Federal Court of Appeal | Cour d'appel fédérale

Date: 20111019

Docket: A-85-11

Citation: 2011 FCA 291

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

DOUG KIMOTO, VIC AMOS and
WEST COAST TROLLERS (AREA G) ASSOCIATION
on behalf of all AREA G TROLL LICENCE HOLDERS

Appellants

and

THE ATTORNEY GENERAL OF CANADA,
GULF TROLLERS ASSOCIATION (AREA H)
and AREA F TROLL ASSOCIATION

Respondents

Heard at Vancouver, British Columbia, on October 19, 2011.

Judgment delivered from the Bench at Vancouver, British Columbia, on October 19, 2011.

REASONS FOR JUDGMENT OF THE COURT BY: LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on October 19, 2011)

LAYDEN-STEVENSON J.A.

[1] This is an appeal from the order of Justice Harrington of the Federal Court (the judge) dismissing an application for judicial review of a decision of the Minister of Fisheries and Oceans (the Minister). The judge's reasons are published as 2011 FC 89.

[2] On appeal, the appellants and the respondent Attorney General provided written submissions and appeared at the hearing. The other respondents neither filed submissions nor appeared at the hearing. Notwithstanding the detailed arguments of the appellants' counsel, Mr. Harvey, for the reasons that follow, we are of the view that the appeal must be dismissed.

[3] The background underlying the application for judicial review is described in the reasons of the judge. Briefly, in 1985, recognizing the need for conservation and rational management of the Pacific salmon fishery, Canada and the United States entered into the Pacific Salmon Treaty (the Treaty). Chapter 3 of the Treaty addresses Chinook salmon. Amendments to Chapter 3, effective January 1, 2009, among other things, require Canada to reduce its catch of Chinook salmon from the West Coast of Vancouver Island and the United States to reduce its Alaskan catch. The amendments also stipulate that the United States would provide $30 million to Canada (the U.S. Fund) for a fishery mitigation program to reduce effort in its commercial salmon troll fishery. In light of this and other litigation, the Minister has agreed not to spend the U.S. Fund absent a court order.

[4] The Canadian Pacific salmon troll fishery comprises three areas: individual stock based management (ISBM) fisheries in the Strait of Georgia (Area H); aggregate abundance based management (AABM) fisheries in northern British Columbia (Area F) and AABM fisheries on the West Coast of Vancouver Island (Area G). The Treaty reduction applies only to Canada's Area G. The Minister chose to achieve the reduction by lowering the commercial allotment, leaving the sport and First Nations' quotas intact.

[5] After the amendments became effective, the Department of Fisheries and Oceans (DFO) consulted with domestic stakeholders regarding the development of a mitigation program and the use of the U.S. Fund. An Integrated Advisory Group was created to provide a number of options to DFO. At the conclusion of the Advisory Group process, the results of the consultations and options were considered by DFO and a report was presented to the Minister. On December 9, 2009, the Minister decided on three key elements of the mitigation program to reduce effort in the commercial salmon troll fishery. Specifically, the program includes:

- a voluntary permanent licence retirement program for troll licence holders in Areas F, G and H;
- a $500,000 program to support economic development in Vancouver Island West Coast communities (Area G); and
- $1 million to support the development of a new salmon allocation framework.

[6] The appellants sought judicial review of the Minister's decision, taking issue only with the licence retirement aspect applicable to each of the fishing areas. Basically, the appellants took the position that the U.S. Fund should be paid to them and, to this end, they also instituted a class action in the Federal Court. The action is stayed pending final determination of the application for judicial review. As stated earlier, the judge dismissed the application.

[7] The judge reviewed the Minister's decision on a standard of reasonableness. We agree that reasonableness is the applicable standard of review.

[8] The appellants submit that the Minister's decision does not comply with the Treaty and the *Financial Administration Act*, R.S.C. 1985, c. F-11 (the FAA) and is therefore *ultra vires*. We disagree. Section 26 of the FAA prohibits disbursements from the Consolidated Revenue Fund without the authority of Parliament. Section 21, in conjunction with the definition of "public money" in section 2 of the FAA, permits funds collected under a treaty to be paid out for a purpose specified in or pursuant to that treaty. Accordingly, if the proposed program is related to the purpose specified in the Treaty, this Court cannot interfere with the Minister's decision, unless the decision was unreasonable.

[9] The appellants' position is founded on the proposition that the U.S. Fund was provided in exchange for the reduction in Area G. The fact that the reduction adversely impacted Area G is not disputed. However, it does not follow that the Treaty must be interpreted to remedy that impact. Indeed, the plain language of the Treaty does not support the appellants' interpretation. Article 4 of the Treaty states:

> 4. The Parties agree that $30 million (U.S.) of the funding to be provided by the United States identified in paragraph 3, above, is to be made available to Canada to assist in the implementation of this Chapter. Specifically, $15 million (U.S.) is to be provided in each of two U.S. fiscal years from 2009 to 2011, inclusive, or sooner (for a total of $30 million U.S.), with the following understandings:
>
> (a) the bulk of this funding would be used by Canada for a fishery mitigation program designed, among other purposes, to reduce effort in its commercial salmon troll fishery; and
>
> (b) Canada will inform the Commission as to how this funding was utilized in support of the mitigation program within two years of receiving such funding (my emphasis).

[10] On its face, the language of Article 4 permits the use of the U.S. Fund for a fishery-wide mitigation program. The money is made available for the purpose of implementing Chapter 3 as a whole. The reduction in Area G is but one component of the fisheries management and financial provisions covered by Chapter 3. Significantly, Chapter 3 does not state anywhere that the U.S. Fund is tied to the harvest reduction in Area G, or to the Area G fishers. To the contrary, the Treaty permits Canada to use the bulk of the U.S. Fund for the purpose of reduction of effort in the commercial salmon troll fishery. That fishery includes three areas: F, G and H.

[11] Although the appellants strenuously argue that Area H does not fall within Chapter 3 and that it sustained no impact, Article 13(4) of Chapter 3 clearly contemplates the inclusion of ISBM fisheries; Area H is an ISBM fishery. Further, the evidence before the Minister specifically indicates that Area H sustained impact or could sustain impact over the tenure life of the Treaty. (see appeal book, volume 4, at pp. 1254-1264). This evidence supports the reasonableness of the Minister's decision to allocate portions of the U.S. Fund to fishers other than those in Area G. Because Chinook may again be caught in Area H, it was reasonable for the Minister to take a proactive approach to her contingent conservation obligations.

[12] Even if the Treaty permits the U.S. Fund to be used for a fishery-wide mitigation program, the appellants claim they have a property right in the fish that will now remain uncaught. This, they say, renders the program an expropriation which must be explicitly authorized by the FAA. In support of their argument, they rely on *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3

S.C.R. 166 (*Saulnier*). In our view, this argument is ill-founded. The appellants' proposition is the antithesis of fisheries being the common property of all, a principle deeply ingrained in Canadian law. Moreover, *Saulnier* does not advance the appellants' argument. *Saulnier* addressed the question whether a fishing licence could fall within the statutory definition of "property" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and the *Nova Scotia Personal Property Security Act*, S.N.S. 1995-96, c. 13. In holding that it could, Justice Binnie, at paragraph 48, specifically cautioned that the ruling did not expand the nature of a licence holder's interest as defined in the *Fisheries Act*, R.S.C. 1985, c. F-14 beyond the particular statutory context before the court. Consequently, this prong of the appellants' argument must fail.

[13] The Minister is charged with the formidable task of managing, developing and conserving the fisheries, which belong to the Canadian people as a whole. Decisions with respect to conservation and management issues must necessarily balance the interests of competing stakeholders. In this case, the Minister informed herself of the available options (of which there were many) by conducting extensive consultations with the various stakeholders. Ultimately, she chose to expend the U.S. Fund, for the most part, on a voluntary and permanent licence retirement program. This was a highly discretionary decision guided by fact and policy. In our view, the basis of the Minister's decision was sufficiently transparent and intelligible, and the decision itself fell within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*see Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, para. 47).

[14] The appellants also contend that the program does not fall within the Treaty because licence reduction will not reduce "fishing effort." This prong of their argument also fails on the basis of the deferential standard of review we must apply. Essentially, the appellants say that it was incorrect for the Minister to conclude that reducing fishing licences would reduce fishing effort by limiting the number of boats fishing. In *Comeau's Sea Foods Ltd. v. Canada* (*Minister of Fisheries and Oceans*), [1997] 1 S.C.R. 12, at paragraph 37, the Supreme Court stated:

> Licensing is a tool in the arsenal of powers available to the Minister under the *Fisheries Act* to manage fisheries. It restricts the entry into the commercial fishery, it limits the numbers of fishermen, vessels, gear and other aspects of commercial fishery.

[15] It was reasonably open to the Minister to conclude, in the circumstances, that a licence reduction component would reduce the fishing effort. The appellants have not demonstrated otherwise.

[16] With respect to the argument that the Treaty amounts to an impermissible sale of fishery resources, the judge properly distinguished this Court's decision *in Larocque v. Canada* (*Minister of Fisheries and Oceans*), 2006 FCA 237, 270 D.L.R. (4th) 552 (*Larocque*). The *Larocque* reasoning does not apply to the facts of this case. This program is directed to conservation and does not involve third-party service providers. Moreover, reciprocal conservation obligations are imposed on the United States under Article 9(a) of the Treaty. There is no sale of fishery resources as there was in *Larocque*.

[17] In view of the appellants' concession that their submissions regarding unjust enrichment and restitution were made solely for the purpose of providing context and not as a ground for judicial review, we need say nothing more about them.

[18] Since this is sufficient to dispose of the matter, we need not address the appellants' other arguments or the alternative arguments of the respondent advanced to sustain the judge's order.

[19] At the outset of the hearing of this appeal, the respondent brought a motion seeking an order striking Notices of Constitutional Question served by the appellants. The appellants submitted that the Notices raised issues concerning the applicability and operability of certain unspecified provisions of the FAA. We granted the motion, with reasons to follow. These are our reasons.

[20] The Notices are deficient and must be struck. They do not set out clearly and with particularity what provisions are inapplicable or inoperative, and the grounds for such a finding. They also do not specifically seek relief, such as declaratory relief, that provisions are inoperative or inapplicable. Therefore, the Notices fall short of what is required under section 57 of the *Federal Courts Act*, R.S.C. 1985, c.F-7. We would add that the Notice of Appeal similarly lacked clarity and particularity on this issue. We did indicate that the appellants were not precluded from arguing constitutional considerations in relation to issues of statutory interpretation.

[21] The appeal will be dismissed with costs.

"Carolyn Layden-Stevenson"
J.A.

“I agree
John M. Evans J.A.”

“I agree
David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-85-11
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HARRINGTON, OF THE FEDERAL COURT, DATED JANUARY 26, 2011, DOCKET NUMBER T-1582-10 (2011 FC 89)	
STYLE OF CAUSE:	Doug Kimoto et al. v. The Attorney General of Canada et al.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 19, 2011
REASONS FOR JUDGMENT OF THE COURT BY:	EVANS, LAYDEN-STEVENSON, STRATAS JJ.A.
DELIVERED FROM THE BENCH BY:	LAYDEN-STEVENSON J.A.

APPEARANCES:

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