Federal Court  Cour fédérale

Date: 20110706

Docket: T-1271-07

Citation: 2011 FC 825

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, July 6, 2011

PRESENT: Richard Morneau, Prothonotary

BETWEEN:

ROLAND ANGLEHART SR. ET AL.

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] The Court has before it a motion by the plaintiffs seeking a ruling on the undertakings taken under advisement by the defendant during the examination for discovery of her designated representative, Jim Jones. This examination that took place over a period of eighteen (18) days, from September 27 to October 26, 2010.

[2] This motion relates to an action in damages brought in 2007 by the some 96 plaintiffs. It seems reasonable to define the parameters of this case by reproducing a summary provided in the past by the defendant as part of an order denying the plaintiffs the production of a more complete affidavit of documents:

> [TRANSLATION]
>
> … The wrongful action complained of by the plaintiffs that gave rise to the dispute between the parties began on May 2, 2003, when the Minister of Fisheries and Oceans (hereinafter the "Minister") issued the three-year snow crab management plan in Area 12 of the Gulf of St. Lawrence. It is alleged that, by announcing this management plan, the Minister decided unilaterally to reduce the plaintiffs' share of the total allowable catch (hereinafter "TAC") in order to allocate it to Aboriginal persons, fishers of other fish species, and fishers in other fishing areas.
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> [References omitted.]

Analysis

I - Questions to be answered and documents to be produced during an examination for discovery: Applicable general principles

[3] In *Reading & Bates Construction Co. and al. v. Baker Energy Resources Corp. and al.* (1988), 24 C.P.R. (3rd) 66, Justice McNair, in a general six-point note, first defined, in points 1 to 3, the parameters for determining whether a question (here an undertaking) or a document is relevant, and then stated, in points 4 to 6, a series of circumstances or exceptions whereby a question need not be answered or a document need not be produced.

[4] The Court stated the following at pages 70 to 72 :

> 1. The test as to what documents are required to be produced is simply relevance. The test of relevance is not a matter for the exercise of the discretion. What documents parties are entitled to is a matter of law, not a matter of discretion. The principle for determining what document properly relates to the matters in issue is that it must be one which might reasonably be supposed to contain information which may directly or indirectly enable the party requiring production to advance his own case or to damage the case of his adversary, or which might fairly lead him to a train of inquiry that could have either of these consequences: *Trigg v. MI Movers Int'l Transport Services Ltd.* (1986), 13 C.P.C. (2d) 150 (Ont. H.C.); *Canex Placer Ltd. v. A.-G. B.C.* (1975), 63 D.L.R. (3d) 282, [1976] 1 W.W.R. 644 (B.C.S.C.); and *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.).
>
> 2. On an examination for discovery prior to the commencement of a reference that has been directed, the party being examined need only answer questions directed to the actual issues raised by the reference. Conversely, questions relating to information which has already been produced and questions which are too general or ask for an opinion or are outside the scope of the reference need not be answered by a witness: *Algonquin Mercantile Corp. v. Dart Industries Canada Ltd.* (1984), 82 C.P.R. (2d) 36 (F.C.T.D.); affirmed 1 C.P.R. (3d) 242 (F.C.A.).
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> 3. The propriety of any question on discovery must be determined on the basis of its relevance to the facts pleaded in the statement of claim as constituting the cause of action (...)
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> 4. The court should not compel answers to questions which, although they might be considered relevant, are not at all likely to advance in any way the questioning party's legal position: *Canex Placer Ltd. v. A.-G. B.C.*, supra; and *Smith, Kline & French Laboratories Ltd. v. A.-G. Can.* (1982), 67 C.P.R. (2d) 103 at p. 108, 29 C.P.C. 117 (F.C.T.D.).
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> 5. Before compelling an answer to any question on an examination for discovery, the court must weigh the probability of the usefulness of the answer to the party seeking the information, with the time, trouble, expense and difficulty involved in obtaining it. Where on the one hand both the probative value and the usefulness of the answer to the examining party would appear to

> be, at the most, minimal and where, on the other hand, obtaining the answer would involve great difficulty and a considerable expenditure of time and effort to the party being examined, the court should not compel an answer. One must look at what is reasonable and fair under the circumstances: *Smith, Kline & French Ltd. v. A.-G. Can.*, per Addy J. at p. 109.
>
> 6. The ambit of questions on discovery must be restricted to unadmitted allegations of fact in the pleadings, and fishing expeditions by way of a vague, far-reaching or an irrelevant line of questioning are to be discouraged: *Carnation Foods Co. Ltd. v. Amfac Foods Inc.* (1982), 63 C.P.R. (2d) 203 (F.C.A.); and *Beloit Canada Ltee/Ltd. v. Valmet Oy* (1981), 60 C.P.R. (2d) 145 (F.C.T.D.).
>
> [Emphasis added.]

[5] In addition, the list of exceptions in points 2 and 4 to 6 of *Reading & Bates* is not strictly intended, in my opinion, to be exhaustive.

[6] In many situations, the weighing referred to by the Court in *Reading & Bates* at point 5 will be necessary.

[7] In fact, although it was stated in relation to an area of law other than the one of concern to the parties in the case at bar, it seems to the Court that it would be nonetheless useful to reproduce here the following excerpt from *Faulding Canada Inc. v. Pharmacia S.p.A.* (1999), 3 C.P.R. (4th) 126, page 128:

> ... the general tendency of the courts to grant broad discovery must be balanced against the tendency, particularly in industrial property cases, of parties to attempt to engage in fishing expeditions which should not be encouraged.

[8] Rule 242 of the *Federal Courts Rules* (the Rules), which applies to all cases, contains a warning to that effect. In fact paragraphs 242(1)(*b*) to (*d*) of the Rules read as follows:

242. (1) A person may object to a question asked in an examination for discovery on the ground that	**242.** (1) Une personne peut soulever une objection au sujet de toute question posée lors d'un interrogatoire préalable au motif que, selon le cas :
(…)	(…)
(*b*) the question is not relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party;	*b*) la question ne se rapporte pas à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire ou par la partie qui l'interroge;
(*c*) the question is unreasonable or unnecessary; or	*c*) la question est déraisonnable ou inutile;
(*d*) it would be unduly onerous to require the person to make the inquiries referred to in rule 241.	*d*) il serait trop onéreux de se renseigner auprès d'une personne visée à la règle 241.

[9] Finally, the Court would merely add the following comment here. The defendant is making much of the fact that in August 2009 the Federal Court of Appeal indicated in this matter that the plaintiffs themselves acknowledged in an interlocutory argument that their action was not founded on the unlawfulness of the decisions of the Minister of Fisheries and Oceans. According to the defendant, this admission would still be binding on the plaintiffs.

[10] I think instead that the situation needs to be considerably qualified. The plaintiffs' remarks were made at the time when the principles of *Canada v. Grenier*, 2005 FCA 348 (*Grenier*) were still in effect. However, on December 23, 2010, the Supreme Court of Canada handed down its decision in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 (*TeleZone*).

[11] Without going into a lot of detail about the ambit of this decision here, the Supreme Court of Canada appears to have recognized that the lawfulness of an administrative decision may be reviewed in the course of a damages claim provided that the main relief sought by the plaintiff is not to have that decision set aside. At paragraphs 4, 6 and 47 of that decision, the Court states:

> [4] The *Grenier* principle would undermine s. 17 of the same Act granting concurrent jurisdiction to the provincial superior courts "in all cases in which relief is claimed against the Crown" as well as the grant of concurrent jurisdiction to the superior courts in s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, to deal with tort claims. A central issue in some (but not all) damages claims against the federal Crown will be the "lawfulness" of the government decision said to have caused the loss. *Grenier* would deny the provincial superior courts the jurisdiction to deal with that central issue in a damages claim pending before them. Adoption of the *Grenier* principle would relegate the provincial superior courts in such matters to a subordinate and contingent jurisdiction — not concurrent, i.e., subordinate to the Federal Court's decision on judicial review and contingent on the Federal Court being willing to grant a discretionary order on judicial review in favour of the plaintiff.
>
> …
>
> [6] …The *Federal Courts Act* does not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential "unlawfulness" of government orders …
>
> …
>
> [47] …Section 18 does *not* say that a dispute over the lawfulness of exercise of statutory authority cannot be assessed in the course of a trial governed by the *Crown Liability and Proceedings Act* brought in the provincial superior court or pursuant to s. 17 of the *Federal Courts Act* itself.
> [Emphasis added.]

II - The undertakings to be determined

[12] Although the parties have made very laudable efforts to significantly reduce the many undertakings taken under advisement on the day following Mr. Jones' lengthy examination, there are nonetheless, under the motion in issue, a certain number of undertakings that remain to be determined.

[13] As required by this Court, the parties have produced a joint table showing the Court the substance of the reasons in favour or not in favour of producing any remaining undertaking.

[14] The Court has reproduced this table and given it the title [TRANSLATION] "Table of Undertakings".

[15] After having considered the parties' motion records and having heard their counsel, and keeping the relevant principles of case law in mind, including those cited above and those raised by the parties, the Court has indicated in the Table of Undertakings, using a double line ("‖") in the margin next to all or part of the reasoning of a party for each undertaking to be determined, whether, ultimately, this undertaking should be fulfilled or not. The double line in the margin is in either one or the other of the last two columns of the Table of Undertakings, unless an undertaking is to be fulfilled only in part, in which case the double line may sometimes be found in part in one of the columns, or the undertaking is the subject of a note in this regard in the list at paragraph [16] below.

[16] Thus, the plaintiffs' motion is allowed in part as follows and the defendant will therefore need to fulfill the undertakings which she has already undertaken to fulfill as well as the following undertakings:

- 179: in part only for the production of the two drafts concerned.
- 167
- 203
- 204
- 208
- 163: in part only in accordance with the defendant's approach identified at the top of the Table of Undertakings.
- 154: in part only in accordance with the defendant's approach identified at the top of the Table of Undertakings.
- 186: in part only in accordance with the defendant's approach identified at the top of the Table of Undertakings.
- 291
- 292
- 298
- 299
- 300
- 301
- 302
- 303: in part only for the production of the attachment to the letter.
- 305
- 307
- 308
- 309

[17] Given the length of the Table of Undertakings, this table is deemed to be a part of these reasons for order and order but will be sent by e-mail under separate cover by the registry to counsel for the parties.

[18] As for costs on this motion, in view of the divided outcome, no costs will be awarded.

[19] Moreover and as discussed in Court on June 29, 2011, the parties will see to jointly sending, in the form of a draft order to the Court, on or before July 27, 2011, a timetable that will cover the remaining steps to be completed , in a reasonable timeframe, following this order. The Court will determine whether it is appropriate to adapt the dates or other conditions proposed based on its needs and availability.

[20] Finally, for the purposes of these reasons for order and order and henceforth, the style of cause to be used in this matter will be as follows:

ROLAND ANGLEHART SR. ET AL.

Plaintiffs

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Defendant

"**Richard Morneau**"
Prothonotary

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1271-07
STYLE OF CAUSE:	ROLAND ANGLEHART SR. ET AL. and HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 29, 2011
REASONS FOR ORDER AND ORDER:	PROTHONOTARY MORNEAU
DATED:	July 6, 2011

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