Date: 20050926

Dockets: T-891-03
T-818-04

Citation: 2005 FC 1309

Ottawa, Ontario, the 26th day of September 2005

Present: the Honourable Mr. Justice Blanchard

BETWEEN:

ASSOCIATION DES CRABIERS ACADIENS INC.,
duly incorporated under the laws of
the province of New Brunswick, and
ASSOCIATION DES CRABIERS DE LA BAIE,
an association duly formed under the laws of
the province of Quebec

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] In an application for judicial review, the applicants argued on several grounds that the Minister of Fisheries and Oceans erred in law and exceeded his jurisdiction when, in 2003 and 2004, he drew up plans for the management of snow crab fishing. To this end, they entered several

affidavits in evidence. The respondent filed a motion to strike these exhibits, which was granted in its essential aspects by an order of Prothonotary Tabib on May 4, 2005.

[2] This proceeding concerns a motion filed by the applicants pursuant to rule 51 of the *Federal Courts Rules* (the Rules) to appeal this decision. They sought the following relief:

> [TRANSLATION]
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> (1) an order reversing the decision of Prothonotary Mireille Tabib on May 4, 2005, striking out, in whole or in part, the affidavits filed by the applicants in this application for judicial review;
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> (2) costs; and
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> (3) any other measure which this Honourable Court may see fit to make.

[3] The impugned affidavits were filed in the following circumstances. On May 2, 2003, the Minister of Fisheries and Oceans announced a three-year management plan for snow crab fishing in the southern Gulf. On May 30, 2003, the applicants filed a notice of application for judicial review. By that application, the applicants sought a ruling that the Minister had exceeded his jurisdiction in preparing the plan as well as an order quashing the plan and referring it back to the Minister. On February 6, 2004, the applicants filed two affidavits, those of Robert Haché and Gérard Conan.

[4] On March 25, 2003, the Minister made public a snow crab fishing management plan for the 2004 season. On April 26, 2004, the applicants filed a second application for judicial review

regarding the plan. Both proceedings were joined on August 24, 2004. The applicants filed into the record the affidavits of Marc Couture, Adrien Roussel, Mario Savoie and Stephen E. Patterson, sworn to on August 27, 2004, as well as a supplementary affidavit by Robert Haché, sworn to on August 30, 2004. In a decision on May 4, 2005, Prothonotary Tabib struck out the affidavits filed by the applicants, some in part and others entirely.

2. Impugned decision

[5] After setting out the applicable rules of law, the prothonotary proceeded to consider the disputed evidence. She ordered that the following be struck out:

- paragraphs 13 to 20, 28 to 42, 45 to 57, 87 to 90, 92, 93 and 96 to 98 of Robert Haché's affidavit dated February 6, 2004;
- all of Gérard Conan's affidavit, except for paragraphs 1, 12 and 14 to 18;
- paragraphs 3 and 5 of Marc Couture's affidavit;
- all of Adrien Roussel's affidavit;
- paragraphs 2 to 9 and 21 to 24 of Mario Savoie's affidavit;
- paragraph 18 of Robert Haché's affidavit dated August 30, 2004.

[6] The prothonotary also found that the affidavit of Stephen E. Patterson was inadmissible.

[7] It was agreed at the hearing that the issue of the admissibility of the paragraphs of the affidavits filed which dealt with the consultations, negotiations and exchanges preceding the adoption of the management plans as well as the admissibility of documents originating with the

Minister or in his possession at the time the decision was made, but which were not considered, would be referred to the judge who will rule on the case on the merits.

[8] Further, the prothonotary did not accept what she considered to be the fundamental premise put forward by the applicants, namely that it was the Court's duty, in the exercise of its supervisory power, to examine the validity or merits of the facts and scientific opinions submitted to a decision-maker. In the prothonotary's view, such an exercise would result in transforming the process of reviewing the legality of a decision into an appeal on the merits of the decision: *Vancouver Island Peace Society v. Canada*, [1992] 3 F.C. 42.

[9] The prothonotary went on to find that it did not appear to her that the purpose sought by the applicants, or the effect which the affidavits were likely to produce, was to establish the inherent falsity, invalidity, non-existence or unreasonableness of the factors considered in decision-making process, as the applicants contended. The prothonotary found that the primary purpose of the affidavits was to show that the plans adopted by the Minister would not have the effect of promoting or meeting the objectives which they claimed to achieve or which were required by law. Therefore, the foregoing evidence was struck out as, in the prothonotary's view, the conditions necessary for the exercise of the Court's discretionary power in this way had been met.

[10] The prothonotary found that the affidavit of Stephen E. Patterson was also inadmissible since his opinion was based on documentary and academic sources which did not appear to have been consulted by, or accessible to, the Minister. Finally, she ruled that the issue of whether the Marshall

Initiative, or the undertakings made in connection therewith, were valid was one which should be the subject of a separate judicial review.

3. Standard of review

[11] In *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, the Federal Court of Appeal indicated the grounds warranting the intervention of a court hearing an appeal from a decision of a prothonotary. This standard was in fact confirmed by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 at paragraph 18:

> Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case: *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), *per* MacGuigan J.A., at pp. 462-463.

4. Issue

[12] In my view, the following issue has to be decided for the purposes of the motion at bar: was the order of the prothonotary to strike, in whole or in part, the affidavits supporting the application for judicial review filed by the applicants based on an improper application of a rule of law or misapprehension of the facts, or did it raise a question vital to the final issue of the case?

5. Analysis

[13] The applicants argued that the prothonotary erred in refusing to accept that the affidavits filed were the only means available to them for challenging the Minister's jurisdiction. The purpose of this impugned evidence was to establish that the material considered by the Minister was

erroneous, false and/or irrelevant to the exercise of his power. That evidence should also serve to show the bad faith of the Minister, as well as to establish that he in part dictated the information he wanted to find in the recommendations supporting his decisions. The applicants contended that it was wrong to say they tried to offer new evidence that was not before the decision-maker. Indeed, they maintained that no hearing was held in the case at bar and the Minister made his decision without their having an opportunity to file the evidence in question. The evidence related to the basic principles surrounding the sound management of fisheries and general scientific knowledge relating to snow crabs. It would serve to help the Court assess, in a judicial review proceeding, the content of the allegations made by the applicants and constituted information which the Minister did not take into account in making his decision.

[14] The applicants distinguished *Ecology Action Centre Society v. Canada (Attorney General)*, [2002] F.C.J. No. 1778 (QL), from the facts at bar. In *Ecology Action, supra*, this Court upheld on appeal a decision by the prothonotary to strike five of the seven affidavits filed on the ground that the filing of extrinsic evidence was not the only means of challenging the decision-maker's jurisdiction. In the case at bar, the applicants maintained that the information prepared and submitted by the Minister's officials to justify his decisions did not show the wrongful and capricious nature and the bad faith of the Minister. In the applicants' submission, the disputed evidence showed that the Minister had in part dictated the information he wished to see in the recommendations supporting his decisions.

[15] The applicants argued that the affidavits of Robert Haché, Gérard Conan and Stephen Patterson were important as they dealt with the fundamental principles surrounding sound fisheries management and general scientific knowledge relating to snow crabs. They would serve to help the Court assess, in an application for judicial review, the content of the allegations made by the applicants. However, in the applicants' submission, the Minister's decisions did not take this information into account.

[16] The applicants further maintained that the prothonotary made an error in determining the purpose underlying the filing of Stephen Patterson's affidavit. The latter stated that no snow crab fishing right was conferred on the First Nations by the Halifax treaties, as interpreted by the Supreme Court of Canada in *R. v. Marshall*, [1999] 3 S.C.R. 456, and in *R. v. Marshall*, [1999] 3 S.C.R. 533. However, the Minister decided to give aboriginals access to this fishing under the terms of the “Marshall Initiative” program, since he felt he had a legal obligation to include aboriginals in snow crab fishing. The applicants argued that the *Marshall* decisions did not give aboriginals this right and created no legal obligation of this kind.

[17] It is true that the Rules of this Court contain no provision authorizing the striking out, on a preliminary motion, of affidavits filed in a judicial review proceeding. Although the case law recognizes that, in exceptional cases, the Court has a discretionary power to strike affidavits, that power must be exercised sparingly: *Canadian Tire Corp. v. P.S. Part Source Inc.*, [2001] F.C.J. No. 181. Accordingly, it is only in exceptional circumstances, where the existence of harm is shown and the evidence is clearly devoid of relevance, that this type of motion is warranted.

[18] It is also well established that only the evidence which the initial decision-maker had available is considered by the Court in a judicial review proceeding: *Chopra v. Canada (Treasury Board)*, [1999] F.C.J. No. 835 (QL), at paragraph 5. It is nevertheless possible, in some cases, to offer evidence extrinsic to the record presented to the court of review. In *Gitxsan Treaty Society v. Hospital Employees' Union*, [2001] 1 F.C. 135 (F.C.A.), the Court of Appeal held, at paragraph 13, that this possibility is limited to cases in which the filing of such new evidence is the only means of challenging the want of jurisdiction.

[19] In the case at bar, the prothonotary said that she was not:

> [TRANSLATION]
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> . . . persuaded of the merits of the basic premise put forward by the applicants, namely that it is for the Court, in exercising its supervisory power, to examine the validity or the merits of the facts and scientific opinions submitted to a decision-maker in order to determine whether that decision was made within the limits of the decision-maker's jurisdiction. It seems to me that what such an exercise involves is substituting the Court's assessment of the value and weight to be given to the facts submitted for that of the decision-maker, and so transforming the process of reviewing the legality of a decision into an appeal of the merits of the decision.
>
> In any event, even assuming that it was possible to offer extrinsic evidence to show the inherent falsity, invalidity, non-existence or unreasonableness of the factors taken into account or allegedly considered in a decision, it seems clear from reading the impugned affidavits that this is neither the purpose sought, nor the likely effect of these affidavits.
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> None of the affidavits seeks to question the accuracy, veracity or existence of the facts and scientific information submitted to the Minister.

[20] I am of the view that the prothonotary did not err in applying the rules of law regarding the striking of an affidavit in a judicial review proceeding. This Court's decisions on the applicable principle are consistent: extrinsic evidence that was not before the decision-maker is not admissible,

unless there is no other means of challenging the want of jurisdiction: *Gixtsan*, *supra*; *Farhadi*, *supra*; *Franz v. Minister of Employment and Immigration*, [1994] F.C.J. No. 862; *Bovar Waste Management Inc. v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 487. In the case at bar, the prothonotary admitted the paragraphs of the affidavits submitted that dealt with the consultations, negotiations and exchanges preceding the adoption of the management plans. That evidence was admitted as relevant on the grounds referred to in the application for judicial review, which dealt with the bad faith and failure or refusal of the Minister to observe the rules of natural justice. This evidence referred to the judge called to decide the case on merits also includes evidence regarding opinions, unsupported generalizations and hearsay testimony. It follows that that judge will be seized of evidence supporting the grounds stated by the applicants for challenging the want of jurisdiction. The evidence struck out is accordingly not the only means of challenging the want of jurisdiction.

[21] I accept the respondent's arguments that the affidavits are meant to offer evidence that was not before the decision-maker. It is an attempt to offer evidence on the merits of the impugned decision so the Court will rule on the validity, not merely the legality, of the decision. In a judicial review proceeding this Court does not sit as an appellate body: rather, it is required to determine whether decisions have been made in accordance with legislation and the prescribed process has been complied with, in view of the documentation available to the decision-maker.

[22] The evidence struck out, expert testimony for the most part, related to the history of fishing, the state and evolution of scientific knowledge on the evaluation of stocks and the biomass, crab

biology, the effect of overfishing on stocks and of overcapacity on the viability of fisheries, fishery management, the establishment of fishing zones, conservation efforts and memoranda and the rationalization of lobster fishing, finally leading to the establishment and distribution of the total allowable catch (TAC) and the evidence submitted regarding aboriginal fishing rights under the 1760-1761 treaties.

[23] Having read the evidence, I am of the view that the prothonotary did not err in dismissing the basic premise put forward by the applicants with respect to the evidence struck out. The prothonotary could properly find, from reading these affidavits, that the evidence could not establish the inherent falsity, invalidity, non-existence or unreasonableness of the factors taken into account which were allegedly considered in the decision. The evidence struck out is an attempt to file new evidence on the merits of the impugned decision so that the Court will rule on the validity, and not merely the legality, of the decision, which is contrary to the purpose of judicial review. As the prothonotary observed, there was clearly some basis for the opinions submitted to the Minister, a basis which the applicants themselves used, but to support a different argument.

[24] In the case at bar, I am of the view that, in exercising her discretion, the prothonotary could properly find that the impugned evidence was patently irrelevant and inadmissible in a judicial review proceeding. It cannot be said that the prothonotary relied on a wrong principle or a misapprehension of the facts. In short, the prothonotary's decision was not vitiated by any obvious error.

[25] I am also of the view that the striking out ordered in the case at bar is not a question vital to the final issue of the case, since the effect of the order is not to limit the applicant's substantive rights. The evidence struck out was considered irrelevant for the purposes of judicial review and forms only part of the applicants' evidence. The application for judicial review can still proceed: *Ecology Action Centre, supra*.

6. Conclusion

[26] For these reasons, the motion will be dismissed with costs.

ORDER

THE COURT ORDERS that:

1. The motion be dismissed.

2. Costs be awarded to the respondent.

« Edmond P. Blanchard »
Judge

Certified true translation

François Brunet, LLB, BCL

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-891-03 and T-818-04
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