Date: 19990617
Docket No. C.A. 149362

NOVA SCOTIA COURT OF APPEAL

Cromwell, Hart and Hallett, JJ.A.
Cite as: Francis v. Pictou Landing First Nation,
1999 NSCA 88

BETWEEN:

RAYMOND FRANCIS and DENNIS FRANCIS Appellants	)	Brian J. Hebert for the appellants
- and -	)	
CHIEF AND COUNCIL OF THE PICTOU LANDING FIRST NATION Respondents	)	Nick Scaravelli, Q.C. for the respondents
	)	Appeal heard: June 4, 1999
	)	Judgment delivered: June 17, 1999

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.: Hart and Hallett, JJ.A. concurring.

CROMWELL, J.A.:

[1] The appellants claimed compensation for loss of their lobster operation from the Continuing Compensation Account of the Boat Harbour Settlement Trust. The Trust was established as part of the settlement of an action brought on behalf of the Pictou Landing Micmac against Her Majesty the Queen in Right of Canada. The action arose out of the construction of an effluent treatment system at Boat Harbour in 1965 to treat effluent from Scott Maritimes Limited Pulp and Paper Mill at Abercrombie Point, Pictou County.

[2] Under the terms of the settlement agreement, which was signed on July 8, 1993, the Crown paid a total of $35,000,000 representing a cash settlement of its fiduciary or other obligations relating to the adverse effects of the treatment system. The settlement funds, less certain deductions not directly relevant here, were paid into the Boat Harbour Settlement Trust. The trustees of the Trust are appointed by the Chief and Council.

[3] The funds were divided into three accounts. The Band Compensation and Development Account was intended to provide continuing community benefits including resource rehabilitation, cultural and social support, economic development initiatives and housing development. The Community Development Account was to enable the Pictou Landing Micmac to be completely free of, or to protect themselves from, any possible future health hazards by allowing for the establishment of a new community on reserve lands away from the effects of the effluent treatment system. Eligible uses

included the purchase of land, capital costs of community infrastructure, planning assistance and alternative housing. The third account, the Individual Compensation and Development Account was subdivided into funds for Individual Compensation and Continuing Compensation. The Individual Compensation Account funded direct cash payments to eligible members of set amounts not dependant on proof of specific individual losses. The Continuing Compensation Account was funded for the purpose (as stated in section 5.2.2(b)) "... of enabling members, as individuals or groups, to advance claims for compensation for damages which are directly attributable to continuing adverse effects from the Boat Harbour Effluent Treatment System." (emphasis added) Once claims filed within two years of the date of the settlement agreement have been resolved, the remaining capital is to be distributed for the benefit of all eligible members of the Pictou Landing Micmac in equal shares.

[4] The fund relevant to this case is the Continuing Compensation Account. As noted, eligible members of the Pictou Landing Micmac, including the appellants, may claim compensation from the Trust for loss or damage attributable to continuing adverse effects from the Boat Harbour Effluent Treatment System. Claimants against the Continuing Compensation Account have the burden of proving their claim on a balance of probabilities: section 11.2.10.

[5] The appellants filed a claim which was submitted for arbitration to R. Lorne MacDougall, Q.C. pursuant to the terms of section 11 of the settlement agreement. They claimed the loss of their lobster fishery and adduced expert evidence in an effort

to quantify the amount of that loss. In a 54 page written decision, Mr. MacDougall awarded the appellants $40,000.00. They now appeal to this Court pursuant to the terms of article 11.2.15 of the agreement. Under the terms of the settlement agreement, the appeal is limited to a point of law or jurisdiction.

[6] The arbitrator held that the appellants had discontinued their fishing business in 1965 and that their total claim arising from the discontinuance was in the amount of $200,000.00. He determined that the effluent treatment system resulted in the loss of only 25% of their fishery (because in his view only 25% of their fishing took place in Boat Harbour) and that the system was not the only cause of their decision to discontinue their fishing operation. He found that boat difficulties, which the appellants were experiencing at the time, were 20% responsible for the decision and the effluent treatment system 80% responsible. He accordingly awarded 80% of 25% of the overall claim of $200,000.00 resulting in his award of $40,000.00.

[7] The appellants argue that the arbitrator erred in law in using $200,000.00 as the starting point for his calculation of the losses attributable to the effluent treatment system. They say that this figure was advanced only as an offer of settlement and was not advanced as an estimate of the total value of their fishery. They submit that the arbitrator did not derive this starting figure from the expert evidence and that he in fact appeared to accept that the expert evidence could sustain a significantly higher value. They say that the claim advanced and the evidence adduced supported a finding of a much larger total loss. They submit there was no evidence to support the use of

$200,000.00 as the starting point and that, in light of his other findings, the arbitrator erred in failing to give effect to much larger losses as quantified by the appellants' expert, Dr. Tugwell.

[8] The respondents answer that this appeal is restricted to questions of law or jurisdiction. In order to find that the arbitrator erred in law or jurisdiction, the Court must be persuaded, say the respondents, that there was an almost complete absence of evidence to support his conclusion that the appellants' estimate of the value of their entire fishery was $200,000.00. The respondents submit that there was some evidence before the arbitrator to support that conclusion. Therefore, no error of law or jurisdiction has been shown and the appeal should be dismissed.

[9] The parties have not made extensive submissions on the standard of review on an appeal such as this which, as noted, is restricted by the terms of the settlement agreement to errors of law or jurisdiction. They appear to agree, however, that for the purposes of this appeal, a finding which has no evidence to support it or is so weakly supported by the evidence that no reasonable trier of fact could make the finding on the evidence adduced, constitutes an error of law within the meaning of the appeal provisions of the agreement. We will assume, without deciding, that this is the applicable standard. The question to be answered on this appeal, then, is whether there was a reasonable basis in the evidence for the arbitrator's decision to use $200,000.00 as the starting point of his award.

[10] The claim filed by the appellants set out an estimated loss of income of $605,080.00. This figure was based on 100% of the fishery being lost as a result of the effluent treatment system. The claim then stated: "... in recognition of the fact that the Band has limited funds to pay such claims, and that others may come forward with valid claims, we propose to offer to settle the claim stated herein for the sum of $200,000.00." It seems to me, therefore, that the $200,000.00 figure stated in the original claim was advanced as their total claim based on 100% loss of their fishery. While there is considerable force to the appellants' submission that this statement in the written claim should have been interpreted as merely an offer of settlement, this was not the only basis for the arbitrator's conclusion.

[11] The appellants led evidence at the arbitration hearing, at which they were represented by counsel, that their total claim was for $200,000.00. The arbitrator states at page 23 of his award that the evidence adduced by the appellants through one of their witnesses was that "... the claim here is for $200,000.00." The arbitrator linked this finding to Dr. Tugwell's evidence in the following passage of his reasons:

> Dr. Tugwell in his evidence, and the tables he referred to in Exhibit "D", is corroborated by Mr. Hanes with respect to the total catches per fisherman. Based on this his estimate of the net loss to these claimants from 1965 to 1991 is over $500,000. The total claim of these claimants of $200,000 then is modest or conservative with respect to Dr. Tugwell's findings in Pictou County. He did not make an assessment or appraisal of the earnings of fishermen in the Pictou Landing area exclusively. This of course has the possibility of some error inherent in his analysis and figures. The over-all claim however is roughly about forty percent (40%) or less that Dr. Tugwell's estimate.

[12] The arbitrator also addressed this issue in the following part of his reasons:

> Though the cost to these claimants by the adverse effects caused them by the effluent treatment system of Boat Harbour has been estimated both in the claim,

and by Dr. Tugwell, as between $600,000 and roughly $1,000,000, this is not what the claimants have claimed. In referring to the claim in this respect it should be noted that the agreement provides for the distribution [of] this fund (Continuing Compensation Account) or the remainder thereof among the Band Members after twenty-one years or thereabouts. In other words, the more the fund is depleted by adverse effects claims then the less money there will be for eventual distribution to the Band Members. This and the fact that there may be further claims is apparently what these claimants had in mind when adding the following last three paragraphs to their claim (Exhibit "B", Tab "B"):

> "The before mentioned calculations are given for the purpose of providing an estimated loss of income only. There is no way one could provide a figure which would even be accurate within 30 per cent of actual income without the expenditure of a great deal of money, (even then the variables would be many and the end result would still be only an estimate) such things as climatic conditions, availability of lobsters and so on over the 26 year period could drive up or down the total considerably. Also, there is the matter of interest on income lost and a possible expansion of the business that could be calculated into a total. If one were to take into account all these factors a total claim of something in excess of one million dollars could quite easily be calculated.
>
> When trying to assess the financial losses to our families and come up with a dollar figure to attach to our claim many factors were considered. Foremost among these factors is the limited funds the band has available to pay such claims. After much deliberation we have concluded that instead of seeking the maximum amount we would settle for a much smaller amount.
>
> Therefore, in recognition of the fact that the Band has limited funds to pay such claims, and that others may come forward with valid claims, we propose to offer to settle the claim stated herein for the sum of $200,000. In return for being paid the stated amount, we would be prepared to sign an agreement with the Pictou Landing Band to forgo any further claims that may arise from this matter."

From the foregoing it is my opinion that the maximum claim presented here is for compensation of the value of $200,000 in total. From the evidence there is no question but that these claimants are community minded and have concern for the welfare of the Reserve and its members generally, which I understand to be the reason for the claim being framed in the foregoing manner. (emphasis added)

[13] It is obvious from the settlement agreement that the parties intended that the decision of an arbitrator acting pursuant to the agreement should not be set aside lightly in court. The appeal from the arbitrator is limited to questions of law or jurisdiction. The issue raised on this appeal is one of fact: what were the appellants asserting as the total value of their lost fishery? Before we can interfere with the arbitrator's conclusion that the claim was for $200,000.00, we must be persuaded that his finding on this point either has no evidence to support it or is so weakly supported by the evidence that to make the finding was unreasonable. It is not our function on this appeal to substitute our opinion for that of the arbitrator nor to give effect to other possible conclusions which, in our view, might be more strongly supported by the evidence. The Court must respect the dispute resolution mechanism chosen by the parties to the settlement agreement and limit our review on appeal to that specified in the agreement.

[14] It should be noted that the $605,080.00 advanced in the claim as an estimated loss of income had a number of limitations. It assumed catches of 18,000 lbs per year, while it appeared from Dr. Tugwell's report and other evidence that average catches were roughly one-third of this amount. It made no allowance for the costs necessary to carry on the fishing. According to Dr. Tugwell, the net income could be 33% or 50% of gross receipts. The claim was expressed in real dollars (as opposed to constant 1998 dollars as Dr. Tugwell did) and made no claim for interest. In other words, the $605,080.00 amount would have to be reduced by roughly two-thirds to reflect average catches and that amount reduced by a further two-thirds or one-half to

take account of the costs of fishing. The possibility for adjustment to reflect the loss of use of the money and the loss of value of money over time would have to be considered. None of these factors were addressed in the original written claim submitted by the appellants.

[15] It should also be noted that, as the arbitrator pointed out, the appellants' loss does not constitute simply what they would have made fishing, but the difference between what they would have made fishing and what they were able to make instead as a result of stopping their fishing activities. As noted, what is compensated under the Continuing Compensation Account is "loss or damage directly attributable to continuing adverse effects" of the effluent treatment system: section 5.6.1 and the burden of proving their claim was on them: section 11.2.10. The arbitrator had this in mind when he wrote that the appellants cannot, to use his phrase, "double-dip".

[16] The arbitrator noted that there was evidence that the appellant Dennis Francis acquired his first school bus in 1969/70, that he now owns two and that he could not both operate the bus and fish because he drives the bus September to June and the fishing season is May and June. There was also evidence that the appellant Raymond Francis had a salaried job as an alcohol counsellor for 7 or 8 years after he stopped fishing. He started a contracting business in 1975. By providing no information about their income after they stopped fishing, the appellants left the arbitrator with very little evidence of their actual loss. Given that they had the burden of proving their loss, this must be taken into account in assessing whether the arbitrator's conclusion that

$200,000.00 represented the claimed value of the loss of 100% of the fishery was so unreasonable that it constituted an error of law.

[17] Bearing in mind the limited nature of our role on this appeal and the evidence as summarized in the arbitrator's decision and in the Exhibits, I conclude that his finding that the total loss asserted by the appellants was $200,000.00 was not an error of law. There was some evidence to support that conclusion and I cannot say that it is so weakly supported by the evidence so as to be unreasonable. It follows that I would dismiss the appeal, but in the circumstances, without costs.

Cromwell, J.A.

Concurred in:

Hart, J.A.

Hallett, J.A.