

FEDERAL COURT FISHERIES

ISSUES:

A SURVEY OF FISHERIES CASES
COMMONLY HEARD IN THE
FEDERAL COURT

By Brad M. Caldwell

Federal Court Jurisdiction Over Fisheries Matters

- *In rem* claims pursuant to s. 22
- Judicial Review pursuant to s. 18 and 18.1
- Actions Against the Crown pursuant to s. 17
- (*Forfeiture Provisions of s. 72 Fisheries Act*)

Legal Nature of a Fishing licence

- *Saulnier v. Royal Bank of Canada*, 2008 SCC 58
 - Although not property at common law, under expanded definitions of property in both the Bankruptcy and Insolvency Act and Nova Scotia PPSA Act, qualified as property
 - Rejected earlier cases espousing (a) traditional property approach; (b) regulatory approach; and commercial realities approach.

Nature of Licence Dispute

- Disputes Between Licence Holders and Gov't. Gov't Usually Wins.
 - *Jollife v. Queen*, [1986] 1 FC 511.
 - *Saulnier*, para 48.
- Disputes Between Private Individuals
 - *Saulnier* – treated like property
 - *Wa Yas* [1993] F.C.J. No. 909 – constructive trust

In Rem Actions Pursuant to S. 22

- Cases where jurisdiction recognized:
 - Supply of bait and ice
 - Supply of fish on high seas to process
 - Supply of funds for acquisition of fish to process on high seas
 - Supply of vessel to use for purchasing fish
- Cases where jurisdiction not recognized:
 - Disputes re fishing licenses and quotas such as *Radil Bros v. Queen* 2001 FCA 317

Judicial Review: S.18 and 18.1

- Intro: Wide Range of Applications
- Impediments:
 - Proper Procedure
 - Broad Interpretation Given to s. 91(12)
 - Wide Discretion Given to Minister under s. 7, Standard of Review and Grounds for Review
 - Justiciability

Wide Range of Applications

- Issuance of fishing licenses (16 cases since 1997)
- Allocation of licenses between groups and rights to fish (9)
- Quota Entitlements (5)
- Fisheries Management (9)
- Cancellation and Suspension for contravention of *Fisheries Act* (6)
- Customs Act Forfeiture (1)
- Fisheries Act Forfeiture (2)
- Aboriginal Entitlement (12 with some overlap)
- Aquaculture (3)
- Closure of fishing area within a National Park (1)
- Challenge to DFO Management of Environment (?)

Determination of Proper Procedure for Judicial Review

- Originating Application under SS. 18 and 18.1 to 18.4.
- Can be later converted to action with leave.
- Can commence JR and action and apply to have heard at same time.
- Declaratory Relief Only Available Through JR

Broad Powers of Crown Under S. 91(12) (Sea Coast and Inland Fisheries)

- *Gulf Trollers Assn. v. Canada*, [1987] 2 F.C.93
 - “Parliament may manage the fishery on social, economic or other grounds, either in conjunction with steps taken to conserve, protect, harvest the reserve or simply carry out social, cultural or economic goals and policies.”
 - Cited with approval in *Ward v. Canada (A.G.)*, 2002 SCC 17
 - Relevant to question of whether Minister acted for irrelevant or extraneous purpose.

Standard of Review and Grounds

- S. 7 of *Fisheries Act* provides authority to issue licenses in “absolute discretion.”
- *Dunsmuir*, 2008 SCC 9; *Khosa* 2009 SCC 12; *Smith and Alliance Pipeline* 2011 SCC 7
 - Discretionary decisions attract reasonableness.
 - Standard of review analysis need not be done at every instance.
- Pre-*Dunsmuir*, bulk of cases silent or apply patent unreasonableness with a few reasonableness *simpliciter*

Standard of Review: Cont.

- Post Dunsmuir, most fisheries cases have applied the reasonableness standard
- See Bastarache *Post-Dunsmuir* article: *“The manner in which reasonableness is to be assessed is by looking at whether or not the reasons are rational and coherent, and whether or not the result falls within the range of possible, acceptable outcomes. Where decisions are highly discretionary and political in nature, the range of acceptable outcomes will be wider”*

Grounds for Review

- *Khosa*, 2009 SCC 12
 - Important to distinguish between standard of review and grounds for review
- Post *Dunsmuir*, but *pre-Khosa*, the FCA applied *Maple Lodge Farms* grounds in *Arsenault* .

Grounds for Review – Cont.

- *Maple Lodge Farms*, [1982] 2 S.C.R. 2
 - *Where the statutory discretion has been exercised in good faith **and**, where required, in accordance with the principles of natural justice, **and** where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere [emphasis added].*
- Useful that *Maple Lodge Farms* test quoted fully in *Arsenault* and *Carpenter Fishing* because sometimes misunderstood because of unfortunate choice of words in *Comeau's Sea Foods*, [1997] 1 S.C.R. 12 decision when summarizing the test.

Some Elements of Maple Lodge Farms Test

- Bad Faith

- *Aucoin v. Canada* 2001 FCT 800 (Rouleau, J.)

- Irrelevant or Extraneous Purpose

- *Carpenter Fishing*, [1998] 2 F.C. 548

[W]hen examining the exercise by the Minister of his powers, duties, functions and discretion in relation to the establishment and implementation of a fishing quota policy, courts should recognize, and give effect to, the avowed intent of Parliament and of the Governor in Council to confer to the Minister the widest possible freedom to manoeuvre

Elements of Maple Lodge Farms

Test – Cont

- Irrelevant or Extraneous Purpose – Cont.
- Examples:
 - Paying for test fishing with proceeds of catch *Laroque*, 2006 FCA 237;
 - Creating a regime to offer financial aid to seasonal fish plant employees paid for from fishing licence revenue *Aucoin*;
 - Taking into account potential criticism from other fish harvesters *Keeting*;

Justiciability

- Courts are not a suitable forum for deciding matters of public policy.
 - *Carpenter Fishing*
 - *Cummins v. Canada* (1996), 117 F.T.R. 309
 - *Kimoto*, 2011 F.C. 89

Damage Claims Against the Crown s. 17.

Procedure: *Canada (A.G.) v. TeleZone Inc.*, 2010 SCC 62

- Abolished *Grenier* requirement that damage claimants have lawfulness of gov't decision determined in Fed. CT. by J.R. before pursuing damage claim.
- Fed Crown unsuccessfully attempted to apply it in *Kimoto*.

Damage Claims: Types

- Misfeasance or abuse of Public Office
- Negligence
- Contract
- Conversion
- Breach of *Canadian Bill of Rights* and *Charter*

Misfeasance or Abuse of Public Office

- Not that common (6 cases), success is rare.
- *Lapointe v Canada* (1992) 4 Admin. L.R. (2d) 29 (T.D.)
The facts reveal the defendants consciously elected to disregard the law in order to make an example of the plaintiff and to confirm the Department's commitment to preventing fishermen from fishing in closed areas. The cancellation of the plaintiffs' licences can only be characterized as an extraordinary action taken in a highly visible situation. By unlawfully ordering the cancellation, with full knowledge there was no legislative authority to do so, the defendants committed an unwarranted and illegal act for which they are subject to liability for the damages sustained by the plaintiffs.

Negligence

- *Comeau's Sea Foods Limited*, [1997] 1 S.C.R. 12
- *Canada (A.G.) v. Keeping*, 2003 NLCA 21
- Negligent Misrepresentation:
 - *Keleher v. Canada* (1989), 26 F.T.R. 161 (T.D)
 - *Genge v. Canada*, 2007 NLTD 36
- With respect to proximity as it relates to Crown Liability, no fisheries cases referring to *Cooper v Hobart* or *Fullowka v. Pinkertons*, 2010 SCC 5

Contract

- *Puddister Trading Corp. v. Canada*, 1997 CanLII 5145 (Simpson J.)
- *Aucoin*, 2001 FCT 800
- *Andrews v. Canada (A.G.)*, 2009 NLCA 70
- Numerous case involving contractual disputes between private individuals in the fisheries context, normally dealt with by Superior Cts.

Unjust Enrichment

- *Kimoto* (Harrington J.)

A group of fish harvesters brought a judicial review application seeking a declaration of unjust enrichment arising out of the 30 million dollars Canada was to receive under the terms of a treaty with the United States. Applying *Garland v. Consumer Gas Co.*, this claim was denied by the court on the grounds that (a) the existence of the treaty and the requirements of the *Financial Administration Act* was a juristic reason for depriving the claimants of their catch, and (b) the Minister was not enriched because she was under no obligation to mitigate the loss to the fisher harvesters caused by reduction in fishing.

Conversion

Longmire v. Canada, [1993] F.C.J. No. 977
(*McKay J.*)

This case involved a scallop fisherman who was charged with fishing in a prohibited area. When the fishing vessel returned to harbour approximately three hours after being boarded by fisheries officers, the fisherman was ordered to return a large portion of his catch to sea pursuant to section 73(4) of the *Fisheries Act*. After being acquitted of the fisheries charge, the fisherman sued the Crown on the grounds that the order to return the catch to sea was not authorized by the Act because it was not done “at the time of seizure” as required by s. 73(4). *McKay J.* accepted this argument and awarded the fisherman damages for conversion

Breach of Canadian Bill of Rights and Charter

- *Noel & Lewis Holdings v. Queen* (1983), 1 Admin. L.R. 290 (Muldoon J.).
- *Vancouver (City) v. Ward*, 2010 SCC 27.

Forfeiture Pursuant to s. 72 of the *Fisheries Act*

Section 72(1) of the *Fisheries Act* provides that “72. (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty

Forfeiture - Cont

- Normally forfeitures handled by Provincial Courts and Superior Courts.
- *R. v. Ulybel Enterprises* (2001), 203 D.L.R. (4th) 513 (SCC).

Although section 74 and 75 of the Fisheries Act envision applications for relief from forfeiture by innocent parties to be made before superior courts, it *“is open to an innocent party to assert its interest in the form of an in rem claim against the vessel in Federal Court, under its admiralty jurisdiction.”*

Conclusion

- As can be seen by this survey, the Federal Court hears a wide variety of fisheries cases, primarily under its jurisdiction over judicial review proceedings and to a lesser extent under its jurisdiction over admiralty actions and damage actions against the Crown.
- For updates on fisheries cases and more detailed digests of the cases footnoted in this paper, see the fisheries page of admiraltylaw.com edited by **Brad M. Caldwell**.