

Date: 20080508

Docket: T-1594-07

Citation: 2008 FC 588

Ottawa, Ontario, May 8, 2008

PRESENT: THE HONOURABLE MADAM JUSTICE DAWSON

BETWEEN:

**MARK BURLEY, OVILA COMEAU, EUGENE DAIGLE, RHEAL DOUCET,
IDOLA FONTAINE, RONALD KELLY, KENNETH KELLY, CECIL KELLY,
ESMOND VAUTOUR and NORMAN VAUTOUR**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Kouchibouguac National Park (Park) is located on New Brunswick's eastern shore and stretches along the Acadian coast. It boasts the warmest salt water north of Virginia and is home to a wide variety of species, including one endangered shorebird, the piping plover, nine rare plants, and soft-shell clams.

[2] The establishment of the Park in 1969 was controversial. Complaints were made about a number of matters, including that the expropriation was conducted in a manner that left much to be desired, insufficient compensation was paid for expropriated land, inadequate compensation was

paid for the loss of commercial fishing and clam digging activity in the Park, and then, in any event, fishing and clam digging were permitted within the Park.

[3] In 1981, a special inquiry, chaired by Gérard V. La Forest, Q.C., issued a report that reviewed the history of the creation of the Park and made a number of recommendations designed to resolve outstanding grievances and ensure the peaceful operation and use of the Park (La Forest Commission Report). One recommendation was that “people should be permitted to dig for clams with hand tools in the Park and to sell them outside the Park, thus ensuring that the former residents can continue to do so, subject to the right of Parks Canada to regulate and manage the activity with a view to preserving the resource.”

[4] This application for judicial review suggests that the controversy surrounding the establishment of the Park has not entirely abated.

[5] The applicants are members of the Kouchibouguac Commercial Clam Fishermen Association Inc. The first applicant, Mark Burley, is the president of that association. In this application for judicial review, the applicants challenge the decision made on July 30, 2007, by a superintendent under the *Canada National Parks Act*, S.C. 2000, c. 32 (Act), which prohibited the harvest of soft-shell clams in the Park from August 1, 2007 to March 31, 2008 (closure order). The determining factor in the decision to close the soft-shell clam fishery is said, by the superintendent, to have been the inability of the Parks Canada Agency to secure a law enforcement presence that would enforce the protection scheme in place for the clam fishery.

[6] The applicants say that they have a traditional right to fish for soft-shell clams within the Park that cannot be abrogated by the superintendent. Additionally, as individuals who have demonstrated a historical commercial use of the clam fishery, the applicants are among 37 individuals who qualify for, and possess, licenses to harvest soft-shell clams on a commercial basis in the Park.

The Issues

[7] The parties acknowledge that this application is moot because the decision at issue lapsed on March 31, 2008. It follows that a decision of the Court will not resolve any live controversy which now affects the rights of the parties.

[8] Therefore, the issues to be decided are:

1. Should the Court exercise its discretion to hear the application, notwithstanding that the superintendent's decision has ceased to have any practical effect upon the parties?
2. If so, what is the applicable standard of review to be applied to the superintendent's decision?
3. Did the superintendent err in deciding to prohibit the applicants from harvesting soft-shell clams within the Park?

Summary of Conclusions

[9] For the reasons that follow, I have decided that:

1. The Court should exercise its discretion to consider the propriety of the closure order.
2. The Court should not exercise its discretion to consider the existence of any traditional right the applicants may possess to fish for soft-shell clams in the Park.
3. The standard of review to be applied to the superintendent's decision is reasonableness.
4. The superintendent made no reviewable error in deciding to close the soft-shell clam fishery for the balance of the 2007-2008 seasons.

Mootness

[10] As explained above, the parties agree that the superintendent's decision is now, as a matter of law, moot. However, any legal analysis about mootness must proceed by way of a two-step process. First, it is necessary to determine if the required tangible dispute has disappeared. Second, where the dispute has disappeared, it is necessary to decide whether the Court should nonetheless exercise its discretion to hear the case. The three factors that are relevant to that exercise of discretion are: the presence of an adversarial context; concern for judicial economy; and awareness of the Court's proper law-making function. See: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[11] I agree with the parties that this matter is now moot. Subsection 9(1) and item 42.2 of Schedule II of the *National Parks of Canada Fishing Regulations*, C.R.C., c. 1120 (Regulations), provide that the open season for fishing for soft-shell clams in the waters of the Park is between May 15 and September 15 each year.¹ Subsection 35(1) of the Regulations permits a superintendent

to, during an open season, close any park waters to fishing. The period of closure at issue in this application is now over, and the open season should commence again on May 15, 2008, unless a new closure order is made.

[12] In other words, any ruling the Court might make with respect to the propriety of the closure order will not resolve a live controversy about the applicants' current ability to fish for soft-shell clams.

[13] As to the Court's discretion to hear a matter that is moot, the parties agree that an option available to the Court is to exercise its discretion to rule on the propriety of the closure order, while not exercising its discretion to rule on the existence of any traditional rights the applicants may have to fish for soft-shell clams. This option is available because the Attorney General concedes that the applicants have standing to bring this application by virtue of their status as holders of licenses that allow them to harvest soft-shell clams on a commercial basis.

[14] Turning to the issue of whether the Court should exercise its discretion to review the propriety of the closure order, it is clear that the necessary adversarial context remains despite the lapse of the closure order. Counsel for both parties appeared and fully argued the merits of this application. See: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at paragraph 44.

[15] With respect to the concern about the expenditure of judicial resources, this concern is partially met if the Court's decision will have some practical effect on the rights of the parties. The

concern is also met, at least partially, in a case that is of a recurring, but brief, nature. This is because, in order to see that important questions raised in that unique context do not elude review, the doctrine of mootness is not applied with its usual strictness.

[16] Applying these principles to the present case, the factor that led to the closure order — the absence of a law enforcement presence — may well continue. The evidence is unchallenged that the difficulties with law enforcement arose after an Appeals Officer issued a direction on May 9, 2007, pursuant to the *Canada Labour Code*, R.S.C. 1985, c. L-2, that park wardens should discontinue all law enforcement activities, unless they were provided with a sidearm and appropriate training in its use. In response, Parks Canada, on a national basis, withdrew park wardens from all law enforcement activities.

[17] In this case, in an attempt to secure alternative law enforcement in the Park, Parks Canada approached different federal departments that had law enforcement capacity, including the Royal Canadian Mounted Police (RCMP). Parks Canada was successful in securing an enforcement presence from the local RCMP detachment for the month of June, 2007. It was unable to make any other arrangement for law enforcement for the period following the end of June, 2007.

[18] The issue of the need for park wardens to carry sidearms has been controversial. See: *Martin v. Canada (Attorney General)*, [2005] 4 F.C.R. 637 (C.A.). This controversy may well remain unresolved by May 15, 2008, and alternate enforcement facilities may remain as scarce as they were in July of 2007.

[19] In those circumstances, I find that the parties will be assisted if the relevance of the availability of a law enforcement presence in the Park is determined.

[20] As well, there will likely be a relatively short window of time between the making of any further closure order and the end of the season. This makes it very difficult for the parties to have an application for judicial review perfected, heard, and adjudicated upon before any closure order becomes moot. The parties were unable to do so in the present case.

[21] Given the practical effect the ruling may well have, the difficulty in having closure orders reviewed before they become moot and the Court's preference that important issues be decided on a fully developed record with adequate time for argument and consideration, I find the proper concerns about judicial economy would be met if the Court decided the issue of the propriety of the closure order.

[22] As for the final criterion, I do not believe that adjudication upon the reasonableness of the superintendent's closure order could be seen to intrude into the roles of the legislative or executive branches of government.

[23] Having considered the three criteria under the second step of the mootness analysis, I exercise my discretion to decide whether the closure order was made in reviewable error.

[24] I reach the opposite conclusion with respect to the applicants' claim that they have a traditional right to fish commercially for soft-shell clams. This conclusion is based largely upon the frailty of the evidentiary record on this point. In this regard, while Mr. Burley has sworn an

affidavit as to his connection to the Park and his understanding that residents or former residents of the Park have a traditional right to fish for soft-shell clams, the basis of that understanding is not clearly set out in his affidavit. Further, no evidence is provided with respect to the personal history and circumstances of the other applicants.

[25] When I look at the record before me in its entirety, at least three significant questions are unanswered.

[26] First, at the time the land now comprising the Park was expropriated, the *New Brunswick Fishery Regulations*, P.C. 1954-1908, were in force. Section 5 of those regulations prohibited fishing for, taking, having in possession, or selling soft-shell clams under a particular size (except when taken from an over-populated area so designated by the responsible Minister), prohibited fishing for, or taking, soft-shell clams from any public bed other than with hand tools, and prohibited the export of soft-shelled clams from New Brunswick except in the shucked or canned state. Aside from these restrictions, it does not appear that one was required to hold a permit or license in order to fish for clams, either for recreational or commercial purposes. This would seem to suggest that, prior to the expropriation of land for the Park, the applicants' right to harvest clams was one shared with every other person in New Brunswick and, like all harvesters, the applicants faced some restrictions on their ability to harvest clams. Further evidence would be required to explain the historic basis of the applicants' claimed right in these circumstances.

[27] Second, Mr. Burley places significant reliance upon the recommendations of the La Forest Commission Report. Mr. Burley swears, for example, that "[m]y economic livelihood, and my

future security, as with those of the other Applicants, are dependent upon the continuing adherence of Parks Canada to the recommendations of the La Forest Commission Report." However, as set out above at paragraph 3, the recommendation of the La Forest Commission Report was that any right to harvest soft-shell clams should be subject to the right of Parks Canada to regulate and manage the harvest with a view to preserving the resource. Thus, the scope of the relevant recommendation was narrower than the scope of the traditional right now asserted by the applicants. This requires an explanation.

[28] Finally, the La Forest Commission Report made recommendations with respect to other fisheries, specifically the fishery for eel, smelt, and gaspereau. At the time the report was issued (October, 1981), persons who were licensed in 1967, 1968, or 1969 and current license holders could continue this type of fishing in the Park. The La Forest Commission Report recommended that the federal government declare this to be settled policy, which would continue so long as necessary to allow those currently entitled to fish to do so.

[29] Subsection 2.1(1) of the Regulations now provides that:

2.1(1) These Regulations do not apply in respect of fishing for commercial purposes for eel, smelt or gaspereau in Kouchibouguac National Park of Canada by persons who

(a) in 1967, 1968 or 1969, possessed a commercial fishing licence under the authority of the New Brunswick Fishery Regulations, C.R.C., c. 844, to fish for eel, smelt or gaspereau

2.1 (1) Le présent règlement ne s'applique pas à la pêche commerciale de l'anguille, de l'éperlan et du gaspereau pratiquée dans le parc national Kouchibouguac du Canada par les personnes suivantes :

a) celles qui détenaient en 1967, 1968 ou 1969 un permis de pêche commerciale de l'anguille, de l'éperlan et ou gaspereau, applicable aux eaux de ce parc, délivré en vertu du

within the waters of that park;
or

(b) in 1979, were registered as commercial fishers under the authority of the New Brunswick Fishery Regulations, C.R.C., c. 844, and fished from the Cap St.-Louis or Loggiecroft wharf areas within that park.

(2) Fishing for commercial purposes for eel, smelt or gaspereau within Kouchibouguac National Park of Canada shall be subject to the requirements of the Fisheries Act and the regulations made under that Act. [underlining added]

Règlement de pêche du Nouveau-Brunswick, C.R.C., ch. 844;

b) celles qui, en 1979, étaient enregistrées comme pêcheurs commerciaux en vertu du Règlement de pêche du Nouveau-Brunswick, C.R.C., ch. 844, et pêchaient dans ce parc depuis les quais de Cap-St-Louis ou de Loggiecroft.

(2) La pêche commerciale de l'anguille, de l'éperlan et du gaspereau dans le parc national Kouchibouguac du Canada est assujettie à Loi sur les pêches et à ses règlements d'application. [non souligné dans l'original]

[30] No similar provision exists in respect of the fishing, for commercial purposes, of soft-shell clams in the Park. The existence of subsection 2.1(1) of the Regulations, and the absence of an equivalent provision in respect of the soft-shell clam fishery, is not consistent with the rights asserted by the applicants that are said to flow in part from the La Forest Commission Report.

[31] An issue as important as the existence of the applicants' alleged traditional right to fish for soft-shell clams on a commercial basis should not be decided on the limited evidence currently before the Court. Therefore, I exercise my discretion not to consider this issue.

[32] Having decided to consider the propriety of the closure order, I turn to the appropriate standard of review to be applied to the superintendent's decision.

Standard of Review

[33] In supplementary submissions, filed following the release of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the parties each submitted that the applicable standard of review to be applied to the superintendent's decision is reasonableness. For the brief reasons that follow, I agree.

[34] The superintendent's decision was made pursuant to subsection 35(1) of the Regulations, which provides that:

35(1) Notwithstanding sections 3 and 10 and Schedule II, a superintendent may, by notice in writing, during an open season close any park waters to fishing or restrict the extent of fishing in such waters where it is necessary to do so for the protection, conservation and management of fish in those waters. [underlining added]

35(1) Malgré les articles 3 et 10 et l'annexe II, un directeur peut, par avis écrit durant une saison de pêche, interdire ou limiter la pêche dans les eaux du parc lorsque la protection, la conservation ou la gestion des poissons dans ces eaux l'exigent. [non souligné dans l'original]

[35] The Regulations are enacted under the authority of paragraph 16(1)(d) of the Act.

Subsection 4(1) of the Act dedicates Canada's national parks to the people of Canada and requires those parks to be "maintained and made use of so as to leave them unimpaired for the enjoyment of future generations."

[36] Section 8 of the Act makes the Minister responsible for the management and control of Canada's national parks. The section also dictates that the first priority of the Minister (and his delegates) when managing the parks is the "maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes."

[37] The Act and the Regulations contain no relevant privative provision.

[38] This is the legislative context in which the standard of review is to be determined.

[39] Important contextual factors are that the decision of the superintendent is discretionary and involves questions of fact and policy. Further, the superintendent enjoys greater experience and expertise than the Court when considering what is required to protect, conserve, or manage fish. These factors generally attract the standard of reasonableness. See: *Dunsmuir* at paragraphs 51 and 53. I am satisfied that the standard of reasonableness is appropriate in this case.

[40] Review on the reasonableness standard requires the reviewing court to inquire into the qualities that make a decision reasonable, which include both the process and the outcome. Reasonableness is concerned principally with the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within the range of acceptable outcomes that are defensible in fact and in law. See: *Dunsmuir* at paragraph 47.

Application of the Standard of Review to the Superintendent's Decision

[41] I begin consideration of the reasonableness of the superintendent's decision by briefly reviewing the legislative framework.

[42] As referenced above, the Regulations are enacted pursuant to paragraph 16(1)(d) of the Act, which permits the Governor-in-Council to make regulations respecting the management and regulation of fishing.

[43] The Regulations act to protect the soft-shell clam fishery as follows:

- paragraph 3(1)(d) prohibits fishing for soft-shell clams in the waters of the Park, unless the fisher holds a soft-shell clam permit;
- subsection 15.1(c) requires that one must hold a license, issued under the *National Parks of Canada Businesses Regulations, 1998, SOR/98-455*, in order to remove soft-shell clams from the Park for commercial purposes;
- open seasons, and catch and possession limits are set for both the recreational and commercial clam fisheries in the Park;
- subsections 9(1) and 9(2) and item 42.2 of Schedule II limit the clam fishery to between May 15 and September 15 of each year;
- section 20.1 further limits the scope of the clam fishery as follows:

20.1(1) Despite column I of item 42.2 of Schedule II, no person shall fish for soft-shell clams in any waters of Kouchibouguac National Park of Canada except where waters are marked for that purpose and in the manner set out in a notice posted by the superintendent or, where no such notice is posted, in the manner set out in the soft-shell clam permit.

20.1(1) Malgré la colonne I de l'article 42.2 de l'annexe II, il est interdit de pêcher la mye dans les eaux du parc national Kouchibouguac du Canada ailleurs que dans celles marquées à cet effet par des balises et autrement que de la manière prévue dans l'avis affiché par le directeur ou, à défaut d'avis, de la manière prévue dans le permis de pêche de la mye.

(2) The superintendent shall, in

(2) Le directeur fixe la manière

determining the manner in which a person may fish for soft-shell clams, take into account the park's natural and cultural resources and the preservation, control and management of the park.

de pêcher la mye en tenant compte des ressources naturelles et culturelles du parc et de la préservation, de la gestion et de l'administration du parc.

- section 10 and item 20 of Schedule III provide catch limits for the recreational clam fishery and provide that no soft-shell clam can be harvested for either recreational or commercial purposes unless it is over 50 mm in overall length.

[44] Additionally, as set out above, subsection 35(1) of the Regulations allows the superintendent to close any park waters to fishing, or to restrict the extent of fishing, where necessary for the protection, conservation, and management of fish.

[45] Turning to the decision at issue, the evidence is uncontradicted that:

- the decision to close the soft-shell clam fishery was precipitated by Parks Canada's decision to withdraw park wardens from law enforcement activity;
- in an effort to secure an alternate law enforcement presence, Parks Canada arranged with the RCMP to carry-out clam protection patrols, but only for the month of June, 2007; and
- Parks Canada made other efforts, but neither the Department of the Environment nor the Department of Fisheries and Oceans was able to provide assistance for the balance of the season.

[46] Subsection 35(1) empowers the superintendent to close the clam fishery in order to "protect" the fish. I accept the submission of the Attorney General that the requirement to protect fish refers

to, or at least includes, the need to prevent actions that would harm, or pose a threat to, fish.

Enforcement capability is, therefore, directly relevant to the need to protect fish. In the absence of an enforcement presence, there is no way to ensure compliance with the restrictions and regulations in place to protect fish.

[47] It follows, in my view, that ensuring the existence of adequate law enforcement resources falls within the meaning of protecting the fishery.

[48] The Park's prior history with respect to the clam fishery then becomes relevant. In 2001, park wardens were first removed from law enforcement activities. Nonetheless, the soft-shell clam fishery was allowed to open and continue during that year.

[49] The applicants characterize the resultant situation in 2001 to have been a "free-for-all." Mr. Burley swears that, during the 2001 season, he observed over-fishing and the removal of the undersized soft-shell clams. This led to a significant decline in the clam stocks within the Park.

[50] The parties agree that the extent of the decline was such that the clam fishery remained closed until the 2007 season. Then, by letter dated June 21, 2007, the applicants were advised by Parks Canada that the clam fishery had been restored to a level that it could sustain harvesting, with conservation measures.

[51] In view of the legislative framework, the good-faith efforts of Parks Canada to attempt to obtain a law enforcement presence and the prior experience when park wardens were first withdrawn from law enforcement duties, there existed a justifiable, transparent and intelligible basis

for the superintendent's decision that, if no law enforcement presence was available to protect the clam fishery, the superintendent ought to close the fishery in order to protect it. I do not find that this decision falls outside the range of acceptable and defensible outcomes. The decision was, therefore, reasonable. Key to the reasonableness of the decision was the genuine effort made by Parks Canada to secure adequate law enforcement resources and the prior history of the clam fishery.

[52] The applicants contest the reasonableness of the decision on two principal grounds. First, they say that the closure was not necessary for the protection, conservation, or management of the fishery. Second, the applicants submit that there is no evidence that the closure of the fishery furthered the objectives of the Act.

[53] With respect to the applicants' submission that closure of the fishery was not necessary, the applicants argue that the depletion of the fishery in 2001 was caused by the failure of Parks Canada to place restrictions upon who could fish for soft-shell clams or how large the catch could be.

[54] This submission, however, is contrary to the regulations that were in effect during the summer of 2001. The version of the *National Parks Fishing Regulations* in force as of April 30, 2001, prohibited the commercial harvest of soft-shell clams in the Park without a license (subsection 15.1(c)), limited the duration of the season (subsection 9(1) and item 42.2 of Schedule II), and imposed daily catch, possession, and overall length limits (section 10 and item 20 of Schedule III).

[55] On the basis of the existence of those regulations, I conclude that the disruption of the soft-shell clam fishery in 2001 resulted from the absence of law enforcement personnel and not from the absence of conservation regulations.

[56] With respect to the applicants' second submission that the closure order does not conform with the objectives of the Act, the closure order was made pursuant to regulations enacted for the purpose of managing and regulating fishing. This management activity is consistent with the Minister's mandated first priority: the maintenance or restoration of ecological integrity through the protection of natural resources and natural processes (see subsection 8(2) of the Act).

[57] The applicants rely upon other legislative objectives, specifically:

- the exercise of traditional renewable resource harvesting in a national park (section 17 of the Act);
- the protection of nationally significant examples of Canada's cultural heritage in national parks in view of their special role in the lives of Canadians and the fabric of the nation (preamble, *Parks Canada Agency Act*, S.C. 1998, c. 31, (Agency Act)); and
- the encouragement of stewardship (preamble, Agency Act).

[58] However, section 17 of the Act has no application to the present case as there is no evidence of a federal-provincial agreement so as to make paragraph 17(1)(f) of the Act applicable, nor is there evidence of a land claim agreement so as to make subsection 17(2) applicable.

[59] While, in its preamble, the Agency Act speaks to the protection of cultural heritage and the encouragement of stewardship, these goals, in separate but related legislation, cannot trump subsection 8(2) of the Act which makes the maintenance or restoration of ecological integrity the first priority in a national park. The Act clarifies in subsection 2(1) that "ecological integrity" includes "the composition and abundance of native species and biological communities, rates of change and supporting processes."

Conclusion and Costs

[60] For these reasons, the application for judicial review will be dismissed.

[61] Both sides sought costs, if successful. In my view, costs should follow the event.

[62] If not agreed, the applicants shall pay to the respondent costs assessed at the mid-point of Column III of the table to Tariff B of the *Federal Courts Rules*, SOR/98-106.

1. The Regulations define "fish" to include a soft-shell clam. Thus, the Regulations (see section 20.1) and these reasons refer to fishing for soft-shell clams.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.
2. If not agreed, the applicants shall pay to the respondent costs assessed at the mid-point of Column III of the table to Tariff B of the *Federal Courts Rules*.

“Eleanor R. Dawson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1594-07

STYLE OF CAUSE: MARK BURLEY ET AL., Applicants and
THE ATTORNEY GENERAL OF CANADA,
Respondent

PLACE OF HEARING: FREDERICTON, NEW BRUNSWICK

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DATED: MAY 8, 2008

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