SUPREME COURT OF NOVA SCOTIA
Citation: *Robinson v. Canada (Attorney General)*, 2018 NSSC 37

Date: 20180226
Docket: Hfx No. 469762
Registry: Halifax

Between:

Dana Robinson

Applicant

v.

Attorney General of Canada

Respondent

Decision

Judge:	The Honourable Justice Denise Boudreau
Heard:	January 10, 2018, in Halifax, Nova Scotia
Counsel:	Richard W. Norman, for the Applicant Jan Jensen, for the Respondent

By the Court:

[1] The respondent, Attorney General of Canada, seeks summary judgment on the applicant's pleadings.

[2] Those pleadings are in the form of a Notice of Application in Court, amended November 28, 2017, which requests the following:

> The Applicant is applying to the Court for an order:
>
> 1. declaring that Section 11(11) of the Commercial Fisheries Licensing Policy for Eastern Canada – 1996 (the "Policy")
>
>   (a) discriminates against disabled fisherman and is contrary to Section 15(1) of the *Charter of Rights and Freedoms* (the "Charter"), and
>
>   (b) the impugned section cannot be saved under Section 1 of the *Charter*, and
>
>   (c) the impugned section is of no force and effect pursuant to s. 52 of the Constitution Act, 1982, and/or
>
> 2. declaring that the Minister of the Department of Fisheries and Oceans' "absolute discretion" to issue fishing licenses, referred to in s. 7 of the *Fisheries Act*, is subject to and limited by s. 15 of the *Charter*, and/or
>
> 3. awarding damages to Mr. Robinson for breach of his *Charter* rights pursuant to s. 24 of the *Charter*.
>
> **Grounds for the order**
>
> The applicant is applying for the order on the following grounds:
>
> 1. Dana Robinson is a fisherman who lives in Granville Ferry, Nova Scotia.
>
> 2. The Respondent, the Attorney General of Canada, represents the Department of Fisheries and Oceans ("DFO"), the federal department responsible for the Policy.

3. Mr. Robinson has an owner – operator license (the "license") to fish lobster in Area 35 (License No. 111730), located on the northwest coast of Nova Scotia.

4. The License has been held by Mr. Robinson since 2007. The applicable regulations and policies requires the license – holder to personally fish the license.

5. Since obtaining the License in 2007, Mr. Robinson personally fished the License until such time as his medical condition, further discussed below, prevented him from doing so.

6. In approximately 2009, Mr. Robinson began experiencing problems with his legs, which caused severe pain. He was subsequently diagnosed with venous insufficiency. In 2011, Mr. Robinson had surgery in an effort to resolve his condition. The surgery was not successful.

7. Due to his medical condition, Mr. Robinson cannot be on a fishing vessel for any significant period of time. Mr. Robinson's medical condition renders him unable to personally fish his license.

8. Section 23(2) of the *General Fishery Regulations* permits DFO to authorize a substitute operator to fish an individual's license.

9. Section 11(11) of the Policy states that when such an authorization is provided on medical grounds, such designation may not exceed a total period of five years.

10. In or around 2009, due to his medical condition, Mr. Robinson requested a substitute operator authorization pursuant to Section 11(11) of the Policy. His request was approved. He requested and was approved for a substitute operator authorization in subsequent years. His requests were supported by evidence from qualified physicians.

11. In 2015, Mr. Robinson was advised by DFO that any further requests by him for a substitute would not be approved. DFO's permission to use a substitute to fish the License was to end in July 2016.

12. In October 2016, Mr. Robinson appealed DFO's decision to the Regional Licensing Appeal Board.

13. On March 13, 2017, Mr. Robinson was advised by the Regional Licensing Appeal Board that his appeal was dismissed, and that DFO would not be giving him any additional medical substitute operator authorizations.

14. In May 2017, Mr. Robinson filed an appeal of that decision with the Atlantic Fisheries Licensing Appeal Board (the "Appeal Board"). As of this date, his appeal has not been scheduled or heard. Due to the delays in hearing the appeal, Mr. Robinson was advised that he would be granted an additional extension to use a substitute through July 2018. This permission was given solely because the Appeal Board was unable to schedule his appeal hearing in a timely manner because the Appeal Board lacked quorum to hear appeals.

15. Mr. Robinson says that insofar as the Policy contains any upper limit on the amount of time (or years) a license – holder can obtain a medical substitute operator authorization, the Policy violates Section 15(1) of the *Charter.*

16. The Policy discriminates against fishermen with disabilities who require the use of a substitute in order to make a living.

17. Mr. Robinson says that this violation cannot be saved under Section 1 of the *Charter.*

18. Mr. Robinson seeks a declaration that Section 11(11) of the Policy is of no force and effect insofar as it limits a disabled or ill fishermen to using a substitute for a maximum of five years.

19. Mr. Robinson also says that the Minister of DFO's absolute discretion over licensing, provided for in the *Fisheries Act,* is subject to s. 15(1) of the *Charter,* and he seeks a declaration to that effect in addition.

20. Pursuant to s. 24 of the *Charter*, Mr. Robinson seeks damages as a result of the alleged *Charter* violations. The damages would be for compensation, vindication, and to deter future *Charter* violations.

21. Mr. Robinson also seeks his costs of this application.

[3] The present motion before the court reads:

The Attorney General of Canada moves for an order for summary judgment on the Respondent's pleadings which are clearly unsustainable:

(a) The Respondent's claim that subsection 11 (11) of the *Commercial Fisheries Licensing Policy for Eastern Canada 1996* breaches subsection 15 (1) of the *Canadian Charter of Rights and Freedoms* is a matter that is in the exclusive jurisdiction of the Federal Court;

(b) In the context in which it arises, the Respondent's *Charter* challenge regarding section 7 of the *Fisheries Act* is similarly a matter that is in the exclusive jurisdiction of the Federal Court. Alternatively, this claim fails to raise a reasonable cause of action;

(c) In the alternative, the moving party requests an order extending the time for the filing and serving of a notice of contest of an application in court by 15 days, following the final disposition of the motion; and

(d) The moving party seeks the costs of this motion.

[4] For ease of reference, I also provide the sections of Civil Procedure Rule 13.03 which are relevant to the Motion before me:

Summary judgment on pleadings

13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

…

(b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;

…

(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

(a) …

(b) dismissal of the proceeding, when the statement of claim is set aside wholly;

…

> (3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

[5] In assessing a motion pursuant to this Rule, the facts alleged in the pleadings are assumed to be true. The burden is on the moving party to show that it is "plain and obvious" that the Action cannot stand and that it should therefore be struck (*Geophysical Service Inc. v. Canada* 2016 NSSC 264; *Prentice v. Canada* 2005 FCA 395).

[6] The respondent contends that the first issue raised by the applicant is within the exclusive jurisdiction of the Federal Court. With regard to the second issue (relating to section 7 of the *Fisheries* Act), while the respondent acknowledges that it would be in the concurrent jurisdiction of this Court and the Federal Court, the respondent submits that the *forum conveniens* is the Federal Court. In the alternative, says the respondent, this issue relating to s. 7 of the *Fisheries Act* has already been litigated and conclusively resolved.

[7] The applicant disagrees. He submits that in relation to his first claim, the Supreme Court would have at least concurrent jurisdiction; in his view the "policy", in its nature and quality, is binding and should be viewed as a statutory instrument. Furthermore, and in the alternative, he submits that this Court does not

have before it, within this motion, the necessary evidence to make this decision. He asks that this motion for summary judgment be dismissed.

[8] I shall address each of the issues contained in the respondent's Motion in the order they were presented:

Issue #1: The Respondent's claim that subsection 11(11) of the *Commercial Fisheries Licensing Policy for Eastern Canada 1996* breaches subsection 15(1) of the *Canadian Charter of Rights and Freedoms* is a matter that is in the exclusive jurisdiction of the Federal Court.

[9] This policy states as follows:

> Commercial Fisheries Licensing Policy for Eastern Canada, 1996
>
> 11. General Policy Guidelines
>
> (11) Where the holder of a license is affected by an illness which prevents him from operating a fishing vessel, upon request and upon provision of acceptable medical documentation to support his request, he may be permitted to designate a substitute operator for the term of the license. Such designation may not exceed a total period of five years.

[10] The *Federal Court Act*, R.S.C. 1985 c. F-7, provides that the Federal Court has exclusive jurisdiction over certain areas:

> 18(1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> …

> (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

[11] Further, at 18.1(3) and (4) of that same *Act*:

> 18.1(3) On an application for judicial review, the Federal Court may
>
> (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
>
> 18.1(4) The federal court may grant relief under subsection (3) if it is satisfied, *inter alia*, that the federal board, commission or other tribunal
>
> (a) acted without jurisdiction, acted beyond its jurisdiction or refuse to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> …
>
> (f) acted in any other way that was contrary to law.

[12] These provisions have been interpreted in a number of cases. It has been repeatedly held that while provincial Superior Courts may, or do, have jurisdiction over Charter challenges to legislation (both provincial and federal), the Federal Court has exclusive jurisdiction over challenges to the manner in which federal decision-makers exercise their powers (*Canada v. L'Anglais* [1983] 1 S.C.R. 147; *R. v. Cummins* [1997] B.C.J. No. 2540).

[13] In *Mousseau v. Canada* (1993) 107 D.L.R. (4th) 727 (N.S.C.A.), the applicants argued that the federal government had discriminated against them in

relation to housing subsidies. The applicants were status natives who had married non-natives and left their reserves, thereby losing their status. The chambers judge concluded that since the relief sought was a Charter remedy, the provincial Supreme Court had authority to proceed.

[14] The Court of Appeal disagreed. After noting "There is, however, a distinction between jurisdiction to determine the constitutional validity or the applicability of legislation on the one hand and jurisdiction to pass upon the manner in which a board or tribunal functions under such legislation on the other" (par. 13), their conclusion was as follows:

> 22 In my opinion, the issue in this case relates not to whether the legislation under which the appellants functioned infringed the Charter, but whether the manner in which they functioned under that legislation did so. The question is whether in such circumstances this amounts to a constitutional issue over which the Supreme Court has jurisdiction in the face of s. 18 of the Federal Court Act. Strong policy considerations exist for answering this question in the negative…
>
> 23 In my opinion, the activities of federal agencies pursuant to federal law – as distinct from the law itself - are clearly matters which can be scrutinized under the Charter only by a court which is otherwise one of competent jurisdiction within the meaning of s. 24 (1) of the Charter. The Supreme Court is not such a court…

[15] In *Nolan v. Canada* [1998] O.J. No. 39 (Ont. Gen. Div.), the applicants sought declaratory relief related to a distinction being made by the federal government between *Indian Act* bands, and non-reserve natives. The applicants did not challenge any federal legislation, but sought declarations that certain decisions made had infringed the Charter. The applicants submitted that the *Mousseau*

(supra) decision could be distinguished, or that it was at odds with existing Ontario case law. The court disagreed:

> 24 I am not convinced that Mousseau was incorrectly decided. Accordingly, since the applicants and the intervenors are challenging administrative decisions made by entities (the Minister, the Commission and the respondent) that are federal boards, commissions or other tribunals, as defined in s. 2 of the Federal Court Act, and since those entities were acting pursuant to valid federal legislation, the declaratory relief sought in the application is, because of the provisions of s. 18 (1) of that Act, available only in the Trial Division of the Federal Court of Canada. Therefore, this court being without jurisdiction, the application is dismissed. Contrary to the submission of counsel for the applicant and the intervenors, I do not think that the result should be any different merely because what is sought in the application is a Charter remedy.

[16] A similar conclusion was reached in *Day Star First Nation v. Canada* [2003] S.J. No. 406:

> 17 …The plaintiffs are in essence, challenging the manner in which a federal program of government funding is being administered. It is the actions of the Minister and the policy decisions of the Minister which is complained of. The complaint relates to the manner in which a federal official functioned under federal legislation. Accordingly, since the plaintiffs are challenging administrative decisions made by the Minister, that is a "federal board, commission or other tribunal" as defined in s. 2 of the *Federal Courts Act* and, since the minister was acting pursuant to valid federal legislation, the declaratory relief sought in the application, because of the provisions of s. 18 of the *Federal Courts Act,* is available only in the Trial Division of the Federal Court of Canada. Therefore, this Court is without jurisdiction.

[17] In *PEI v. Canada (Fisheries and Oceans)* 2006 PESCAD 27, the applicant fishermen had made a number of claims against the respondent, seeking *inter alia* declarations that the Minister, in a number of licensing decisions, had violated sections of the *Constitution Act (1982)* and the *Charter*.

[18] The PEI Court of Appeal noted the extensive caselaw that had already made the distinction between legislation, on the one hand, and the manner in which decisions are made pursuant to that legislation, on the other:

> [37] … As for the constitutional breach claims and the jurisdiction to deal with them, I find that the motions judge has mis-characterized the issues here and thus misapplied the law. Superior courts have the power to decide constitutional issues but the primary issue in the instant case is the way the fishery was managed - the way licensing decisions were made - under the *Fisheries Act*. If in reviewing these decisions the federal court finds that there were constitutional Charter breaches, it has the authority to apply those principles. So long as those constitutional breaches are only incidental to the exercise of otherwise valid federal power by federal board or tribunal, then the federal court has the exclusive jurisdiction pursuant to s. 18 to hear and decide the matter.
>
> …
>
> [40] The fact that the challenge to these decisions is a constitutional challenge does not usurp the authority of the federal court. The Federal Court is empowered to apply constitutional principles in making its decisions so long as those decisions relate to actions taken or decisions made pursuant to valid federal legislation. While there is some jurisdiction in superior courts to decide upon damage claims against federal officials (See: **Constitutional Litigation in Canada** by Lokan and Dassios, at pp. 4-7 to 4-8), a declaration such as one sought here has consistently been found to be within the exclusive jurisdiction of the Federal Court. The Supreme Court of Prince Edward Island thus does not have jurisdiction to hear these constitutional claims.

[19] The case of *Canada v. TeleZone* [2010] 3 S.C.R. 585 is also quite helpful in my view. The respondent company, who had made an application for a telecommunications license and had been rejected by the Minister of Industry Canada, started an action in the provincial Superior Court for claimed losses in respect of that refused license. It alleged breach of contract, negligence, and unjust enrichment (arising out of application fees for the license).

[20] A preliminary issue arose as to whether TeleZone was required to first seek the Minister's order quashed on judicial review, at the Federal Court. The Supreme Court of Canada decided it did not, since the particular causes of action put forward were within the jurisdiction of the Superior Court:

> [75] The Crown contends that TeleZone's argument would risk putting judicial review of federal decision makers back in the provincial superior courts dressed up as damages claims. On this view the "artful pleader" will forum-shop by the way the case as framed. Of course, "artful pleaders" exist and they will formulate a claim in a way that best suits their clients' interests. However, no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. Such relief is not available in the provincial superior court. The claimant must, as here, be content to take its money (if successful) and walk away leaving the order standing.
>
> …
>
> [79] TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a license to TeleZone, acted in breach of his contractual and equitable duties or in breach of the duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licenses issued to its competitors. It does not seek to undo what was done. It complains about what was *not* done, namely fulfillment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself.

[21] That is not the case before me. The applicant Mr. Robinson has not brought forward any claims in contract, tort, or equity, which would be causes of action within the jurisdiction of this Court.

[22] The applicant has claimed in oral submissions that, similar to *TeleZone,* he does not seek to set aside the Minister's decision. (On that point, I note that the applicant also seeks damages for breach of his *Charter* rights; those two requests are clearly contradictory.) In any event, the fact remains that the applicant's claim is framed as a review of a policy of a department of the federal government. *TeleZone* is entirely distinguishable.

[23] The applicant submits that, in certain cases, government policy can be similar in nature and effect to law and/or regulation in that the decision-maker treats the policy as "binding". In such cases, says the applicant, the policy could be challenged in the provincial superior court, as it is "akin" to legislation.

[24] The applicant submits that the policy at issue here is such a "binding" policy. In the alternative, the applicant submits that this Court should require further evidence and/or information about the policy before making this decision.

[25] The applicant has referred to the case of *Canadian Federation of Students v. Greater Vancouver Transportation Authority* [2009] SCC 31 in support of this argument. In that case, the respondent had refused permission to a group of students to place ads encouraging voting on the sides of their buses. The respondent's refusal was based on its advertising policies, which barred all

political or controversial ads. The students commenced an action seeking a declaration that these policies breached the guarantee of freedom of expression as found in the *Charter*.

[26] There were a number of debates to be resolved within the *Canadian Federation of Students* case: whether the respondent fit within the definition of "government" contained in s. 32 of the *Charter* (thereby making their activities subject to the *Charter*); whether the advertising policies infringed s. 2(b) of the *Charter*; and if they did, whether that infringement was justified under s. 1 of the *Charter*. It is within that last debate that the discussion of "law" vs. "policy" took place.

[27] In order to be saved by s. 1, a breach must be shown to be a "reasonable limit prescribed by law". In his analysis, the trial judge had asked himself whether the impugned policies were "law" for the purposes of s. 1; he concluded that they were not. Both the Court of Appeal and the Supreme Court of Canada engaged in a fulsome discussion as to whether a government policy could fit within the term "law" as contained in s. 1. The conclusion reached was as follows:

> 65 Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".

[28] In other words, the issue in *Canadian Federation of Students* was very specific to its fact scenario. Its analysis of a "policy" being akin to law is entirely in the context of the use of the word "law" in s. 1 of the *Charter*.

[29] I am unconvinced that this case is applicable to the scenario before me, where the question is jurisdiction. I have been provided no caselaw or precedent where a provincial Superior Court decided that it was empowered to review a federal government policy because it was "binding" and therefore "legislative in nature".

[30] In *Carpenter Fishing Corporation v. Canada* 155 D.L.R. (4th) 572 (F.C.A.), the respondent Ministry of Fisheries had implemented a new policy relating to halibut fishing quotas (based on historical catches, size of vessel, and other considerations). The applicants sought a declaration that the new policy was unlawful, and sought damages for their losses. Within that decision the Federal Court of Appeal made the following comments:

> [28] The imposition of a quota policy (as opposed to the granting of a specific license) is a discretionary decision in the nature of policy or legislative action. Policy guidelines outlining the general requirements for the granting of licences are not regulations; nor do they have the force of law. It flows from the decision of the Supreme Court in *Maple Lodge Farms v. Government of Canada* [1982] 2 S.C.R. 2 and from the decision of this Court in *Canadian Assn. of Regulated Importers v. Canada (Attorney General)* [1994] 2 F.C. 247 (F.C.A.), that the Minister, provided he does not fetter his discretion to grant a license by treating the guidelines as binding upon him, may validly and properly indicate the kind of

> considerations by which he will be guided as a general rule when allocating quotas.

[31] As to the applicant's submission that the policy here was/is applied in a "binding" manner, I note that the facts alleged in the Application (which I am to accept as true for the purposes of this motion) do not support this suggestion:

> 14. In May 2017, Mr. Robinson filed an appeal of that decision with the Atlantic Fisheries Licensing Appeal Board (the "Appeal Board"). As of this date, his appeal has not been scheduled or heard. Due to the delays in hearing the appeal, Mr. Robinson was advised that he would be granted an additional extension the use a substitute through July 2018. This permission was given solely because the Appeal Board was unable to schedule his appeal hearing in a timely manner because the Appeal Board lacked quorum to hear appeals. (emphasis added)

[32] In other words, the applicant acknowledges that the policy was waived for him in 2017-2018, due to his special circumstances. A policy that can be waived, by definition, is not binding. I see no need for further evidence on that point.

[33] In the final analysis, I find that the applicant's claim seeks to attack the manner in which the Minister's decisions are made, in the area of substitute operators for disabled fishermen. The legislation permitting such substitutes is not being challenged. What is being challenged is the policy whereby the respondent (under normal circumstances) does not allow such substitutes after five years. In my view that is a challenge to the manner in which the Minister exercises his discretion pursuant to the *Fisheries Act*, and therefore falls squarely within the exclusive jurisdiction of the Federal Court.

[34] I find that the Supreme Court is without jurisdiction in respect of Issue #1 raised by the applicant. I grant summary judgment on the pleadings in relation to that claim to the respondent pursuant to Rule 13.03(1)(b). This claim is therefore dismissed (Rule 13.03(2)(b)).

Issue #2: In the context in which it arises, the Respondent's *Charter* challenge regarding section 7 of the *Fisheries Act* is similarly a matter that is in the exclusive jurisdiction of the Federal Court. Alternatively, this claim fails to raise a reasonable cause of action.

[35] S. 7 of the *Fisheries Act* reads:

> **Fishery leases and licenses**
>
> 7(1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licenses for fisheries or fishing, wherever situated or carried on.
>
> (2) Except as otherwise provided in this Act, leases or licenses for any term exceeding nine years shall be issued only under the authority of the Governor in Council.

[36] It is acknowledged by the respondent that this question, on its face, would be within the jurisdiction of both the provincial Supreme Court and the Federal Court. However, given my conclusion that the "main" part of this application is in the exclusive jurisdiction of the Federal Court, it seems clear that the most convenient forum for this second issue is also, clearly, the Federal Court. The issues are intertwined and related, as framed by the applicant. I see no benefit in continuing

this part of the claim in Supreme Court, as such would not be the best use of court resources.

[37] As an alternative submission, the respondent had also noted that this particular question has already been addressed by multiple courts. Those courts have held that the word “absolute” in s. 7 of the *Act* is redundant and does not remove the discretion of the Minister from *Charter* scrutiny (*Comeau Sea Foods v. Canada* [1997] S.C.J. No. 5; *PEI v. Canada (Fisheries and Oceans)* 2006 PESCAD 27). I leave it to the applicant to decide whether he wishes to pursue this second issue in his Application to Federal Court.

[38] If the parties cannot agree on costs, I would ask for submissions in writing within 30 days of the present decision.

Boudreau, J.