Date: 20080305

Docket: T-378-07

Citation: 2008 FC 299

Ottawa, Ontario, March 5, 2008

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ROBERT ARSENAULT, JOSEPH AYLWARD, WAYNE AYLWARD, JAMES BUOTE, RICHARD BLANCHARD, EXECUTOR OF THE ESTATE OF MICHAEL DEAGLE, BERNARD DIXON, CLIFFORD DOUCETTE, KENNETH FRASER, TERRANCE GALLANT, DEVIN GAUDET, PETER GAUDET, RODNEY GAUDET, TAYLOR GAUDET, CASEY GAVIN, JAMIE GAVIN, SIDNEY GAVIN, DONALD HARPER, CARTER HUTT, TERRY LLEWELLYN, IVAN MacDONALD, LANCE MacDONALD, WAYNE MacINTYRE, DAVID McISAAC, GORDON L. MacLEOD, DONALD MAYHEW, AUSTIN O'MEARA and BOYD VUOZZO

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This is an appeal by the plaintiffs pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 (the Rules) of the order of Prothonotary Morneau, dated September 6, 2007 (the impugned order), which, *inter alia*, struck out a portion of the plaintiffs' statement of claim. Prothonotary

Morneau further ruled that it is a prerequisite to the prosecution of this action that the administrative decisions which apparently lay at the heart of the plaintiffs' claim for damages be declared invalid or unlawful. Until that form of relief is obtained by way of judicial review, this action cannot be sustained. The plaintiffs have not brought a motion for an order extending the time to file an application for judicial review but instead ask the Court to set aside the impugned order and to dismiss the respondent's motion to strike, with costs.

THE PRESENT ACTION

[2] The plaintiffs' statement of claim was filed on March 6, 2007, pursuant to section 17 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the FCA) which allows a party to seek relief against the Crown. The plaintiffs, twenty-seven "traditional" snow crab fishers in Prince Edward Island, claim to have suffered damages in connection with certain measures taken by or on behalf of the Minister of Fisheries and Oceans (the Minister) which significantly reduced what they allege to be their "guaranteed" snow crab fishing quotas.

[3] The primary cause of action is framed as an action for breach of contract, with additional allegations in unjust enrichment, negligent misstatements, misfeasance in public office and breach of fiduciary duty. The plaintiffs seek an array of damages, including past and future revenue losses; diminution in the value of their fishing enterprises; general damages and punitive damages; specific performance of agreements entered into with the Crown; and, restitution of the value of snow crab quota wrongfully taken from them by the defendant.

[4] For the purpose of the present motion, I assume that the facts as stated in the statement of claim can be proved at trial by the plaintiffs.

[5] In 1989, the 160 traditional fishermen (30 from Prince Edward Island, called the "traditional inshore fishermen", and 130 from New-Brunswick, Quebec and Nova-Scotia, called the "traditional mid-shore fishermen") witnessed the almost total collapse of Fishing Area 12, the area in which the traditional inshore fishermen are licensed. Following this dramatic event and throughout the 1990s, discussions and negotiations took place between the traditional fishermen and DFO. Indeed, between 1990 and 2002, the plaintiffs entered into a series of agreements with the Minister (the Individual Quota Agreements) that provided, *inter alia*, each plaintiff with a specific quota from the total allowable snow crab catch (TAC) for Prince Edward Island.

[6] As part of the overall scheme and ministerial commitment not to increase the number of licenses, the traditional fishermen also agreed to finance certain new management measures undertaken by the Department of Fisheries and Oceans (DFO). Indeed, in 1997, the parties entered into a five-year co-management agreement (the Co-Management Agreement) which provides for the limited sharing of excess commercial biomass (by the allotment of temporary permits) and for a yearly contribution by the 160 traditional fishermen in the order of 1.75 million dollars to finance DFO's research, conservation, protection and management policies.

[7] Moreover, following the Supreme Court of Canada's decision in *R. v. Marshall*, [1999] 3 S.C.R. 456, DFO attempted to integrate certain First Nations into the Canadian commercial fisheries

through a process of voluntary buybacks of existing licences. The Marshall Agreement, commonly referred to as the "one-out, one-in" principle provides that for every aboriginal new entrant to the fishery, an existing fisher's licence shall be bought out by the Crown. According to the plaintiffs, DFO made representations that there would not be an increase in the number of fishing licences granted or in the actual fishing effort as a result of this voluntary buyback process. Two of the original 30 licenses issued to traditional inshore fishermen were purchased by the Government of Canada for provisions to First Nations Fishers, leaving a balance of 28 traditional inshore fishermen. At present, the plaintiffs collectively hold 27 of these 28 original licenses.

[8] The plaintiffs submit in their pleadings that both the Individual Quota Agreements (including the Co-Management Agreement) and the Marshall Agreement (collectively, the Agreements), contain an implicit promise that the defendant would compensate the plaintiffs should the defendant fail to honour same. Moreover, the pleadings allege that the Minister and his representatives made statements calculated to mislead the plaintiffs into believing that the Minister could and would be bound by contract. In this case, it is submitted by the plaintiffs that the claim in negligent misstatement arises not out of a "policy decision" pertaining to the allocation of quota, but out of an "operational decision" of the Minister, as servant of the Crown.

[9] At the core of the allegations against the defendant is a series of administrative actions subsequent to the Agreements which have significantly reduced the snow crab quotas to which the plaintiffs as traditional inshore fishermen were allegedly contractually entitled, thereby breaching the Agreements. More particularly, in May 2003, the TAC was decreased to 17,148 metric tons

rather than the 21,500 metric tons as recommended by industry representatives and the DFO's own scientists. Five percent (5%) of the TAC (less the quota already taken away and provided to First Nations) was taken away in order to rationalize the lobster and ground fish fisheries by providing new access to new entrants to the snow crab fishery. Over 4.7081% of the TAC (less the quota already taken away and provided to First Nations and the lobster and ground fish fishermen) was taken away in order to rationalize the Fishing Area 18 snow crab fishery by providing access to the Fishing Area 12 snow crab fishery. By virtue of these measures, DFO increased fishing efforts from 160 traditional vessels to approximately 400 vessels (with a proportionate increase in traps), thereby endangering the snow crab fishery. Moreover, the taking of the plaintiffs' quotas continued in each of 2004, 2005 and 2006. The plaintiffs also allege that between 2004 and 2006, DFO set aside an allocation from the TAC to finance DFO's own departmental activities. The plaintiffs state that the taking of quota to finance DFO's departmental activities is not only contrary to the Agreements, but is also unlawful as was decided in 2006 by the Federal Court of Appeal in *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, [2006] F.C.J. No. 985 (QL) (*Larocque*) and by this Court in *Association des crabiers acadiens v. Canada (Attorney General)*, 2006 FC 1241, [2006] No. 1566 (QL) (*Association des crabiers*).

[10] In addition to their claims in damages for breach of the Agreements, as well for specific performance of same, the plaintiffs also submit that on the basis of the facts mentioned above, they are also entitled to restitution (because the taking of quota constitutes unjust enrichment of the Crown) and further that the defendant's actions were negligent and in breach of the fiduciary duty owed to the plaintiffs.

THE IMPUGNED ORDER MADE BY THE PROTHONOTARY

[11] On April 16, 2007, the defendant filed a motion to strike the statement of claim on the grounds that this Court does not have jurisdiction to hear the plaintiffs' action, that it discloses no reasonable cause of action and/or that it is an abuse of process. Alternatively, the defendants sought an order staying the action pursuant to paragraph 50(1)(*a*) of the FCA. Finally, the defendants sought an order granting leave to defer the filing of their defence until the final disposition of the motion.

[12] Prothonotary Morneau issued the impugned order on September 6, 2007, which first struck out the plaintiffs' request for relief in the form of specific performance and all the statements in the statement of claim that support the claims for damages for breach of contract pursuant to Rule 221(1)(*a*) of the Rules. Secondly, Prothonotary Morneau ordered that the plaintiffs' remaining action in tort be stayed pending successful judicial review, provided that if the plaintiffs did not commence the judicial review process within 30 days (or if they did and their application was ultimately dismissed), the plaintiffs' action would be deemed struck without further judicial process. Prothonotary Morneau provided extensive reasons in support of the impugned order (2007 FC 876).

[13] Prothonotary Morneau relied on *Hodgson et al v. Ermineskin Indian Band et al.* (2000), 180 F.T.R. 285, page 289 (affirmed (2000), 267 N.R. 143; leave to appeal to the Supreme Court of Canada dismissed (2001), 276 N.R. 193) (*Hodgson*) for the proposition that pursuant to Rule 221(1)(*a*) of the Rules, the "plain and obvious" test applies to the striking out of pleadings for lack

of jurisdiction in the same manner as it applies to the striking out of any pleading on the ground that it discloses no reasonable cause of action.

[14] Prothonotary Morneau emphasized that not all actions brought against the Crown must proceed by way of an application for judicial review and found in this regard that the plaintiffs' central argument is whether the Minister, in the exercise of his "absolute discretion" under section 7 of the *Fisheries Act*, R.S.C. 1985, c. F-14, violated the terms of the Agreements.

[15] Section 7 of the *Fisheries Act* states as follows:

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 licences for fisheries or fishing, wherever situated or carried on.	7. (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences d'exploitation de pêcheries — ou en permettre l'octroi —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.
(2) Except as otherwise provided in this Act, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.	(2) Sous réserve des autres dispositions de la présente loi, l'octroi de baux, permis et licences pour un terme supérieur à neuf ans est subordonné à l'autorisation du gouverneur général en conseil.

[16] Since the plaintiffs' action is, in the opinion of the Prothonotary, in essence an action for breach of contract (and not an attempt by the plaintiffs to collaterally attack the Minister's Decisions), it was not "plain and obvious" for the Prothonotary that the Court did not have the

jurisdiction to hear the plaintiff's action in breach of contract. However, Prothonotary Morneau found that same failed to disclose a reasonable cause of action under another ground of dismissal advanced by the defendant, specifically the application of the "non-fettering doctrine". According to the Prothonotary's reasons, "the *Fisheries Act* contains no provision authorizing the Minister to bind or fetter, by contract, the discretion [she or] he has in respect of management and thus the allocation, from time to time, of fishing quotas." As such, the plaintiffs' request for relief in the form of specific performance and the plaintiffs' action for breach of contract were struck out.

[17] At the same time, Prothonotary Morneau also found that the measures referred to in the statement of claim constitute decisions by the Minister affecting fishing quotas (the Decisions) and that "those [D]ecisions fall under and within subsection 18.1(2) of the [FCA]" which provides a 30-day time limitation for commencing an application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal. Therefore, Prothonotary Morneau concluded that the essence of the plaintiffs' remaining tort action is, in fact, a legal challenge to the Minister's Decisions. In his opinion, the tort damages sought by the plaintiffs are all contingent on a preliminary determination under sections 18 and 18.1 of the FCA that the underlying Decisions are not legal.

[18] As such, relying on *Canada v. Grenier,* 2005 FCA 348, [2005] F.C.J. No. 1778 (QL) (*Grenier*), Prothonotary Morneau concluded that the plaintiffs would first have to seek, by way of an application for judicial review, a ruling that all the Decisions are invalid or unlawful before continuing their action in tort. The plaintiffs' action would not be struck until the plaintiffs have

exhausted their remedies under subsection 18.1(2) of the FCA. The action was therefore stayed until the final resolution of an application for judicial review.

[19] In his reasons, Prothonotary Morneau considered the effect of *Larocque* and *Association des crabiers* and stated in this regard:

> It is also not appropriate to allow certain Torts alleged by the plaintiffs to proceed immediately by way of action, on the ground that the decision of the Federal Court of Appeal in [*Larocque*] and the decision of this court in [*Association des crabiers*] constitute *res judicata* in respect of judicial review as to whether the Minister has no right to appropriate a portion of the plaintiffs' quota for his own purposes. Although those two decisions might support what the plaintiffs are saying, the facts in this case, and the parties involved, are not identical to the facts and parties in those two decisions. Accordingly, the principle of *res judicata* does not apply as a basis for an attempt to avoid, or skip over, the judicial review avenue.

[20] Therefore, even if the taking of quota to finance DFO's activities has been held twice to be illegal in *Larocque* and *Association des crabiers*, Prothonotary Morneau found that *Grenier* nevertheless applies and forces the plaintiffs to first obtain a declaration of invalidity of the Decisions under section 18 of the FCA prior to the pursuance of an action in damages against the Crown.

APPEAL *DE NOVO*

[21] Rule 221(1) dictates that the Court may order a pleading be struck out on following basis:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(*a*) discloses no reasonable cause of action or defence, as the case may be, […]	*a*) qu'il ne révèle aucune cause d'action ou de défense valable; […]
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[22] The threshold for striking a statement of claim is very high; the statement must be found to be certain to fail as it contains a "radical defect". In *Hunt v. Carey Inc.*, [1990] 2 S.C.R. 959 (*Hunt*) the Supreme Court of Canada referred to the "plain and obvious" test:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect […] should the relevant portions of a plaintiff's statement of claim be struck out […]

[23] Numerous Federal Court and Federal Court of Appeal judgments have endorsed these very strong statements of the Supreme Court of Canada. Therefore, only if the action is certain to fail because it contains a "radical defect" should a motion to strike be granted. As mentioned by this Court in *Tyhy v. Schulte Industries Ltd.*, 2004 FC 1421, [2004] F.C.J. No. 1708 (QL) : "[w]hat

constitutes a "radical defect" will depend on the facts of each case”. Moreover, as stated by the Federal Court of Appeal in *Shubenacadie Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 255, [2002] F.C.J. No. 882 (QL): “although a pleading may be very broad and encompassed in general terms, it should not be struck out so long as a cause of action, however tenuous, can be gleaned from a perusal of the statement of claim.”

[24] However, the defendant submits that when, as occurs here, the motion to strike is based on a question of jurisdiction, the “plain and obvious” test is not applicable as there is no longer room for discretion. I respectfully disagree with the defendant: the particular nature of the arguments made by a party in support of a motion to strike, whether they are jurisdictional or not, does not change the test on a motion to strike. The judge has always discretion to strike or not a statement of claim. It must be remembered that in cases contemplated by Rule 221(1)(*a*), the Court does not have the benefit of reviewing evidence or hearing witnesses. Indeed, while *Hunt* was not rendered in the context of whether pleadings ought to be struck on the basis of a jurisdictional challenge, the Federal Court of Appeal has accepted that the “plain and obvious test” applies equally to a motion to strike for want of jurisdiction: *Hodgson*, above, and *Sokolowska v. Canada*, 2005 FCA 29, [2005] F.C.J. No. 108 (QL), leave to appeal to the Supreme Court of Canada refused (2005), 346 N.R. 195.

[25] If the claim has some chance of success, the action must be permitted to proceed. In addition, relevant to this motion is the principle that the novelty of the claim will not militate against the plaintiffs. As Justice Wilson stated in *Hunt*, above at para. 52:

> Indeed, I would go so far as to suggest that where a statement of claim reveals a <u>difficult and important point of law, it may well be</u>

> critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.
>
> [Emphasis added]

[26] Although this Court is not bound by decisions of the Ontario Court of Appeal, I find the reasoning of Assistant Chief Justice O'Connor at para. 39 of *Transamerica Life Inc. et al. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.) helpful in this case:

> On a pleadings motion, a court should not dispose of matters of law that are not settled in the jurisprudence. Where the law, any particular area can be described as "muddy," the court will not strike that part of the pleading, nor hold that the claim or defence must fail.
>
> [Emphasis added]

[27] Further, I find another Ontario case, namely *Dalex Co. Ltd. v. Schwartz, Levitsky Feldman* (1994), 19 O.R. (3d) 463 (Gen. Div.), apposite as it stands for the proposition that in order to meet the test on a motion to strike, there must be a decided case directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected. It is only by restricting successful attacks of this nature to the narrowest of cases that the common law can have a full opportunity to be refined or extended. With respect to Rule 221(1)(*a*): see *Nidek Co. v. Visx Inc.* (1998), 82 C.P.R. (3d) 289 (Fed. C.A.).

[28] The plaintiffs raise essentially the same arguments on appeal as were submitted in their response to the original motion to strike. They allege in this regard that Prothonotary Morneau committed a number of errors which must be corrected by the Court. Essentially, their grounds of appeal are as follows. First, they state that the Prothonotary was right in deciding that the Court has

jurisdiction with respect to the contractual breaches alleged in the statement of claim. However, the Agreements do not constitute an illegal fettering of the Minister's discretion, as accepted without evidence, by the Prothonotary. This is a complex question of fact and law which ought not to have been resolved by way of a motion. Second, Prothonotary Morneau erred in holding that an application for judicial review must precede the plaintiffs' tort action. The torts alleged were not, as stated by the Prothonotary, in respect of federal "decisions" but were instead with respect to negligent misstatements made by the Minister and his representatives. Third, Prothonotary Morneau erred in finding that prior judicial review is required in respect of the claim for damages resulting from the illegal use of the snow crab resource to fund the Minister's departmental activities. This issue has already been resolved twice and hence, the matter is effectively *res judicata*. Fourth, the plaintiffs' claims of negligent misstatements, unjust enrichment, and breach of fiduciary duty all constitute distinct causes of action which should have been considered separately by the Prothonotary.

[29] I start this analysis by re-stating that discretionary orders of prothonotaries ought not be disturbed on appeal by a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts (*Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2003] F.C.J. No. 1925 (QL)). Here, the impugned order is "vital to the final issue of the case" and the Court must therefore decide this appeal *de novo*. Indeed, even absent any errors in the underlying decision, the impugned order may still be set aside or varied if the Court is disposed to exercise its discretion "differently" on the same record: *Jazz Air*

LP v. Toronto Port Authority, 2007 FC 624, [2007] F.C.J. No. 841 (QL). This is such a case for the reasons mentioned below. I will first address the jurisdictional issue (*Grenier*) and then the "fettering" doctrine and other grounds adduced by the defendant in support of their motion to strike.

[30] The defendant argues that *Grenier*, which was decided by the Federal Court of Appeal in 2005, clearly stands for the proposition that all administrative actions of a federal entity – in this case, the Minister – cannot be attacked by way of an action, and that for this reason alone the entire statement of claim (which includes claims in contract and in tort) stands no chance of success. See also *Canada v. Tremblay*, 2004 FCA 172, [2004] F.C.J. No. 787 (QL).

[31] In *Grenier*, the Federal Court of Appeal writes at paras. 20 and 24-25:

> For the reasons expressed below, I think the conclusion our colleague, Madam Justice Desjardins, arrived at in Tremblay, is the right one in that it is the conclusion sought by Parliament and mandated by the Federal Courts Act. She held that a litigant who seeks to impugn a federal agency's decision is not free to choose between a judicial review proceeding and an action in damages; he must proceed by judicial review in order to have the decision invalidated.
>
> […]
>
> In creating the Federal Court and in enacting section 18, Parliament sought to put an end to the existing division in the review of the lawfulness of the decisions made by federal agencies. At the time, this review was performed by the courts of the provinces: see Patrice Garant, *Droit administratif*, 4th ed., Vol. 2, Yvon Blais, 1996, at pages 11-15. Harmonization of disparities in judicial decisions had to be achieved at the level of the Supreme Court of Canada. In the interests of justice, equity and efficiency, subject to the exceptions in section 28 [as am. by S.C. 1990, c. 8, s. 8; 2002, c. 8, s. 35], Parliament assigned the exercise of reviewing the lawfulness of the decisions of federal agencies to a single court, the Federal Court.

> This review must be exercised under section 18, and only by filing an application for judicial review. The Federal Court of Appeal is the Court assigned to ensure harmonization in the case of conflicting decisions, thereby relieving the Supreme Court of Canada of a substantial volume of work, while reserving it the option to intervene in those cases that it considers of national interest.
>
> To accept that the lawfulness of the decisions of federal agencies can be reviewed through an action in damages is to allow a remedy under section 17. Allowing, for that purpose, a remedy under section 17 would, in the first place, disregard or deny the intention clearly expressed by Parliament in subsection 18(3) that the remedy must be exercised only by way of an application for judicial review. The English version of subsection 18(3) emphasizes the latter point by the use of the word "only" in the expression "may be obtained only on an application for judicial review". [Emphasis added]

[32] In this case, the plaintiffs strenuously argue that *Grenier* must be distinguished as they are not challenging the lawfulness under the *Fisheries Act* of any particular decision made by the Minister. A finding of breach of contract by the Crown is not contingent to a declaration of invalidity under sections 18 and 18.1 of the FCA of the impugned actions. The Crown may be sued in damages for breach of contract if the Minister fails to conform to the promises made in the Agreements, irrespective of whether or not the Decisions are legally authorized by section 7 of the *Fisheries Act*.

[33] The plaintiffs argue in this respect that Prothonotary Morneau erred in finding that successful judicial review is a prerequisite to their action. According to the plaintiffs, the underlying action is not based, either directly or indirectly, on a challenge of the validity of a particular decision of the Minister, nor is it a collateral attack on a ministerial decision. Instead, the cause of action first

relates to a breach of contract and subsidiarily to negligent misstatements made by a Minister and his officers a number of years ago.

[34] I agree with the plaintiffs that the facts in *Grenier* are very different from the allegations made in the statement of claim. There was no allegation of breach of contract in *Grenier* which involved an action for damages by a federal inmate who claimed to have been unlawfully placed into administrative segregation. The inmate never attempted to challenge the lawfulness of the segregation decision by way of judicial review and the action for damages was commenced approximately three years after the fact. The action was ultimately struck out as it was found to represent a collateral attack on the lawfulness of the segregation decision which could only be challenged by way of judicial review brought under sections 18 and 18.1 of the FCA. Such a collateral attack was found to conflict with Parliament's grant of exclusive jurisdiction to the Federal Court for reviewing the lawfulness of decisions by federal agencies. Moreover, the inherent delays in proceeding by way of an action raised concerns regarding the need for certainty and finality around the execution of administrative decisions of this nature.

[35] I note that the jurisprudence of this Court clearly suggests that there are various exceptions to the principle elucidated in *Grenier*. For example, *Peter G. White Management Ltd. v. Canada*, 2007 FC 686, [2007] F.C.J. No. 931 (QL) (*Peter G. White*), involved an appeal from a decision of the prothonotary which dismissed the Crown's motion to strike the plaintiff's statement of claim. Justice Hugessen determined that an administrative decision not to grant the plaintiff a business license for the operation of its gondola on Mount Norquay in Banff National Park involved an

action against the Crown for breach of contract. Justice Hugessen, at para. 9 of *Peter G. White*, cautioned against misreading *Grenier*:

> In my view, it is a gross misreading of the decision of the Federal Court of Appeal in Grenier to hold that it requires that every time a Crown official decides deliberately not to respect his employer's contractual obligations that that "decision" must first be attacked by judicial review before an action in damages may be brought. I respectfully suggest that that is not, and has never been, the law.

[36] *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694, which was decided by the Federal Court of Appeal prior to *Grenier*, involved a ministerial decision in a tendering process. When the bidding contractor sought to judicially review the ministerial decision, the respondent moved to dismiss, arguing that it was a matter of "pure contract" that could not properly be the subject of a judicial review. The Court permitted the judicial review to proceed. However, it did not oust the possibility that an action in damages against the Crown would also be the normal route when the action is based on a breach of contract.

[37] I find the following comments of Justice Décary in *Gestion* at pages 702 to 705 very instructive:

> […] I must say I have some difficulty giving to s. 18(1)(a) [of the FCA] an interpretation which places Ministers beyond the scope of such review when they exercise the most everyday administrative powers of the Crown, though these are also codified by legislation and regulation.
>
> With respect, that would be to take an outmoded view of supervision of the operations of government. The "legality" of acts done by the government, which is the very subject of judicial review, does not

> depend solely on whether such acts comply with the stated requirements of legislation and regulations. […]
>
> This liberal approach to the wording of paragraph 18(1)(a) is not new to this Court. It is readily understandable, if one only considers the litigant's viewpoint and takes account of the tendency shown by Parliament itself to make government increasingly accountable for its actions. In the absence of any express provision, one would hardly expect a bidder's right to apply to this Court to vary depending on whether the call for tenders was required by regulations (as in *Assaly*) or, as in the case at bar, was left to the Minister's initiative. […]
>
> In recent years Parliament has made a considerable effort to adapt the jurisdiction of this Court to present-day conditions and to eliminate jurisdictional problems which had significantly tarnished the Court's image. As between an interpretation tending to make judicial review more readily available and providing a firm and uniform basis for the Court's jurisdiction and an interpretation which limits access to judicial review, carves up the Court's jurisdiction by uncertain and unworkable criteria and inevitably would lead to an avalanche of preliminary litigation, the choice is clear. I cannot assume that Parliament intended to make life difficult for litigants.
>
> [Footnotes omitted]

[38] That being said, *Agustawestland International Ltd. v. Canada (Minister of Public Works and Government Services)*, 2006 FC 767, [2006] F.C.J. No. 961 (QL), (*Agustawestland*), directly questions the applicability of *Grenier* in cases of tendering. In *Agustawestland*, the Court decided that the decision of the minister of Public Works and Government Services not to award a procurement contract to the unsuccessful bidder could be legally challenged for abuse of process, breach of contract or tort by way of an action seeking damages against the Crown. Justice Kelen, at para. 47 states:

> In *Grenier v. Canada*, [2005] F.C.J. No. 1778 the Federal Court of Appeal held that a person cannot indirectly challenge the lawfulness of a decision, by way of an action for damages, that is subject to judicial review within 30 days after the decision is made pursuant to subsection 18.1(2) of the *Federal Courts Act*. I would add that subsection 18(3) of the *Federal Courts Act* provides that the remedies of judicial review may be obtained only on an application for judicial review under section 18.1. The *Grenier* case applies to administrative decisions which are generally subject to judicial review, not to acts by the Crown which are normally subject to legal actions for breach of contract or tort. For this reason, the plaintiff's action in this case for breach of contract and for tort would not be barred if the plaintiff had not, as the plaintiff has, also commenced applications for judicial review over the same subject matter.

[39] *Khalil v. Canada*, 2007 FC 923, [2007] F.C.J. No. 1221(QL) at paras. 137-53 also questions, and ultimately rejects, the *Grenier* decision. In *Khalil*, the plaintiffs alleged that the defendant's delay in processing their applications for permanent residence caused them harm. Accordingly, they asserted that they are entitled to damages arising from the defendant's negligence (as well as the infringement of their sections 7 and 15 *Charter* rights).

[40] The case law in the provinces with respect to any legal requirement to make a judicial review application prior to taking an action in damages for breach of contract or tort is still in development. In two recent Ontario Superior Court of Justice decisions, namely *McArthur v. Attorney General of Canada* (September 21, 2006), Kingston, 13720/01 (Ont. S.C.J.) (*McArthur*) and *G-Civil Inc. v. Canada (Public Works and Government Services)*, [2006] O.J. No. 5092 (S.C.J.) (QL) (*G-Civil*), the arguments of the federal government based on *Grenier* were accepted. Both cases are being appealed. In the most recent decision on the issue, *TeleZone Inc. v. Canada (Attorney General)*, [2007] O.J. No. 4766 (S.C.J.) (QL) (*TeleZone*), also in appeal, the plaintiff

alleged the Crown (through the actions of the Minister and officials in Industry Canada), breached contractual obligations arising through the licensing process in question or, alternatively, that the Crown was liable for negligence for the manner in which it conducted the licensing process. Justice Morawetz distinguished *McArthur*, *G-Civil* and *Grenier*, and also came back to the scope of *Gestion*. At paras. 39, 78-79, he stated:

> TeleZone seeks damages against the Crown for breach of contract and in tort. The contract claim is founded on the Supreme Court of Canada's "Triptych" of tendering law: *R. v. Ron Engineering and Construction* (*Eastern*) *Limited*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction* (*1951*) *Ltd.*, [1999] 1 S.C.R. 619; and *Martel Building Ltd. v. R.*, [200] 2 S.C.R. 860. Under this doctrine, a preliminary contract, "Contract A", may arise upon the submission of a tender. The gist of such a contract is that the tender will be evaluated in accordance with the criteria and procedures that were promulgated to the applicants. This is to be distinguished from Contract B, which is entered into upon acceptance. Whether the process creates a Contract A and the terms of such a contract are to be found in the documents and surrounding factual matrix
>
> […]
>
> I do not read *Gestion* as saying that the contractor's action must have proceeded by way of judicial review, but rather that the action could proceed by way of judicial review. Section 18 of the FCA focuses on the relief sought by the plaintiff. The fact that an act taken pursuant to federal power could form the subject of a judicial review does not foreclose an action in damages in contract or tort. <u>The availability of judicial review does not preclude a well-founded private law action, and judicial review is not a prerequisite for an independent and well-founded civil claim.</u>
>
> In any event, I reiterate that the standard on a Rule 21 motion is a high one. A plaintiff's claim should not be struck unless it is plain and obvious that it will fail. The state of the law in Ontario does not make it plain and obvious that *TeleZone*'s claim will fail.
>
> [Emphasis added]

[41] Justice Morawetz, at para. 82 of *TeleZone*, rejected the argument that the plaintiff's claims against the Crown constitute a "collateral attack" on a decision of a federal board as follows:

> In its pleading, *TeleZone* is not challenging the decision of the Minister. It is not seeking to set aside the licences that have been granted. It is not seeking a licence for itself. It is seeking damages as a result of alleged breach of contract and negligence and the collateral attack doctrine has no application. Phrases like "challenge to the lawfulness of a decision" and "impugning a federal agency's decision" must be used with care in this context in order to be consistent with the Supreme Court of Canada's jurisprudence on the doctrine of collateral attack. A claim should only be struck as a collateral attack if it seeks to affect a decision's legal validity.

[42] In *Genge v. Canada (Attorney General),* 2007 NLCA 60, [2007] N.J. No. 335 (QL), the plaintiffs' claim alleged that an officer of the Federal Crown in 2004 deliberately or negligently misrepresented that the seal fishery in areas 9 to 32 of the Gulf of St. Lawrence had been closed when in fact no variation order closing the fishery had been issued as required by the applicable Regulations. The plaintiffs sought damages for loss of revenue during the 2004 seal fishery. The Crown's position was that a superior court of a province does not have jurisdiction over a tort action when the actions of federal officials are impugned, unless there has been a successful judicial review before the Federal Court. The Crown applied to strike the plaintiffs' statement of claim. The applications judge concluded the Supreme Court of Newfoundland and Labrador has jurisdiction over the action because it is "in essence" a claim in negligence. The motion to strike was dismissed. The Crown then sought to overturn this decision. The Court of Appeal upheld the lower court's decision finding the applications judge did not err in failing to find that the Federal Court had exclusive jurisdiction pursuant to sections 18 and 18.1 of the FCA, since this would result in an unwarranted restriction on the statutory jurisdiction of provincial superior courts to hear actions in

negligence. Likewise, the judge did not err in failing to find that successful judicial review before the Federal Court is a prerequisite to an action for damages, since this would result in an unwarranted restriction on the respondents' statutory right to sue the Crown in tort within six years, to have a trial with *viva voce* evidence, and to obtain an effective remedy. The appeal was dismissed.

[43] In view of several of the concerns expressed with respect to the application of *Grenier* in cases share similarities with the present case, I am unable to accept that this action is doomed from the start because of some jurisdictional defect. I will now shortly address a sub-argument made by the defendant related to the fact that judicial review proceedings have been undertaken in the past by other parties to have the taking of quota by the Minister declared illegal by the Court. In my opinion, Prothonotary Morneau erred in finding that additional judicial review is necessary at this juncture.

[44] In 2004, DFO set aside an allocation of 400 metric tons (mt) from the TAC to finance DFO's departmental activities; in 2005, DFO set aside a 480 mt allocation to finance DFO's departmental activities; and, in 2006, DFO set aside a 1,000 mt allocation to finance its activities. The plaintiffs submit that such allocation of the TAC for its own financing purposes is in violation of the Agreements. Furthermore, the illegality of this exercise of discretion has already been determined on judicial review in *Larocque* and *Association des crabiers*. In my opinion, it was not necessary to determine whether the legality issue was *res judicata* as it is also alleged by the plaintiffs that the taking of quota by the Minister is in violation of the Agreements. In any event, in

the course of oral argument before this Court, defendant's counsel agreed that while the plaintiffs were not parties to the judicial review proceedings in *Larocque* and *Association des crabiers*, it remains that the taking of quota to finance DFO's departmental activities is an unlawful act. Therefore, in my opinion, there is an estoppel issue in this case and the Crown would now be barred from ascertaining in any judicial proceeding that the taking of quota is a lawful act. Accordingly, I find that it would be a waste of judicial resources to force the plaintiffs to first obtain a declaration of invalidity of such illegal ministerial actions prior to the pursuance of its present action against the Crown which, *inter alia*, seeks restitution on the basis of unjust enrichment. Again, in my humble opinion, this is certainly a case where the policy considerations of *Grenier* have no application.

[45] At this point, I pause to mention that the plaintiffs also state in their pleadings that they invested significant sums of money on the faith of their belief in the Minister's word and the enforceability of his promises both express and implied; that the Crown obtained corresponding value; and, that there is no juristic reason for the Crown's enrichment. Further, the plaintiffs, having put forward claims based on misfeasance in public office and breach of fiduciary duties, allege the Prothonotary failed to address these claims in his reasons. I agree with the plaintiffs that the claims for restitution and unjust enrichment are separate causes of action that do not necessarily flow from a finding of breach of contract or of negligent misstatements and that there has been no compelling argument made by the defendant that the Court does not have jurisdiction in respect of same. Accordingly, it appears to me that the Court has jurisdiction to hear the totality of this action. Moreover, I find that it would be contrary to the just, most expeditious and least expensive determination of the merits of the plaintiffs' case to institute a separate judicial review proceeding

on the basis that the remaining "tort" claim is a collateral attack on the validity of the decision. The allegation made by the defendant that the present action is otherwise an abuse of process has no merit whatsoever and must also be dismissed by the Court.

[46] Alternatively, the defendant submits that the *Fisheries Act* and related regulations must be read in their entirety and there is nothing in the language of the legislative scheme which clearly or expressly authorizes the Minister to fetter her or his discretion with respect to the allocation of fishing quotas. To the contrary, the defendant submits that the *Fisheries Act* is drafted in such a manner as to give the Minister flexibility in her or his discretion in respect of licenses. This flexible discretion is to be exercised from time to time as the Minister so determines. Accordingly, even if the Court has jurisdiction to hear and decide claims in damages for breach of contract, as accepted by Prothonotary Morneau, there can be no reasonable cause of action because of the application of the non-fettering doctrine. For the same reason, the defendant submits that the Prothonotary erred in staying the remaining tort action (pending the making of a motion to extend the delay to make a judicial review application against the Decisions). The non-fettering doctrine applies both to the Agreements and the Decisions.

[47] Although this Court is not bound by the recent Newfoundland Court of Appeal decision in *Happy Adventure Sea Products (1991) Ltd. v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture),* 2006 NLCA 61, 277 D.L.R. (4th) 117 (*Happy Adventure*), the defendant submits that its reasoning is helpful to the case at bar. In *Happy Adventure*, at issue was whether a provincial minister of the Crown could, by entering into agreements, fetter the future exercise of ministerial

discretion in the issuance of fish processing licences. In rendering its decision, the Newfoundland Court of Appeal relied on another decision from the Newfoundland Court of Appeal, *St. Anthony Seafoods Limited Partnership v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture),* 2004 NLCA 59, 245 D.L.R. (4th) 597, leave to appeal to the Supreme Court of Canada dismissed [2004] S.C.C.A. No. 548 (QL), which stated: "[Public] policy would be undermined if a Minister were estopped from the exercise of that discretion by representations of his or her predecessors as the ability of the Minister to respond to current socio-economic concerns in the fishing industry could be severely circumscribed."

[48] At paragraphs 27 and 28 of *Happy Adventure*, the Newfoundland Court of Appeal concluded:

> The conclusion follows in the case before this Court that the Agreement is unenforceable to the extent that it fetters the discretion of the Minister to issue or refuse a fish processing licence, or to attach terms and conditions that the Minister considers appropriate (subsection 5(2) of the Act), and advisable and necessary (subsection 32(2) of the regulations).
>
> In the result, the companies' applications for a declaration that the Minister is prevented from reducing their crab quota, and damages related to the requested declaration, must fail.

[49] The defendant also refers the Court to *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919 (*Pacific 1*), where the Supreme Court of Canada refused to uphold an agreement signed by the City of Victoria which contained an implied promise not to change the zoning set out in the agreement for a certain period of time. In *Pacific 1*, like in this case, it was alleged that in the event of non-compliance with the implied promise, the City would pay damages

to the developer. However, the plaintiffs say that *Pacific 1* is distinguishable from the particular facts and legal powers involved in the case at bar. They state that the administrative powers of the Minister under the *Fisheries Act* are completely different in nature and in scope from the legislative powers of the City in *Pacific 1*. Indeed, in *Pacific 1,* the Court considered delegated legislative powers which were bestowed upon a municipality by the provincial legislature and were limited to making laws related to certain specifically enumerated subjects.

[50] The plaintiffs argue that the issue as to whether the alleged Agreements are binding on the Crown or constitute an illegal fettering of the Minister's discretion under section 7 of the *Fisheries Act* (as decided without evidence by Prothonotary Morneau) raises complex questions of fact and law. Indeed, this debatable issue should not be resolved, without any evidence, at such an early stage of the proceeding. The plaintiffs submit the powers bestowed on the Minister by section 7 of the *Fisheries Act* are extremely broad in scope. In fact, the powers of the Minister are sufficiently broad to allow the Minister to enter into contracts such as the Agreements and to be bound by the implied terms to pay damages upon breach of said Agreements. The present legislation and regulations clearly contemplate the making of long-term decisions and arrangements in furtherance of the best interest of the management of the fishery. Accordingly, Prothonotary Morneau erred in fact and in law when he determined that the Agreements were unenforceable as they constitute an illegal fettering of ministerial discretion. Since the Minister has the legal authority to issue licences for periods of up to nine years, the plaintiffs argue the Minister is legally empowered to enter into contracts such as the Agreements.

[51] In *Adefarakan v. Toronto (City)*, [2000] O.J. No. 3555 (S.C.J.) (QL) (*Adefarakan*); leave to appeal denied [2001] O.J. No. 2491 (Div. Ct.) (QL), the plaintiffs who were all taxi drivers had full opportunity to participate in a course of investigation, consultation and public meetings that were undertaken by the city and the Licensing Commission prior to the enactment of a relevant by-law. The plaintiffs' position in this case was that the provisions of the by-law reflected the contract that they had entered into with the city via offer, acceptance and mutual consideration prior to the enactment of the by-law. Justice Wilkins dismissed a motion by the defendant to dismiss the plaintiff's action. At para. 32, he stated that what was significant and novel in the pleading was the suggestion not only of the existence of a contract, but a contract that was intended to remain independent from the City's exercise of regulatory authority.

[52] Paragraph 30 of the endorsement of Mr. Justice Wilkins in *Adefarakan* reads:

> It is not the position of the respondents [the plaintiffs] that the contractual relationship prevented the City from exercising its regulatory powers. On the contrary the respondents argue that the enactment by the City was in fact regulatory, but that by reason of the plaintiffs having given consideration for the rights and privileges accorded to them while on the prior Drivers' List, that the City has placed itself as being a party to a concurrent or overlapping contract which is not just regulatory in nature, but which arose and was created in the ministerial, administrative and business functions of the municipality and to that extent its breach should be capable of enforcement as its terms included mutuality of consideration in which, in exchange for the consideration afforded by the members of the Drivers' List, the City undertook to provide protection with respect to obtaining owner's plates which could be converted into economic security upon sale, and the right to utilize substitute drivers which increased the annual income of the persons on the Drivers' List and the loss of these provisions of the contractual arrangement entered into have imposed economic loss on the plaintiffs responding to this motion.

[53] In their submissions, the plaintiffs also rely on *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (*Wells*), another decision of the Supreme Court (that was considered in *Pacific 1)*, to buttress their argument that the Crown can be liable in breach of contract if, by its legislative action, it deprives parties to a contract of their contractual rights. There is thus a distinction between whether the Crown has the authority to take an action, and whether the Crown may escape the legal consequences of that action. A decision that is lawful in the sense that it had statutory authority may still constitute a breach of contract. *Wells* stands for the proposition that unless the Crown has explicitly precluded its own liability, it is liable in private law like any other party. In passing, I note that Justice Lebel distinguished *Wells* in *Pacific 1* on the basis that *Wells* did not deal with a contract governing the exercise of municipal legislative powers. The agreement in dispute remained a business contract in relation to the hiring of senior civil servants: *Pacific 1*, above at para. 62. In this case, there is a debatable argument to make on the applicability of the general principle in *Wells* despite the distinctiveness in *Pacific I*.

[54] At this stage, with no proper evidence before the Court, I am not in a position to decide whether or not the Agreements are in the nature of licences for fisheries or fishing. Assuming (as did the Prothonotary for the purpose of the present motion to strike), without making an express finding of fact, that the Minister entered into the Agreements, the issue is whether or not the Agreements are enforceable and can support an action in damages for breach of contract (or alternatively in tort). The legality or enforcement of the Agreements is a mixed question of fact and law. Any misstatement or promise made by Crown is a purely factual issue which ought to be

determined once witnesses have been heard. As such, at this stage, I am unable to find that the plaintiffs' claim for breach of contract or in tort does not disclose a reasonable cause of action. I agree with the plaintiffs that the issue as to whether the alleged Agreements constitute an illegal fettering of the Minister's discretion (which would make them unenforceable), is a complex question of fact and law which should not be resolved on a motion to strike. If I grant the motion to strike, this implies that I have accepted at this stage that the Agreements are illegal or unenforceable, a determination that I am simply not in a position to make in the abstract, without an analysis of relevant evidence and a review of the content of the Agreements (both of which are not before the Court).

[55] At this stage, the facts alleged by the plaintiffs must be assumed to be true. Their proof at trial may, thus, lead to finding by the Court of breach of contract, negligent misstatements and/or unjust enrichment. Therefore, given that a number of cases have questioned the reach of *Grenier*, I cannot conclude at this stage that on the jurisdictional ground alone raised by the defendant, the plaintiffs' claims are completely devoid of any chance of success. In this instance, the plaintiffs argue both the legislation and the competing public policy reasons require the Minister to be bound by the implied terms of the Agreements. What remains before the Court is an allegation that by virtue of the Minister's actions – administratively or proper or otherwise – the Crown is in breach of its private law contractual obligations. As such, without deciding the issue, there is a valid argument to be made that there may be a valid claim for compensation.

[56] It is equally clear in law that the plaintiffs may not by this action legally force the Minister to exercise his discretion under section 7 of the *Fisheries Act*, in a certain manner (see for example *Joncas v. Canada* (1993), 75 F.T.R. 277, [1993] F.C.J. No. 973 (QL)). Therefore, the claim for specific performance of the Agreements is affected by a radical defect. However, I am not satisfied at this stage that the action in damages or restitution based on breach of contract and tort, including negligent misstatements and unjust enrichment should be struck out by the Court. The defendant has simply not met the high burden of demonstrating to the Court that the action cannot possibly succeed at trial.

[57] In light of the competing public policy issues and the inconsistent jurisprudence in this area, I cannot conclude at this stage that it is "plain and obvious" that the plaintiffs' claim for breach of contract or tort will fail. It is generally accepted that a government cannot contract to legislate or not to legislate or a particular matter in the future since this would amount to a negation or parliamentary sovereignty (see *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at page 548) but, as noted by Peter W. Hogg and Patrick J. Monahan in *Liability of the Crown*, 3rd Ed. (Carswell, 2000), at page 234, "simply because the executive cannot actually control the future behaviour of the legislature does not provide any reason why a government should not be permitted to enter a contract whereby a part, is granted certain rights contingent upon the enactment or regard, of legislation".

[58] Hogg and Monahan refer to *United States v. Winstar Corp.* (1996), 518 U.S. 839, where a department of the U.S. government had promised certain investors that they would receive

favourable regulatory treatment if they took over failing thrifts during the savings and loan crisis of the 1980's. In 1989, congress passed legislation that was inconsistent with the undertakings that had been given and the inventors sued for breach of contract. In upholding the plaintiff's claim, the Supreme Court of the United States noted that the promise of favourable regulatory treatment did not deprive congress of its legislative power. It did mean, however, that if Congress acted inconsistently with the promises made, the government would compensate investors for any resulting losses. Hogg and Monahan further refer to *Re Ontario Public Service Employees Union and Attorney General for Ontario* (1995), 26 O.R. (3rd) 740 (Div. Ct.) (*OPSEU*), which concerned the legality of an order-in-council which had been made without concurrence of the applicant union, contrary to the terms of the provincial government. In *OPSEU*, the union sued for a declaration that the order-in-council was of no force and was able to rely on the fact that the terms of the agreement had been incorporated into provincial law. But what if the province had refused to enact the necessary legislation and then acted contrary to the terms of the agreement? In *OPSEU*, the provincial government could have been held liable in damages according to Hogg and Monahan.

[59] In the present case, the misstatement made by DFO's officials and the implied promise contained in the Agreements have been made independently from the exercise of the licensing power. The passing of new legislative or regulations provisions by Parliament or the Governor-in-council was not needed under the Agreements.

[60] I note in passing that counsel for the plaintiffs has stated at the hearing that the plaintiffs were no longer pursuing their claim for specific performance of the Agreement. Plaintiffs' counsel

has also confirmed that the statement of claim should be read as a whole and indicated the plaintiffs' willingness to amend, if advisable, the statement of claim or to provide particulars to the defendant prior to the filing of its defence. As the case may be, the applicable time frames for doing so may be extended by the Court at its discretion.

CONCLUSION

[61] Since I am determining this appeal *de novo*, and for the reasons already mentioned above, I am of the view that the action should be allowed to proceed, subject to the claim for specific performance of the Agreements which must be struck out because it contains a radical defect. This is not to suggest the plaintiffs' remaining claims in damages are likely to succeed, nor is the defendant without any additional recourse. For example, the defendant may make a motion to seek further and better particulars in relation to the breach of contract allegations contained within the plaintiffs' statement of claim (see Rule 181 and *Huzar et al. v. Canada et al.,* [1997] F.C.J. No. 1556 (QL) at paras. 32-33 for helpful guidance on this point).

[62] Likewise, after the defendant has filed a defence or earlier with leave of the Court, the defendant may also bring a motion for summary judgment accordance with Rule 213(2), provided that the necessary conditions are met: see Rules 216(1) and (3); *Premakumaran v. Canada,* 2006 FCA 213, [2006] F.C.J. No. 893 (QL); leave to appeal to the Supreme Court of Canada dismissed [2006] S.C.C.A. No. 342; *Trojan Technologies Inc. v. Suntec Environmental Inc.*, 2004 FCA 140, [2004] F.C.J. No. 636 (QL); leave to appeal to the Supreme Court of Canada dismissed [2004] S.C.C.A. No. 283 (QL).

[63] In conclusion, unless otherwise indicated in the accompanying order, the motion to strike is dismissed and the motion in appeal is granted, with costs in favour of the plaintiffs in both instances. Provision is also made in the Court's order with respect to amendments, particulars and the delay to serve and file a defence.

ORDER

THIS COURT ORDERS:

1. Unless otherwise indicated in the present order, the motion to strike the statement of claim is dismissed and the motion in appeal is granted, with costs in favour of the plaintiffs in both instances.

2. The order made on September 6, 2007 by the Prothonotary is set aside, save and except the following: that portion of the statement of claim presently praying for the specific performance of the Agreements (as defined in the statement of claim) is struck out.

3. The defendant may request particulars from the plaintiffs by letter, or otherwise serve and file within 45 days of the present order a motion for further or better particulars;

4. The plaintiffs may serve and file within 45 days of the present order an amended statement of claim.

5. The time for serving and filing of the defence by the defendant is extended to the latest of these occurrences:

   (a) 60 days after the present order;

(b) 30 days after the service and filing of an amended statement of claim, as the case may be;

(c) 30 days after the service and filing of further or better particulars, as the case may be.

6. Any judge or prothonotary may extend upon motion any delay mentioned above.

"Luc Martineau"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-378-07
STYLE OF CAUSE:	**ROBERT ARSENAULT, JOSEPH AYLWARD, WAYNE AYLWARD, JAMES BUOTE, RICHARD BLANCHARD, EXECUTOR OF THE ESTATE OF MICHAEL DEAGLE, BERNARD DIXON, CLIFFORD DOUCETTE, KENNETH FRASER, TERRANCE GALLANT, DEVIN GAUDET, PETER GAUDET, RODNEY GAUDET, TAYLOR GAUDET, CASEY GAVIN, JAMIE GAVIN, SIDNEY GAVIN, DONALD HARPER, CARTER HUTT, TERRY LLEWELLYN, IVAN MacDONALD, LANCE MacDONALD, WAYNE MacINTYRE, DAVID McISAAC, GORDON L. MacLEOD, DONALD MAYHEW, AUSTIN O'MEARA and BOYD VUOZZO v. HER MAJESTY THE QUEEN**
PLACE OF HEARING:	Charlottetown, Prince Edward Island
DATE OF HEARING:	January 18, 2008
REASONS FOR ORDER AND ORDER:	MARTINEAU J.
DATED:	March 5, 2008

APPEARANCES:

Mr. Kenneth L. Godfrey Mr. Brandon MacKenzie	FOR THE PLAINTIFFS
Mr. Reinhold M. Endres, Q.C. Ms. Patricia MacPhee	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Campbell, Lea Charlottetown, Prince Edward Island	FOR THE PLAINTIFFS
John H. Sims, Q.C. Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE DEFENDANT