" that may be the subject of an equitable set-off.

(*The Didymi* at 410–11)

[63] Thus, equitable set-off requires the cross-claim to go to the very root of the plaintiff’s claim; only cross-claims that go directly to impeach the plaintiff’s claim meet the test. It is because of the nature of this connection that equity cannot countenance separating them: to do so would be manifestly unjust.

[64] This connection requirement must be met even if the alleged underlying civil fraud or other substantive cross-claim was properly established.

[65] Therefore, what I am prepared to assume for the purpose of the present exercise is that if this claim for equitable set-off is founded on a cross-claim that goes to the root of the respondent's maritime claim and impeaches the respondent's right to make its demand, it could be integrally connected to navigation and shipping and the Federal Court could have jurisdiction to consider the cross-claim.

[66] However, the appellants' cross-claim is not sufficiently connected to the respondent's claim for equitable set-off to apply; therefore, it could not be integrally connected to navigation and shipping and the Federal Court does not have jurisdiction to take into account the alleged equitable set-off

[67] The decisions in *Fed. Commerce*, also known as *The Nanfri*, (relied upon by the Supreme Court of Canada in *Telford*) and in *The Didymi* illustrate that the prerequisite of a close connection has been applied rigorously in the context of maritime transactions.

[68] What may appear to be closely connected claims to a person unfamiliar with maritime law—such as claims and cross-claims arising from the very same contract, in those cases a time charter party—still do not meet the closeness requirement. This is because only claims that deprived the charterer of the use of the ship would go to the root of the transaction and directly impeach the right of the ship owner to claim the charter hire for the use of the vessel. Similarly,

this Court found in *The Didymi* that cross-claims for damages done to the vessel or for increases in the charter hire due to a saving of fuel or to the vessel performing beyond her warranted speed capabilities did not go to impeach the charterer's claim that it had been deprived of the use of the ship during drydocking. They could not be the basis of an equitable set-off. They were each separate and distinct claims, having no bearing whatsoever on the claim for hire; however, the cross-claim could be the subject of a counterclaim.

[69] Obviously, in *The Didymi*, both the claim and the cross-claims involved maritime matters integrally connected to navigation and shipping. In my view, it is somewhat telling that, to my knowledge, there are no reported cases in Canada or in the United Kingdom where the factual matrix involved a claim that is clearly not integrally connected to maritime activities, yet was alleged or found to directly impeach or to go to the root of a claim whose character is integrally connected to navigation and shipping.

[70] With this in mind, I return to the present matter. As mentioned, the appellants' cross-claim does not relate to anything supplied to a ship or even to any actual goods misdescribed in the two invoices at issue. The misdescription in the two invoices filed in support of the respondent's claim is only part of the evidence adduced to establish a fraudulent scheme whose object was to obtain non-marine items that were allegedly purchased for the sole benefit of persons other than Baffin.

[71] This cross-claim simply could not impeach on the respondent's title to claim, nor does it go to the root of the claim for the marine supplies and services to the ships. It does not meet the

criteria necessary to establish a valid defence based on an equitable set-off. Thus, the Federal Court could not have jurisdiction to examine the appellants' defence of equitable set-off, even on the approach suggested by the appellants.

V. Conclusion

[72] In view of the foregoing, I propose to dismiss the appeal with costs set at the agreed amount of $3,680 (all-inclusive).

"Johanne Gauthier"
J.A.

"I agree
Marianne Rivoalen J.A."

"I agree
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-257-21
STYLE OF CAUSE:	THE OWNERS, CHARTERERS AND ALL OTHERS INTERESTED IN THE SHIP M/V "INUKSUK I" AND INUKSUK FISHERIES LTD. AND BAFFIN FISHERIES COALITION and THE OWNERS, CHARTERERS AND ALL OTHERS INTERESTED IN THE SHIP M/V "SIVULLIQ" AND REMOY FISHERIES LTD. AND BAFFIN FISHERIES COALITION v. SEALAND MARINE ELECTRONICS SALES AND SERVICES LTD
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 8, 2022
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	RIVOALEN J.A. ROUSSEL J.A.
DATED:	JULY 27, 2023

APPEARANCES:

Philip J. Buckingham	FOR THE APPELLANTS
Gordon S. Campbell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Goodland Buckingham St. John's, Newfoundland and Labrador	FOR THE APPELLANTS

Aubry Campbell MacLean
Alexandria, Ontario

FOR THE RESPONDENT