Federal Court  Cour fédérale

Date: 20180615

Docket: T-474-17

Citation: 2018 FC 623

Ottawa, Ontario, June 15, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

JOSEPH HUBERT FRANCIS

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] This is a Motion by Joseph Hubert Francis, pursuant to Rule 51(1) of the *Federal Courts Rules* [the *Rules*], appealing the January 18, 2018 Order of Prothonotary Tabib [the Order]. In the Order, the Prothonotary refused the request of Mr. Francis for an advance payment of costs to allow him to pursue his claim for a declaration of his treaty rights to fish. Mr. Francis has been charged in the Province of Quebec with summary conviction offences relating to fishing activities in October 2015.

[2] In order to be entitled to an advance payment of costs, Mr. Francis had to satisfy the test outlined in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [*Okanagan*]. The Prothonotary considered the evidence and the arguments but concluded that Mr. Francis did not satisfy the test.

[3] For the reasons that follow, the appeal is dismissed as the Prothonotary applied the correct test and acted reasonably in exercising the discretion to not order costs in the circumstances.

I. Background

[4] The facts and relevant background are not in dispute and are well-detailed in the Prothonotary's Order. They will be repeated here only as necessary to provide context.

[5] Mr. Francis is a member of the Elsipogtog First Nation in New Brunswick. In June 2015 the Mi'kmaq Grand Council issued him a document titled "Authority to Harvest Seafood for a Moderate Living" which states in part:

> THEREFORE, it is resolved that the aforementioned Treaty Indian, Hubert Francis, is guaranteed the free liberty to harvest seafood without being molested, hindered or otherwise interfered with throughout the ancestral waters of the Micmac Indians. The Treaty Indian identified herein will adhere to established conservation methods pertaining to vessels and equipment that are from time to time prescribed and utilized in fish harvesting regulations promulgated by DFO…Hubert Francis and a vessel duly contracted by him is authorized to fish the following species… [list omitted].

[6] Mr. Francis acknowledges that the Mi'kmaq Grand Council is not a fishing quota holder under the *Aboriginal Communal Fishing Licenses Regulations*.

[7] In 2015, Mr. Francis was engaged in shrimp fishing in the Gulf of St. Lawrence. He acknowledges that he did not have authorization from the Department of Fisheries and Oceans [DFO] under the communal fishing licence held by the Elsipogtog First Nation.

[8] In October 2015, Mr. Francis' vessel was boarded by DFO officials and they seized his catch. He was charged with fishing without authorization and faces summary conviction proceedings in Quebec under the *Fisheries Act*. This was the third incident where DFO officials boarded Mr. Francis' vessel.

[9] In the underlying Federal Court action filed by Mr. Francis on March 30, 2017 he seeks the following:

- A declaration that the prohibitions and restrictions placed upon the Plaintiff as a result of the three incidents are an unjustifiable infringement of the Plaintiff's treaty right, protected by s.35(1) and s.52(1) of the *Constitution Act, 1982* to access the fishing resource and to trade in fish in order to attain a moderate living;
- A declaration that these same prohibitions and restrictions are an unjustifiable infringement of the Plaintiff's Aboriginal rights protected by ss.35(1) and 52(1) of the *Constitution Act, 1982*;

- A declaration that the Plaintiff's Aboriginal right, as a member of the Mi'kmaw nation, to access the fishing resource and to trade in fish is not limited to the purpose of attaining a moderate living;
- An interim order or interim declaration that the Plaintiff may continue his commercial fishing operation, uninhibited by the Crown, as authorized by the Grand Council Authorization, until the matter is fully resolved; and
- Such further and other interlocutory interim relief as may be requested or appropriate for the Plaintiff to maintain his commercial fishing operation as authorized by the Grand Council Authorization, free from seizures or other Crown interference.

[10] Mr. Francis brought a Motion for an order that the Defendant pay, in advance, his costs including, legal fees, consulting and experts' fees, and disbursements to allow him to bring the case to trial and if necessary to appeal. Such orders are governed by Rule 400(1) of the *Rules*, which provides that the Court has full discretionary power over the amount and allocation of costs. The Prothonotary denied his Motion. This is an appeal from the Prothonotary's Order.

II. Prothonotary Order

[11] The Prothonotary began her analysis by outlining the applicable test from *Okanagan*, at para 40 as follows:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial—in short, the litigation would be unable to proceed if there order were not made.

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[12] On the first part of the *Okanagan* test, the Prothonotary acknowledged Mr. Francis' impecuniosity and noted the lack of legal aid funding for civil actions in Quebec, New Brunswick or Nova Scotia. However, the Prothonotary noted a lack of evidence on the availability of legal aid funding for Mr. Francis to defend the summary conviction proceedings in Quebec. As well, the Prothonotary noted a lack of any evidence of attempts by Mr. Francis to secure such funding.

[13] Mr. Francis relied upon *R. v Marshall; R. v Bernard*, 2005 SCC 43 at para 144 [*Marshall and Bernard*], and *R. v Caron*, 2011 SCC 5 at para 19 [*Caron*] to argue that summary conviction proceedings do not provide "…an efficient institutional forum to resolve this sort of major constitutional litigation" (*Caron*, at para 19).

[14] The Prothonotary referred to the Supreme Court's decision in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 41 [*Little Sisters*] stating that courts should consider whether other litigation is pending which could be conducted for the same purpose before ordering advance costs. Further, the Prothonotary noted that the rights declaration sought by Mr. Francis could be raised as a defence in his summary

conviction proceedings. The Prothonotary concluded that Mr. Francis had not discharged the onus on him to show that the summary conviction proceedings could not adequately determine the issues he raises. The Prothonotary therefore concluded that he failed to meet the first branch of the *Okanagan* test.

[15] On the second branch of the test, the Prothonotary considered Mr. Francis' standing to assert treaty and Aboriginal rights. The Prothonotary noted that such asserted rights are primarily collective rights held by communities, not individuals. She concluded that while Mr. Francis is correct that the ancestral and treaty rights to fish can be exercised by individuals, they are nonetheless unique in nature. Further, she noted that they can be invoked in criminal and regulatory proceedings, but not in a bare civil action as an individual.

[16] Mr. Francis argued that bringing an action for a declaration is consistent with the directions of Justice LeBel in *Marshall and Bernard* at para 144, to the effect that summary conviction proceedings are not an adequate forum to address major constitutional litigation. With respect to this argument, the Prothonotary concluded that the comments in *Marshall and Bernard* presuppose the involvement of the Aboriginal collective in the litigation. Here, there was no evidence of the Elsipogtog First Nation's involvement.

[17] The Prothonotary dismissed the motion for advance costs, and concluded that even if Mr. Francis met the three part *Okanagan* test, she could not find that "…the situation is sufficiently compelling or unique for the Court to exercise its discretion to grant such an exceptional remedy."

III. Issues

[18] The only issue is if the Prothonotary erred in the application of the *Okanagan* test.

IV. Analysis

A. *What is the applicable standard of review?*

[19] The parties agree that the applicable standard of review is articulated in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*], where the Court states at paragraph 64 that "discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts."

[20] In determining the request for an advance payment of costs, the Prothonotary is making a highly discretionary decision which is owed a high degree of deference (*Okanagan*, at para 42).

[21] Although Mr. Francis' lawyer argues that this case is about Mr. Francis' right to fish and the Prothonotary erred by concluding that such rights could only be exercised by the collective rights holder, the only issue on this Motion is whether the Prothonotary made an error in her decision which warrants this Court's intervention.

[22] An award of costs, even in the guise of funding for constitutional litigation as the case here, is an inherently discretionary decision. Therefore, absent an error, this Court owes deference to the decision of the Prothonotary.

[23] For the reasons detailed below I conclude that the Prothonotary was not incorrect in law in making her Order and there is no error on the facts. According to *Hospira* there is no basis for this court to intervene with the Prothonotary's Order.

B. *Did the Prothonotary err in the application of the Okanagan test?*

(1) Impecuniosity and Other Litigation Options

[24] The first part of the *Okanagan* test asks if the party genuinely cannot afford to pay for the litigation and there is no other realistic option for bringing the issues to trial (*Okanagan*, at para 40).

[25] Mr. Francis argues that the only option to have his asserted treaty rights to fish acknowledged is in the underlying civil action. He argues that the outcome of the summary conviction matter is irrelevant because his rights will not be recognized and he and others will continue to be charged with fishing violations in the future.

[26] In considering this, the Prothonotary noted that while Mr. Francis may not be able to fund the Federal Court litigation, he had not demonstrated impecuniosity with respect to defending the summary conviction proceedings.

[27] Specifically the Prothonotary concluded that there was no evidence that Mr. Francis sought legal aid funding for the defence of the summary conviction proceedings. In *Little Sisters*, at para 40 the Court states that courts must "remain mindful of all options when they are called upon to craft appropriate orders… and "the Plaintiff must explore all possible funding options" which includes "public funding options such as legal aid." Here considering the lack of evidence that Mr. Francis sought out legal aid for the summary conviction offences, the Prothonotary did not err in concluding that the first branch of the *Okanagan* test was not met.

[28] Further she concluded that Mr. Francis failed to establish that the summary conviction proceedings were not a "realistic option." She considered Mr. Francis' argument that the summary conviction proceedings were not adequate to argue the issue of treaty rights. This point was also the focus of the arguments on this appeal. Mr. Francis relies upon *Marshall and Bernard* and *Caron* to argue that summary conviction proceedings are not an adequate forum to address constitutional arguments.

[29] The Prothonotary noted that Mr. Francis has the burden under the *Okanagan* test to demonstrate that he meets the test (*Okanagan*, at para 40; *Little Sisters*, at para 37). This includes establishing that "no other realistic option exists for bringing the issues to trial…" (*Okanagan*, at para 41). In the Federal Court claim filed by Mr. Francis, the declaration of Aboriginal rights he seeks to establish are phrased as relief to remove the restrictions on *him*, and to facilitate *his* fishing activities. It therefore appears that the Federal Court action was filed mainly as a strategy to defend the pending summary conviction proceedings. As noted by the Prothonotary, the Court

in *Little Sisters*, at para 71 cautions that a request for advance costs cannot be justified as "litigation strategy".

[30] Moreover, in his Federal Court action, Mr. Francis does not challenge a law of general application and he does contest the constitutionality of the legislation under which he has been charged. Rather, his claim is more of a means to provide a solution to his personal circumstances. Accordingly, the statement of the Court in *Caron* that summary conviction proceedings are not always the appropriate forum would not be applicable here as Mr. Francis has not demonstrated, pursuant to *Okanagan*, that the summary conviction proceedings are an inadequate forum to have his asserted rights assessed.

[31] Mr. Francis argues that the interests at stake in the underlying action are beyond his own interests and will apply to all of those whose treaty rights to fish are being interfered with by the authorities. However, despite this assertion of interference with rights to fish, there was no evidence led before the Prothonotary or presented on this appeal of such interference. As this assertion is made in the abstract, it would be inappropriate for the Court to take it into consideration in the overall analysis of the availability of another forum to adequately address Mr. Francis' claim that he was exercising his treaty rights to fish.

[32] Similarly, regardless if Mr. Francis was exercising his individual right or a collective right, if other First Nations fishers are impacted by the actions of DFO officials as he asserts, it is reasonable to assume that those individuals or groups would have joined forces with Mr. Francis to support his action. However, that is not the case.

[33] Accordingly it was reasonable for the Prothonotary to find that the issues raised by Mr. Francis are personal to his situation and do not support his contention that they are common issues for others.

[34] Overall, the Prothonotary evaluated the evidence and the law in respect of the first *Okanagan* factor and her conclusions are supported by the evidence and the law. There is no error.

(2) Merit

[35] The second step of the *Okanagan* test concerns an evaluation of *prima facie* merit.

[36] Here, the Prothonotary held that the Plaintiff lacked standing to assert Aboriginal rights in a bare civil action because the asserted rights are in the nature of "collective rights."

[37] The Supreme Court has held that treaty and Aboriginal rights are rights "held by a collective" (*R. v Sparrow*, [1990] 1 SCR 1075 at 1112; *R. v Van Der Peet*. [1996] 2 SCR 507 at para 33; *R. v Sundown*, [1999] 1 SCR 393 at para 36).

[38] Accordingly, standing to bring a claim to enforce collective rights as a general rule "may be asserted only by a band or individuals authorized by a band" (see *L'Hirondelle v Canada*, 2001 FCA 339 at para 10).

[39] However, Mr. Francis relies upon *Behn v Moulton Contracting Ltd*., 2013 SCC 26 [*Behn*], to support his argument that collective rights can be asserted by individuals in civil causes of action. In *Behn*, at para 33, the Court notes:

> The Crown argues that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community. This general proposition is too narrow. It is true that Aboriginal and treaty rights are collective in nature…However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert Aboriginal or treaty rights…

[40] *Behn* leaves the door open, in "appropriate" circumstances, for individuals to assert collective Aboriginal or treaty rights. However, the Court in *Behn* did not provide any guidance on what constitutes an appropriate circumstance for standing to assert Aboriginal rights in a civil cause of action. Accordingly this issue remains unresolved (*Mohawks of Akwesasne v St. Lawrence Seaway Authority*, 2015 FC 918 at para 55; *Watson v Canada*, 2017 FC 321).

[41] In absence of a more fulsome expansion of what the Supreme Court meant in *Behn*, the Prothonotary concluded that in these circumstances Mr. Francis did not have standing to assert a collective right. Mr. Francis did not plead any particular or extraordinary facts to demonstrate why the Supreme Court's comments in *Behn* would apply to him. Specifically, he did not show why he could adequately raise collective rights without any evidence of support from the Elsipogtog First Nation. He further did not show on the evidence why he was more impacted than any other First Nation member by DFO's conduct, such that he could assert the collective right.

[42] The situation envisioned in *Behn* is extraordinary, as is the award of advance costs. Mr. Francis has not plead facts to prove the extraordinary merit of his case such that he could (1) advance a collective right as an individual and (2) justify an award of advance costs.

[43] Mr. Francis, in response, relies upon *Marshall and Bernard*, and specifically Justice LeBel's opinion in that case. He wrote the following at para 142:

> …it is clear to me that we should re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials. The issues that are determined in the context of these cases have little to do with the criminality of the accused's conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process. In addition, special difficulties come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges.

[44] As the Prothonotary noted, this statement is made in *obiter dicta*. Nonetheless, the circumstances envisioned in *Marshall and Bernard* are different than Mr. Francis' circumstances. In particular, Mr. Francis brings the Federal Court claim in response to the summary conviction charges. This is clear from the language used in his claim challenging the "prohibitions and restrictions" levied on him because of the charges. Additionally, there are no other "competing rights and interests of a number of parties who may have a right to be heard at all stages of the process." As noted above, the Elsipogtog First Nation is not involved in this

claim. Finally, the summary conviction charges were laid in relation to his activities in the province of Quebec.

[45] Accordingly, the Prothonotary correctly interpreted *Marshall and Bernard* as encompassing a case with more parties and communal interests as compared to the narrow basis of the claim filed by Mr. Francis.

[46] Even assuming Mr. Francis can establish a treaty right to fish on the authority of *Behn*, his case would not have *prima facie* merit. The Supreme Court has held that the imposition of licencing requirements do not constitute an unjustified infringement on Aboriginal rights (*R. v Nikal*, [1996] 1 SCR 1013 at paras 92 and 94). The summary conviction proceedings relate to penalties for the breach of the licencing requirement. It is therefore difficult to argue, in the context of this authority, that Mr. Francis' case has sufficient merit to make it a "special" or "extraordinary" situation justifying an award of advance costs: *Little Sisters*, at paras 4 and 36.

[47] Therefore, the Prothonotary did not err by concluding that the Plaintiff did not meet the second part of the *Okanagan* test.

(3) Public Interest

[48] With respect to public interest Mr. Francis argues that there is confusion in the case law after the Supreme Court's decision in *R. v Marshall*, [1990] 3 SCR 456 [*Marshall*] which recognized a treaty right to fish for Mi'kmaq in Nova Scotia. Mr. Francis asserts that *Marshall*

did not deal with an Aboriginal *rights* claim in his circumstances, which makes his claim a novel issue justifying an award of advance costs.

[49] The Prothonotary concluded that Mr. Francis' failure to show the involvement of the Elsipogtog First Nation means that it is not in the public interest to issue an award of advance costs and the matter would not be sufficiently unique.

[50] A case warranting advance costs is "of significance not only to the parties but to the broader community…" (*Okanagan*, at para 38). Here, as noted above, Mr. Francis' action is tied to his own circumstances, and the Elsipogtog First Nation does not appear to be supporting the claim. In a similar vein, I note that the lack of any evidence of support from the authority who purported to issue Mr. Francis the authority to fish, the Mi'kmaq Grand Council.

[51] For these reasons, based upon the high threshold that must be met to establish an entitlement to advance costs and the considerable deference owed to the Prothonotary, she did not err in concluding that this case does not present broad issues of public importance.

[52] Mr. Francis' appeal is therefore dismissed with costs.

ORDER in T-474-17

THIS COURT ORDERS that the Appeal of the Prothonotary's Order is dismissed with costs to the Defendant.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-474-17
STYLE OF CAUSE:	JOSEPH HUBERT FRANCIS v HER MAJESTY THE QUEEN
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	MAY 9, 2018
ORDER AND REASONS:	MCDONALD J.
DATED:	JUNE 15, 2018

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