Docket: 2004-2960(IT) G

BETWEEN:

ROSS WINSOR,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 1, 2007,
at St. John's, Newfoundland and Labrador

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	Ronald A. Cole
Counsel for the Respondent:	Cecil S. Woon

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2000 taxation year is dismissed, with costs.

Signed at Vancouver, British Columbia, this 21st day of November 2007.

"Wyman W. Webb"

Webb J.

Citation: 2007TCC692
Date: 20071121
Docket: 2004-2960(IT)G

BETWEEN:

ROSS WINSOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this case is whether one-half of the amount that the Appellant received from the Federal Government in 2000 for the surrender of his fishing licences should be included in his income either pursuant to section 14 of the *Income Tax Act* ("*Act*") as income from his business or pursuant to section 38 of the *Act* as a taxable capital gain, or not at all.

[2] The Appellant lives in Embree, Newfoundland and started fishing over 30 years ago when he acquired his first lobster licence. The fishing industry in the east coast is an industry that has been subjected to an increasing level of control as the fish stocks have been depleted. There was a time when an individual did not need a licence to fish but this is certainly not the case today. Today, the Federal Government controls many aspects of the fishing industry including limiting the number of licences, the type of boat and gear that may be used, the species that may be caught and when fishing may be done.

[3] In 1998 the Federal Government determined that it needed to reduce the number of individuals who were carrying on a groundfish fishing business and commenced a voluntary program (the Atlantic Groundfish Licence Retirement Program ("AGLRP")) under which the Federal Government requested that individual licence holders submit bids to the Federal Government for the sale by

these individuals of their licences to the Federal Government. The Federal Government would review the bids and evaluate them with the objective of reducing the greatest amount of landed fish at the least cost. There were different rounds that were held for the submission of bids. There was no evidence concerning the total number of individuals who sold their licences to the Federal Government under this program but in the Information Circular for Round eight it is stated that:

> Round seven of the AGLRP concluded on June 2, 2000. A total of 627 bids were submitted by groundfish licence holders in the Newfoundland Region in the seventh round. Of these, 101 bids valued at $10.7 million were accepted by the Department of Fisheries and Oceans.

[4] In 2000 the Appellant submitted a bid for his licences under Round eight of the AGLRP. His bid was successful and he received, based on his bid, an offer dated October 27, 2000 from the Department of Fisheries and Oceans ("DFO") to retire his licences. There were two aspects to the offer - one was the purchase of all of the licences held by the Appellant and the second was his agreement to permanently exit the commercial fishery. The Appellant accepted this offer.

[5] The total amount that was paid to the Appellant was $120,000. The Appellant and the Respondent have agreed that this amount should be allocated equally between the amount paid for the licences and the amount paid to the Appellant for his agreement to permanently leave the commercial fishery. This appeal is related to the $60,000 that was allocated to the licences.

[6] The amount of $30,000 (which is one-half of the amount that was allocated to the licences) was included in the income of the Appellant under subsection 14(1) of the *Act* as there were no amounts determined for A to D in the definition of "cumulative eligible capital" in subsection 14(5) of the *Act* in this case. An amount would only be included under subsection 14(1) of the *Act* if there is an "excess" as determined under subsection 14(1) of the *Act*.

[7] In determining whether there was an "excess" for the purpose of subsection 14(1) of the *Act* for 2000, it is necessary to determine the amount that would have been calculated in 2000 for E in the definition of "cumulative eligible capital" in subsection 14(5) of the *Act*. The rule for determining this amount (prior to the recent amendments to the description of E in the definition of "cumulative eligible capital") has been commonly referred to as the "mirror image rule". This

description of E in the definition of "cumulative eligible capital" for the year in question was as follows:

> E is the total of all amounts each of which is 3/4 of the amount, if any, by which
>
> (a) an amount which, as a result of a disposition occurring after the taxpayer's adjustment time and before that time, the taxpayer has or may become entitled to receive, in respect of the business carried on or formerly carried on by the taxpayer where the consideration given by the taxpayer therefor was such that, if any payment had been by the taxpayer after 1971 for that consideration, the payment would have been an eligible capital expenditure of the taxpayer in respect of the business
>
> exceeds
>
> (b) all outlays and expenses to the extent that they were not otherwise deductible in computing the taxpayer's income and were made or incurred by the taxpayer for the purpose of giving that consideration…

[8] There was no evidence of any outlays or expenses incurred by the taxpayer in relation to the disposition of the fishing licences to the Federal Government.

[9] The amounts that the Appellant received in relation to his licences were for the groundfish, lobster and other licences that he held. The Federal Government, under the AGLRP, required the Appellant (and any other successful bidder) to surrender all of the licences that he held and not just his groundfish licence. While it is clear that the purpose of the program was to reduce the amount of groundfish being caught (and therefore the groundfish licences were extinguished and were not reissued) it is not clear whether the other licences were subsequently reissued to other individuals. However, it is clear that the Federal Government was not acquiring any of the licences so that it could carry on any fishing business.

[10] The Federal Court of Appeal in *The Queen v. Toronto Refiners and Smelters Limited*, 2002 FCA 476, 2003 DTC 5002, [2003] 1 C.T.C. 365 dealt with the application of section 14 of the *Act* in a situation where the City of Toronto was acquiring goodwill of a company in circumstances where the City of Toronto would not be carrying on the business to which the goodwill related. Sharlow J.A. on behalf of the Federal Court of Appeal made the following comments:

> **Question 4 — the mirror image rule: If Toronto Refiners had paid $9 million for the same consideration that it gave the City of Toronto, would that payment have been an eligible capital expenditure of Toronto Refiners?**

15 As this Court said in *Goodwin Johnson, supra*, this question cannot be asked in a vacuum. Rather, it is necessary to assume that the circumstances of the hypothetical payment by Toronto Refiners are the same as the circumstances of the actual payment by the City of Toronto. In other words, Toronto Refiners must be placed notionally in the situation of the City of Toronto.

16 I would state the hypothetical facts as follows. Toronto Refiners is an expropriating authority that wishes to acquire certain land for a civic purpose. There is no actual expropriation but the land is transferred to Toronto Refiners by agreement, with the landowner reserving its right of recourse to the OMB. The business of the landowner terminates and cannot be relocated, and thus the goodwill of the business is destroyed. It is finally agreed that the appropriate compensation under subsection 19(2) of the *Expropriations Act*, in effect the value of the goodwill of the business, is $9 million. Accordingly, in 1992, $9 million is paid as compensation under subsection 19(2). Given those hypothetical facts, would the $9 million payment have been an "eligible capital expenditure" of Toronto Refiners?

17 Counsel for the Crown argued that the hypothetical facts should not be stated in this way. Rather, he argued that it is necessary to hypothesize simply that Toronto Refiners pays a sum of money to another person for giving up its business, and that $9 million of the payment is allocated to goodwill. He suggested that such a scenario might occur if Toronto Refiners were acquiring a competitor, or simply causing another business to terminate for some other business reason.

18 In my view there are two problems with the approach suggested by counsel for the Crown. One is that it is not consistent with the decision of this Court in *Goodwin Johnson*. The Court in that case said that the hypothetical circumstances of the payment must be the same as the actual circumstances of the payment. Counsel for the Crown wishes to hypothesize a commercial, profit motivated transaction where there is none. In this case, there was a termination of a business for a civic purpose, with statutory compensation being payable as a result. Those real circumstances must form the basis of the hypothetical questions asked by the mirror image rule.

...

22 I return now to the hypothetical facts, to consider where they lead. The question at this stage of the analysis is whether the hypothetical $9 million payment by Toronto Refining meets the definition of "eligible capital expenditure" in paragraph 14(5)(b) (as it read in 1992).

23 There are a number of conditions that must be met under that definition. The first condition, found in the opening words of paragraph

> 14(5)(b), is that the payment must have been an outlay or expense made or incurred on account of capital for the purpose of gaining or producing income from a business. In my view, that condition is not met. The hypothetical expropriation, like the real expropriation, had a civic purpose. It had no income earning purpose, and certainly no purpose of gaining or producing income from a business.

[11] The principle that is derived from the *Toronto Refiners and Smelters Limited* case is that in applying the mirror image rule the circumstances related to the hypothetical payment must be the same as the actual circumstances related to the payment of the amount received by the Appellant and if the person making the actual payment has no business purpose in making such payment, then no business purpose can be imputed to the hypothetical payment. In this particular case the Federal Government was not acquiring the fishing licences for any business or any profit motive and, in particular, the purpose of the AGLRP was to extinguish the groundfish licences so that they would not be used in any business. Counsel for the Respondent argued extensively that the *Toronto Refiners and Smelters Limited* case should not be followed. However the principle of *stare decisis* is very clear. Rothstein J.A. (as he then was) in *Commissioner of Competition v. Superior Propane Inc. et al.* (2003), 223 D.L.R. (4th) 55 described this principle as follows:

> [54] The principle of *stare decisis* is, of course, well known to lawyers and judges. Lower courts must follow the law as interpreted by a higher coordinate court. They cannot refuse to follow it: *Re Canada Temperance Act; Re Constitutional Questions Act; Re Consolidated Rules of Practice*, [1939] 4 D.L.R. 14 (Ont. C.A.) at 33, affirmed [1946] 2 D.L.R. 1 (P.C.); *Woods Manufacturing Co.* v. *Canada (Attorney General)*, [1951] S.C.R. 504 at 515, [1951] 2 D.L.R. 465.

[12] Therefore the *Toronto Refiners and Smelters Limited* case is binding on me and I find that, based on the *Toronto Refiners and Smelters Limited* case, since the Federal Government was acquiring these licences for a non-commercial purpose no part of the amount received by the Appellant for his fishing licences would be included in determining E in the definition of “cumulative eligible capital” and hence no amount would be included in the Appellant’s income under section 14 of the *Act* in relation to the amount received by the Appellant for his fishing licences.

[13] The next issue raised relates to whether one-half of the amount received would be a taxable capital gain under section 38 of the *Act*. This would result in the same amount being included in the income of the Appellant (i.e. $30,000) as there was no evidence of any amount that should be included in determining the adjusted cost base of the licences held by the Appellant. Counsel for the Appellant

abandoned his argument in relation to a late filed capital gains election under subsection 110.6(19) of the *Act* that the Appellant had attempted to file on June 5, 2002.

[14] The Appellant would only have a taxable capital gain under section 38 of the *Act* if he had a capital gain under section 39 of the *Act*. Paragraph 39(1)(a) of the *Act* provides "that a taxpayer's capital gain for a taxation year from a disposition of any property is the amount that the taxpayer's gain for the year ...".

[15] Therefore in order for the Appellant to have a capital gain he must have disposed of property.

[16] The status of fishing licences as property for other purposes has been the subject of litigation in the courts of the Atlantic Provinces. The issue arises because section 16 of the *Fishery (General) Regulations* (which are the *Regulations* that relate to the fishing licences held by the Appellant) provides that:

> 16. (1) A document is a property of the Crown and is not transferable.
>
> (2) The issuance of a document of any type to any person does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type.

[17] A document is defined in these *Regulations* as including a licence that grants a legal privilege to engage in fishing. Licences are granted for a one year period. As well the granting of licences is subject to the discretion of the Minister of Fisheries. What rights, if any, that any holder of a fishing licence may have is determined by the law while the value of any such "right" is determined by the marketplace.

[18] Notwithstanding these very restrictive provisions fishing licences have been traded for substantial amounts of money. In the present case the amount allocated to the licences was $60,000. The Appellant surrendered his licences in 2000 after all of the fishing seasons to which his licences related for 2000 were over. Therefore the Appellant had fished during all of the available time periods in 2000. His gross income for 2000 from his fishing business (excluding the amount received for his licences) was $27,182 and his net income was $19,719. The amount allocated to the licences was more than double his gross income for one year and more than three times his net income for one year.

[19] In the recent decision of the Supreme Court of Newfoundland and Labrador, Trial Division in *Green v. Harnum*, 2007 NLTD 23, Handrigan J. made the following comments in relation to the commercial activity related to the buying and selling of fishing licences:

> [16] The Department of Fisheries and Oceans (Canada) takes great pains to ensure that it is clearly understood that a fishing license confers on the license holder no more than a "privilege" and not a "right" to fish. In fact, DFO will not even acknowledge that a license can be "transferred": it insists that a license which is "issued" to replace a license that has been "relinquished" has not been transferred between license holders, even where the new license is identical to the one that has been relinquished and was issued to a person designated by the surrenderer.
>
> [17] But there is, despite DFO's position that licenses are not transferable an active trade in them between fish harvesters and, in some cases, persons who are not fish harvesters but who are involved in the industry through trust agreements. Licenses are "sold" in many cases for large sums of money so it is not surprising that some of these transactions falter and the parties end up in court asking to enforce their agreements; or, as in this case, looking for a share of the value of the licenses.
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> . . .
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> [20] It should also be noted that fishing licences are regularly bought and sold. Dwight Saunders works with Tri-Nav Consultants Inc. in its St. John's, NL office. Tri-Nav was established in 1994 and holds itself out as "largest license and ship brokerage firm operating in Atlantic Canada offering over 50 years combined experience in the marine and fishing industry".
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> [21] Mr. Saunders has been with the company since 1998 and describes himself as a "marine broker". Saunders said his firm offers the same services to the fishing industry that agents offer to buyers and sellers of real estate. He acknowledged that he has been involved in the purchase or sale of over 200 fishing enterprises, including their licences, since he started with Tri-Nav.
>
> [22] Tri-Nav charges a 5% commission, for which it lists and markets the fishing enterprise, brings the parties together through an agreement of purchase and sale and acts as an intermediary with DFO to relinquish and re-issue fishing licenses. Mr. Saunders said he knows that that are other persons who act as marine brokers besides Tri-Nav; and that some fishing enterprises and licenses are bought and sold by fish harvesters themselves without help from brokers.

[20] In *Green v. Harnum, supra,* the court noted the value of the fishing licences in that case was between $400,000 and $500,000 and ordered that the licences be listed for sale and the proceeds split between the parties.

[21] Ken Carew, who is the chief of policy and economic analysis with DFO, testified during the hearing. He confirmed that DFO is aware of the trading of fishing licences notwithstanding the provisions of the *Fishery (General) Regulations* that provide that the licences are not transferable. He also stated that it is DFO's policy that the holder of the licence has the right to renew the fishing licence provided that the holder applies for the renewal, pays the renewal fee and is not in violation of any terms of the licence. This, however, is contrary to the *Fishery (General) Regulations* and particularly subsection 16(2) which clearly states that the issuance of a document (which would include a fishing licence) does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type. The policy of DFO with respect to the rights of individuals to renew their fishing licences cannot change the legal limitations as set out in the *Fishery (General) Regulations*.

[22] The Nova Scotia Court of Appeal in the recent case of *Royal Bank of Canada v. Saulnier*, [2006] N.S.J. 307, 2006 N.S.C.A. 91, dealt with the issue of what property right, if any, existed in fishing licences for the purposes of paragraph 67(1)(c) of the *Bankruptcy and Insolvency Act ("BIA")*. Subsection 67(1) of the *BIA* provides that:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
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> > (*a*) property held by the bankrupt in trust for any other person,
> >
> > (*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or
> >
> > (*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),
>
> but it shall comprise
>
> > (*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

> (*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

[23] The Nova Scotia Court of Appeal reviewed the *Fisheries Act* and *Fishery (General) Regulations* as well as the jurisprudence related to the issue of whether a person has any property when they hold a discretionary licence. The Nova Scotia Court of Appeal stated their conclusions as follows in relation to the issue of whether Mr. Saulnier held any property for the purposes of the *BIA* in relation to his fishing licences:

> [53] Returning to s. 67(1)(c) of the *BIA*, my conclusions are the following:
>
> (a) Mr. Saulnier had a right that his request for renewal of his licence or a reissuance to his designate not be denied arbitrarily, in bad faith, or based on irrelevant considerations. This formulation may translate to one of the standards of review, depending on the circumstances, as a pragmatic and functional approach.
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> (b) Mr. Saulnier's right is not "transitory or ephemeral" whether it is a limited "legal right" or a "beneficial interest". It is intangible property within s. 2 of the *BIA*, and passes to the administration of the trustee under s. 67(1)(c).
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> . . .
>
> [55] I conclude that Mr. Saulnier's rights to apply for, and resist an arbitrary denial of, a renewal or reissuance of his licence are "property" passing to the trustees under each of ss. 67(1)(c) and 67(1)(d) of the *BIA*.

[24] In the *BIA* "property" is defined as follows:

> Property means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property.

[25] In the *Act* "property" is defined as follows:

> Property means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes
>
> (a) a right of any kind whatever, a share or a chose in action,

(b) unless a contrary intention is evident, money,

(c) a timber resource property, and

(d) the work in progress of a business that is a profession.

[26] Therefore in my opinion since any person who has a licence under the *Fishery (General) Regulations* has a right "to apply for, and resist an arbitrary denial of, renewal or reissuance of his licence", this right would not only constitute property for the purpose of the *BIA* but would also be property for the purposes of the *Act*. The definition of property under the *Act* is very broad and includes any right. This right of the Appellant, as described above, tenuous though it may be, is therefore property for the purposes of the *Act*.

[27] Subparagraph 39(1)(a)(i) of the *Act* provides that the Appellant would not realize a capital gain if the property that he disposed of is an eligible capital property. "Eligible capital property" is defined in section 54 of the *Act* as follows:

> Eligible capital property of a taxpayer means any property, a part of the consideration for the disposition of which would, if the taxpayer disposed of the property, be an eligible capital amount in respect of a business.

[28] Eligible capital amount is defined in subsection 14(1) of the *Act* which provides in part as follows:

> Where, at the end of a taxation year, the total of all amounts each of which is an amount determined, in respect of a business of a taxpayer, for E in the definition "cumulative eligible capital" in subsection (5) (in this section referred to as an "eligible capital amount") ...

[29] As a result of the provisions of subsection 248(1) of the *Act*, the meaning assigned to eligible capital amount by subsection 14(1) of the *Act* is applicable for the purposes of the *Act* and not just section 14 of the *Act*.

[30] Since, as noted above, the amount received by the Appellant from the Federal Government in 2000 for the licences is not included in paragraph E in the definition of "cumulative eligible capital" in subsection 14(5) of the *Act* in respect of a business of the Appellant, the amount received by the Appellant in 2000 for the licences is not an eligible capital amount in respect of a business. As a result, in these circumstances, since the Appellant has disposed of the property and the amount received is not an eligible capital amount in respect of a business, the

licences are not eligible capital property of the Appellant. Therefore the gain arising from the disposition of the licences is a capital gain of the Appellant and one-half of that amount is a taxable capital gain of the Appellant.

[31] This does not change the amount that should be included in the income of the Appellant for 2000 nor does it change the amount of the taxes payable by the Appellant. The classification of the amount included in income as a taxable capital gain, instead of business income under section 14 of the *Act*, will give rise to other consequences which are not in issue. As a taxable capital gain, if the Appellant would have had any allowable capital losses that would have been available for deduction in 2000, then any such available allowable capital losses could have been deducted against the taxable capital gain (which they could not if the amount was business income under section 14 of the *Act*). There was no evidence of any available allowable capital losses of the Appellant in this case. The change in the classification of the amount included in income as a taxable capital gain instead of business income will result in a reduction of the earned income of the Appellant for RRSP purposes but this does not affect the amount of taxes payable by the Appellant for 2000.

[32] The appeal to this Court is from an assessment of taxes. In *The Queen v. Anchor Pointe Energy Ltd.* 2007 FCA 188, [2007] 4 C.T.C. 5, 2007 DTC 5379, Létourneau J.A. on behalf of the Federal Court of Appeal made the following comments:

> 32 Second, while it is true that assessment, reassessment and confirmation refer to three specific actions by the Minister under the Act in the process of determining the tax liability of a taxpayer, the word “assessment” also refers to the product of that process. Hugessen J.A. nicely described the two meanings of the word in Consumers' Gas Co. v. R. (1986), [1987] 2 F.C. 60 (Fed. C.A.). At page 67 he wrote:
>
> > What is put in issue on an appeal to the courts under the Income Tax Act is the Minister's assessment. While the word “assessment” can bear two constructions, as being either the process by which tax is assessed or the product of that assessment, it seems to me clear, from a reading of sections 152 to 177 of the Income Tax Act, that the word is there employed in the second sense only. This conclusion flows in particular from subsection 165(1) and from the well established principle that a taxpayer can neither object to nor appeal from a nil assessment.

> 33 I agree with the motions judge that the appeal is not from the confirmation of the assessment. The appeal is, to use the words of Hugessen J.A., from the product of that assessment: see also Minister of National Revenue v. Parsons, supra, at page 814, where Cattanach J. held that the "assessment by the Minister, which fixes the quantum and tax liability, is that which is the subject of the appeal". That product refers to the amount of the tax owing as initially assessed or determined, and subsequently confirmed. From the perspective of the process itself, the assessment pursuant to sections 152 to 165 is not completed by the Minister until, within the time allotted by the Act, the amount of the tax owing is finally determined, whether by way of reconsideration, variation, vacation or confirmation of the initial assessment: see Minister of National Revenue v. Parsons, supra, at page 814.

[33] As a result, since the amount of taxes payable by the Appellant for 2000 is not changed by the reclassification of the amount included in income as a taxable capital gain instead of business income and since the appeal is from an assessment of taxes, the appeal is dismissed, with costs.

Signed at Vancouver, British Columbia, this 21st day of November 2007.

"Wyman W. Webb"

Webb J.

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APPEARANCES:

Counsel for the Appellant:	Ronald A. Cole
Counsel for the Respondent:	Cecil S. Woon

COUNSEL OF RECORD:

For the Appellant:

Name:	Ronald A. Cole
Firm:	Cole Law Offices

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada