Her Majesty the Queen in Right of the Province of Prince Edward Island and Attorney General of Prince Edward Island, Henry Gallant, Paul Anderson, Kenneth B. MacLeod and John P. MacPhee (respondents/plaintiffs) v. Her Majesty the Queen in Right of Canada and the Minister of Fisheries and Oceans (Canada) and the Attorney General of Canada (applicants/defendants)
(S1-GS-20819; 2005 PESCTD 57)

Indexed As: Prince Edward Island et al. v. Canada (Attorney General) et al.

Prince Edward Island Supreme Court
Trial Division
Campbell , J.
November 2, 2005.

Counsel:

Reinhold Endres, Q.C., and Jessica Harris, for the applicants/defendants;

Eugene P. Rossiter, Q.C., and Spencer Campbell, for the respondents/plaintiffs.

Campbell, J., of the Prince Edward Island Supreme Court, Trial Division, heard this application on May 19 and 20, 2005, and delivered the following decision on November 2, 2005.

Introduction

[1] Campbell, J.: The plaintiffs issued a statement of claim against the defendants seeking, among other things, a series of declarations first with respect to the constitutionality of section 7 of the **Fisheries Act**, R.S.C. 1985, Cap. F-14, and then challenging the historical fisheries management decisions of the Minister as it relates to various fisheries in Atlantic Canada.

[2] The defendants have applied to strike the statement of claim on numerous grounds including that the statement of claim discloses no reasonable cause of action, is frivolous, vexatious or otherwise an abuse of process, that the plaintiffs do not have standing to pursue the action, that this court does not have jurisdiction over the subject matters of the action, and that two of the defendants are not proper defendants in such an action.

[3] The first series of claims made by the plaintiff involves section 7 of the **Fisheries Act** which reads 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.
>
> "(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."

[4] The plaintiff submits that section 7 of the **Act** contravenes the rule of law as guaranteed by the **Canadian Constitution (Constitution Act 1867** and the **Canadian Charter of Rights and Freedoms)** and is of no force or effect in that the legislation (a) purports to confer "absolute" discretion on the Minister; (b) is completely silent on the considerations that need to be taken into account by the Minister in exercising that discretion; and (c) does not provide a fair, open,

transparent or accountable process, or require that reasons be given for the Minister's decisions.

[5] The second series of claims set out in the statement of claim also largely relate to the impugned section of the **Act**. The plaintiffs seek declaration that, in making licencing decisions under section 7 of the **Fisheries Act** and in making other decisions affecting PEI fishers, the defendant Minister has:

(a) breached his public trust obligations;

(b) failed to comply with his own policies and has taken into account considerations not contemplated by these policies;

(c) taken irrelevant considerations into account;

(d) failed to act in accordance with the principles of procedural fairness; and

(e) failed to meet fishers' legitimate expectations.

Further, the plaintiffs claim the defendants violated the **Oceans Act**, S.C 1996, C-31, by putting fisheries conservation at risk. Finally, they claim that under the Prince Edward Island Terms of Union, the government of Canada is required to assume and defray all charges for the protection of the fisheries.

[6] In the plaintiffs' written brief they advised the Court that they would be pursuing their constitutional claim, but that the only non-constitutional claim they would be pursuing would be their claim that public trust obligations had been violated. The nature of that claim is set out in paragraph 19 of the statement of claim:

"19. The fishery in Canada is a common property resource that is managed by Canada or the Minister, or both, as a trustee, or fiduciary, and for the benefit of all Canadians, as beneficiaries. As such, they are required to comply with all common law obligations that pertain to that role. Those common law responsibilities include the duty to act in good faith, to act in the interests of all beneficiaries and to avoid conflicts of interest, to preserve the fishery, to act prudently, to treat all beneficiaries impartially and with an even hand, and to furnish information and reasons to persons affected by his decisions, to Islanders and Canadians generally, about the management of the fishery. For ease of reference, these obligations will be referred to as the 'Public Trust Obligations'."

[7] The defendant's motion is made pursuant to Rules 21.01(3) (a), (b), and (d) of the **Rules of Court**:

"21.01 ...

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

. . . . .

Action Frivolous, Vexatious or Abuse of Process

(d) The action is frivolous or vexatious or is otherwise an abuse of the process of the

court,

And the judge may make an order or grant judgment accordingly."

Does the Statement of Claim disclose a reasonable cause of action?

[8] As a general principle, the courts will be very hesitant to strike out a statement of claim as disclosing no cause of action. After reviewing various cases which describe the test as being whether the outcome of the case is "plain and obvious" or "beyond reasonable doubt", Madam Justice Wilson speaking in **Hunt v. T & N plc et al.**, [1990] 2 S.C.R. 959; 117 N.R. 321, stated:

"[33] Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia **Rules of Court** is the same as the one that governs an application under R.S.C. O. 18, r. 19: **assuming 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 ranking with the others listed in Rule 19(24) of the British Columbia **Rules of Court** should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a). **(emphasis added)**

. . . . .

"[52] The fact that a pleading reveals 'an arguable, difficult or important point of law' cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be 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."

[9] In **Horseman v. Horse Lake First Nation** (2002), 323 A.R. 81; 2002 ABQB 765, the plaintiff sued the defendant Indian Band seeking to have her membership in the Band restored. The defendant moved to strike the statement of claim on the grounds that it disclosed no reasonable cause of action and that the Superior Court did not have jurisdiction to hear the case as the **Federal Courts Act** granted exclusive jurisdiction over such matters to the Federal Court. In refusing to strike the statement of claim, Watson, J., provided a summary of the principles to be considered on such a motion:

"(1) On a motion to strike out pleadings, it is well settled that the impugned pleading must be read generously.

(2) The foregoing is a corollary to the well settled rule that a pleading will not be struck out if it is capable of amendment.

(3) A pleading will not be struck out for want of a cause of action unless the flaw is plain and obvious and beyond doubt.

(4) The claim advanced must be hopeless to be struck out.

(5) A court must use extreme caution on a motion to strike out a pleading for want of a cause of action.

(6) That the Plaintiff will have to make novel arguments is no ground to strike out.

(7) Any suggestion that the pleading to be struck out must be read in a narrow fashion appears ... to be logically incompatible with the general rule barring striking out if there is any doubt.

(8) Mis-statement or non-statement of the precise cause of action is not of itself terminal if the pleading gives facts which create that cause of action.

(9) A statement of claim should be struck out on a question of law only if it is a pure question of law requiring neither evidence nor more pleadings.

(10) A pleading should not be struck out for want of a cause of action, even if interpreting a statute one way would bar the suit.

(11) A good defence constitutes neither want of a cause of action, nor ground to strike out.

(12) It is well established that a motion to strike out a pleading is not the appropriate time to decide general important or serious questions of law.

(13) Care must be taken in striking out only part of a Statement of Claim.

(14) Facts pleaded are taken to be true for the purposes of Rule 129(1)(a). Insufficiency in detail of the facts pleaded is not of itself necessarily terminal. Pleadings may be amended.

(15) The Court is not required to strike out a pleading under Rule 129 as the language is permissive (although arguably a proven lack of jurisdiction would not involve considerations of discretion in the same way)."

[10] In **Shubenacadie Indian Band v. Canada (Attorney General) et al.** (2001), 202 F.T.R. 30; 2001 F.C.J. No. 347 (TD) the Court expressed that:

> "[5] The principle is well established that a party bringing a motion of this sort has a heavy burden and must show that indeed it is **beyond doubt** that the case would not succeed at trial."

Justice Huggesen went on to state:

> "[6] If there is in a pleading **a glimmer of a cause of action**, even though vaguely or imperfectly stated, it should, in my view, be allowed to go forward. ... **"(emphasis added)**

[11] The threshold for maintaining one's action in the face of a motion to strike the statement of claim as disclosing no reasonable cause of action is very low. It is in the context of this test that I must review the defendants' submissions.

[12] The defendants present four principal arguments in favor of striking the statement of claim. They submit that:

> "1) The Statement of Claim discloses no reasonable cause of action;
>
> 2) That the Respondents do not have standing;
>
> 3) The Court does not have jurisdiction over the subject matter of this action; and
>
> 4) Her Majesty the Queen in Right of Canada and the Minister are not proper Defendants."

[13] During the course of the hearing counsel agreed that the Attorney General of Canada was the only proper defendant and that Her Majesty the Queen and the Minister of Fisheries and Oceans would be removed as named defendants.

[14] The defendants submit that the plaintiffs'

claims are "devoid of any rational basis" (and therefore disclose no reasonable cause of action) in that:

> "(i) the Minister's discretion in the context of licencing fishing activities is governed by provisos contained in the **Fisheries Act**, including subsections (1) and (2) of section 7;
>
> "(ii) the adjective 'absolute' in the phrase 'in his absolute discretion' in s. 7, has already, and conclusively, been determined as redundant;
>
> "(iii) no matter the language employed in s. 7, the Minister's statutory discretion is clearly not beyond the reach of the courts;
>
> "(iv) regulations, made pursuant to section 43 of the **Act**, serve as a qualifier to the Minister's exercise of discretionary authority; and
>
> "(v) ministerial policies serve as a means for making the licencing process transparent."

The Constitutional Question

[15] Submissions (i), (iv), and (v) are similar in nature. It is true that the Minister's discretion is circumscribed by section 7(2) which requires that licenses for a term exceeding nine years be issued under the authority of the Governor in Council. Setting aside any consideration of the number of licences actually issued for such a term, the Minister is left with "absolute" discretion for licenses with terms of less than nine years. As well, while Major, J., said in **Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)**, [1997] 1 S.C.R. 12; 206 N.R. 363; 142 D.L.R.(4th) 193, (at paragraph 35) "the existence of regulations under section 43 of the **Fisheries Act** "may" restrict the Minister's discretion", the regulations to which we were referred, (i.e. Regulation 22 of the **Fishery (General) Regulations**) do not in any way restrict the Minister's discretion on the fundamental question of who shall be issued a license in the first place. Similarly, ministerial policy statements cannot be viewed as limiting the Minister's discretion when the Minister has untrammelled discretion to change a policy statement as and when he or she sees fit.

[16] The second and third submissions under this argument relate to the actual wording of section 7 of the **Act** and how the courts have treated the phrase "in his absolute discretion". The defendant argues that the Supreme Court of Canada in **Comeau**, has already determined that the word "absolute" is redundant, thus eliminating the plaintiffs' cause of action.

[17] In **Comeau**, the Minister assured the appellant it would receive certain fishing licenses. In reliance on that, the appellants incurred expenses. The Minister, while acknowledging his earlier representation and the subsequent actions of the appellant, changed his mind and refused to issue any licenses. The appellants sued the Minister in negligence and, in the end, lost as the Supreme Court of Canada found the Minister owed no duty to the appellant to issue the promised licenses. Major, J., writing for the Court said, at paragraph 31:

> "[31] In 1929, the **Fisheries Act** was amended to add the words 'in his absolute discretion' following the word 'may' in S.C. 1929, c. 42, s. 2. In the 1985 amendment to the **Fisheries Act**, the adjective 'absolue' was dropped in the French text. The dropping of the qualifier 'absolue' in the French version merely indicates that the translator regarded the French term 'discrétion' as equivalent to the English phrase, 'in his absolute discretion'. see **Everett v. Canada (Minister of Fisheries and Oceans)** (1994), 169 N.R. 100 (F.C.A.), per MacGuigan, J.A., at p. 105:

'A discretion, whether or not described as absolute, is subject to the same legal limitations, and in my opinion the term "absolute" in the English version of the statute is redundant.'"

[18] Major, J., went on to say, at paragraph 35:

"[35] While the existence of regulations under s. 43 of the **Fisheries Act** may restrict the Minister's absolute discretion (R. v. Halliday (1994), 129 N.S.R.(2d) 317 (N.S.S.C.)), that is not an issue in this appeal.

"[36] It is my opinion that the Minister's discretion under s. 7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, no regulations currently being applicable. The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith. The result is an administrative scheme based primarily on the discretion of the Minister: see **Thomson v. Minister of Fisheries and Oceans**, F.C.T.D. No. T-113- 84, February 29, 1984.

"[37] This interpretation of the breadth of the Minister's discretion is consonant with the overall policy of the **Fisheries Act**. Canada's fisheries are a 'common property resource', belonging to all the people of Canada. Under the **Fisheries Act**, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). Licensing is a tool in the arsenal of powers available to the Minister under the **Fisheries Act** to manage fisheries. It restricts the entry into the commercial fishery, it limits the numbers of fishermen, vessels, gear and other aspects of commercial fishery."

[19] The plaintiffs submit that in "reading out" the word "absolute" from section 7 the courts are treating the section as being unconstitutional although they have never explicitly stated they were doing so. Further, the plaintiffs' submit that it is not plain and obvious that it has "no reasonable cause of action" to seek an explicit declaration that section 7 is unconstitutional. In **Comeau**, the constitutional issue does not appear to have been presented to the court. At paragraph 21, Major, J., framed the issue by stating "The question which arises on this appeal is whether the Minister of Fisheries & Oceans once having authorized the granting of fishing licenses had the authority to revoke that authorization."

[20] In **British Columbia Hydro and Power Authority v. Canada (Attorney General) et al.**, [1998] F.C.J. No. 748; 149 F.T.R. 161 (TD), McGillis, J., cited the comments of MacGuigan, J.A., in **Everett** and Major, J., in **Comeau** to support the conclusion that discretionary decisions of the Minister of Fisheries are reviewable by the courts. A similar conclusion was reached by the Federal Court of Appeal in **Jada Fishing Co. et al. v. Canada (Minister of Fisheries and Oceans) et al.** (2002), 288 N.R. 237; 2002 FCA 103.

[21] In **Tucker v. Canada (Minister of Fisheries & Oceans)**, [2000] F.C.J. No. 1868; 197 F.T.R. 66 (TD), Rothstein, J., considered and was obviously influenced by the wording of section 7 of the **Fisheries Act** in deciding what standard of review was applicable to a decision by the Minister. At paragraph 13 he said:

"The parties agree that the standard of review of the Minister's exercise of this discretion is patent unreasonableness. I also agree. The words of section 7 place no restrictions on the Minister in the exercise of his discretion. **Indeed, the provision includes the term 'absolute' discretion which I interpret to be a signal of Parliament's intention that the Court should grant significant deference to the Minister.** The Minister has expertise with respect to the issuance of fishing licences."

(emphasis added)

[22] After reviewing the various judicial pronouncements with respect to the reviewability of the Minister's decisions, I cannot conclude that it is plain and obvious that the plaintiffs would not succeed in obtaining a declaration that the word "absolute" in the phrase "in his absolute discretion" is unconstitutional, whether for offending the rule of law or otherwise. Neither can I say it is plain and obvious that the judicial treatment of section 7 would be the same if the word "absolute" was stricken from that legislation as opposed to being otherwise massaged or interpreted.

Public Trust Obligations

[23] Under what circumstances can one challenge individual decisions of a department of the Federal Government? Does the right to challenge vary if one seeks to attack government policy? Can one raise a court challenge against a series of decisions over time having a greater impact than any one decision? Does an allegation of bad faith or breach of public trust alter or expand the nature of available challenges? How far can or should the courts go in reviewing government actions?

[24] In 1971 the Federal Government created the Federal Court of Canada. It granted that court "exclusive original jurisdiction" to superintend certain conduct of federal boards, commissions or tribunals. Section 2(1) of the **Federal Courts Act** defines federal board, commission or tribunal as "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, ...". This would include the Minister of Fisheries as set out in section 7 of the **Fisheries Act**.

[25] Section 18 and 18.1 of the **Federal Courts Act** set out matters in relation to these questions:

"18(1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

. . . . .

Remedies to be obtained on application

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

"18.1(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the

Federal Court may fix or allow before or after the end of those 30 days.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law"

[26] If one wishes to challenge an individual decision of a Federal Minister, then clearly, pursuant to section 18.1(2) they must do so by way of application for judicial review filed in the Federal Court within 30 days of the making of the challenged decision or order. That is not what the plaintiff is attempting to do here.

[27] In effect, the plaintiffs are seeking to challenge government policy as represented by a series of decisions over a number of years, the cumulative effect of which they allege has been the breach of the Federal Government's public trust obligations and has been to deny PEI and its fishers their fair share of the collective resource, which has harmed PEI and its fishers' economic interests. They are claiming that the Government is operating under a statute which is unconstitutional and they are seeking a declaration to that effect. What is to prevent them from maintaining that action in the Supreme Court of Prince Edward Island?

Does the Federal Court have jurisdiction over these matters?

[28] Can the Federal Court entertain the questions collectively described by the plaintiffs as issues of breach of public trust obligations? It was suggested in argument on this motion that there is a distinction to be drawn between the wording of section 18.1(1) of the **Federal Courts Act** referring to "the matter in respect of which relief is sought" and that of section 18.1(2) referring to "judicial review in respect of a decision or an order". The thirty day time limit for applying for judicial review is referred to only with respect to the latter.

[29] The Federal Court of Appeal addressed this

issue in **Krause et al. v. Canada et al.**, [1999] 2 F.C. 476; 236 N.R. 317 (F.C.A.). In that case the Minister of Finance made a decision in 1989-90 to implement certain accounting procedures that were recommended in 1988 by the Canadian Institute of Chartered Accountants. The actual implementation of the policies never took place until 1993-94. The policies had the effect of restricting the value of Public Service and Canadian Forces Superannuation Funds. In November of 1997, the plaintiffs filed a statement of claim challenging the decision to implement the policy by way of seeking mandamus, prohibition, and declaration. The motion's judge struck out the statement of claim noting that the impugned "decision" was taken either in 1989-90, or at the latest, in 1993-94, either of which were well beyond the thirty day time limit established by section 18.1(2) of the **Federal Courts Act**. The appellants submitted that the actions sought to be reached by way of mandamus, prohibition, and declaration were not "decisions" within the meaning of 18.1(2). They further contended that they were not challenging a single decision but rather a series of annual decisions reflective of the ongoing policy or practice of the Minister over time.

[30] Stone, J.A., reviewed the historical background of the remedies of mandamus, prohibition, and certiorari. He quoted Lord Mansfield from 1762 who was of the view that mandamus ought to be "used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." (**R. v. Barker** (1762), 3 Burr. 1265; 97 E.R. 823, at p. 825). He then quoted Lord Denning, M.R., in **R. v. Greater London Council; Ex parte Blackburn**, [1976] 1 W.L.R. 550, at 559, where he said:

> "I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."

[31] The appellants in **Krause** submitted that their action was directed at compelling the Minister to perform his public duties, preventing further failure to perform such duties and having past conduct declared invalid. The plaintiffs' action in this case is directed towards very similar ends.

[32] In accepting that the word "matter" in 18.1(1) does not embrace only a "decision or order" but is reflective of a variety of administrative actions in respect of which a remedy may be available under section 18 of the **Federal Courts Act**, Stone, J.A., concluded at page 23 that "the time limit imposed by subsection 18.1(2) does not bar the appellants from seeking relief by way of mandamus, prohibition and declaration", and further at paragraph 24 that "the exercise of the jurisdiction under section 18 does not depend on the existence of a decision or order'." This view was adopted by Evans, J., in **Markevich v. Minister of National Revenue**, [1999] 3 F.C. 28; 163 F.T.R. 209 (T.D.), where he said at paragraph 11:

> "11 It seems to be that the permitted subject-matter of an application for judicial review is contained in subsection 18.1(3), which provides that on an application for judicial review the Trial Division may order a federal agency to do any act or thing that it has unlawfully failed or refused to do, or declare invalid or set aside and refer back, prohibit or restrain 'a decision, order, act or proceeding of a federal board, commission or other tribunal'. The words 'act

> or proceeding' are clearly broad in scope and may include a diverse range of administrative action that does not amount to a 'decision or order', such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public program: see **Krause v. Canada**, supra."

I accept the views of the Federal Court and Federal Court of Appeal and conclude that the Federal Court would have jurisdiction to entertain the plaintiffs' case in this matter.

Does the jurisdiction of the Federal Court in this matter oust the jurisdiction of the Superior Court of Prince Edward Island?

[33] As I have indicated, in my view, Parliament did intend to have the Federal Courts superintend the administrative functions of government departments. If challenging those administrative functions is the essence of this second series of claims by the plaintiffs, then I would be of the view that they are properly in the exclusive purview of the Federal Courts. However, in determining whether the statement of claim discloses any reasonable cause of action or whether this court has jurisdiction to entertain the claim, I must carefully assess the true nature of the plaintiffs' claim. And in doing so, I must be conscious of the low threshold the plaintiff needs to meet.

[34] The plaintiffs are alleging a breach of trust. They claim the defendant has a fiduciary duty to manage the common resource that is the fishery, fairly and in good faith, for the equal benefit of all. They claim the defendant has not done that. Their claims are not based on one or two decisions made under the **Fisheries Act**. Their claims are not based on the decisions of one or two Ministers of Fisheries. They are claiming, in effect, that the whole of the decisions and actions taken pursuant to the **Fisheries Act** over an extended time have had an impact that is greater than the results of a collection of individual decisions. They claim that impact constitutes a breach of the defendant's fiduciary duty to the plaintiff. Major, J., in **Comeau**, in considering the appropriate exercise of the Minister's discretion concluded the Minister was bound to base his or her decision on relevant considerations, avoid arbitrariness, and act in good faith. He went on to say "Canada's fisheries are a 'common property resource', belonging to all the people of Canada. Under the **Fisheries Act**, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest."

[35] The issues being raised by the plaintiffs go beyond those of the day-to-day administrative or functional aspects of the **Fisheries Act**. They involve issues regarding the fundamental character of the relationship between the government and those who are governed. In recent years governments have been called upon to provide leadership and assume responsibility with respect to an ever-increasing range of public interests and concerns. As well, governments have been held accountable in ways never imagined a half century ago. Governments themselves have increasingly expressed their legal authority to intervene, on the public's behalf, to promote or protect the public good. In **British Columbia v. Canadian Forest Products Ltd.**, [2004] 2 S.C.R. 74; 321 N.R. 1; 198 B.C.A.C. 1; 324 W.A.C. 1, the Supreme Court of Canada addressed the issue in the context of a claim by the Province of British Columbia for compensation for environmental damage caused to public lands. A forest fire, caused by the defendants, destroyed a large tract of forest and other growth in an environmentally sensitive area. In discussing the Crown's available remedies for public nuisance (in this case, destruction of environmentally sensitive lands) Binnie, J., spoke of the long-standing recognition of the vesting of common

property and public rights in the Crown, quoting from ideas put forward by H. de Bracton in his treatise on English law in the mid-13th century (**Bracton on the Laws and Customs of England** (1968), vol. 2)). Binnie, J., then stated, at paragraph 76:

> "76 ...
>
> Since the time of de Bracton it has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable 'public rights' in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their protection representing the Crown as parens patriae. This is an important jurisdiction that should not be attenuated by a narrow judicial construction.
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> . . . . .
>
> "78 Under the common law in [the United States], it has long been accepted that the state has a common law parens patriae jurisdiction to represent the collective interests of the public. This jurisdiction has historically been successfully exercised in relation to environmental claims involving injunctive relief against interstate public nuisances: se, e.g., **North Dakota v. Minnesota**, 263 U.S. 365 (1923), at p. 374; **Missouri v. Illinois**, 180 U.S. 208 (1901); **Kansas v. Colorado**, 206 U.S. 46 (1907); **Georgia v. Tennessee Copper Co.**, 206 U.S. 230 (1907); and **New York v. New Jersey**, 256 U.S. 296 (1921). In **Tennessee Copper**, Holmes, J., held for the Supreme Court of the United States, at p. 237, that, 'the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain'" (emphasis added).

He elaborated further on the potential evolution of actions coming before the courts:

> "81 It seems to me there is no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance, or negligence causing environmental damage to public lands, and perhaps other torts such as trespass, but there are clearly important and novel policy questions raised by such actions. These include the Crown's potential liability for *inactivity* in the face of threats to the environment, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources, and the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage."

[36] Binnie, J., went on to conclude that as the ground work for a claim on some broader "public" basis in that case had not been fully argued in the lower courts, it was not the appropriate case to delve into such far reaching issues at the Supreme Court level.

[37] If a government can exert its right, as guardian of the public interest, to claim against a party causing damage to that public interest, then it would seem that in another case, a beneficiary of the public interest ought to be able to claim against the government for a failure to properly protect the public interest. A right gives rise to a corresponding duty.

[38] Provincial Superior Courts have jurisdiction to hear cases involving the common law cause of action of breach of fiduciary duty. While I express no comment on the merits of the claim, its character is primarily one of common law breach of fiduciary relationship as opposed to one

of judicial review. I adopt the comments of Conrad, J.A., at paragraph 41 of the Court of Appeal decision in **Horseman v. Horse Lake First Nation** (2005), 361 A.R. 287; 339 W.A.C. 287; 2005 ABCA 15:

> "[41] I conclude that Parliament did not intend to take jurisdiction away from the provincial superior courts to hear matters within their jurisdiction simply because one of the consequential remedies being sought is a formal declaration of those rights. If a statement of claim discloses tort actions, the fact that a prayer for relief has asked for a formal declaration of rights does not deprive the court of jurisdiction to hear those claims. In addition, where the tort action is brought against a person or body that is also a federal board, commission or other tribunal as defined by the **Federal Court Act**, the Court of Queen's Bench has jurisdiction to grant declaratory relief, provided that the declaration sought relates to rights that are fundamental to the tort action and not to a completely separate claim for judicial review."

[39] I am of the view that the plaintiffs have the necessary standing, and can maintain their constitutional challenge and tort action against the Attorney General of Canada. I reiterate that I have reached this conclusion with full recognition of the low threshold the plaintiffs must meet at this stage of the proceedings.

[40] The Supreme Court of Canada issued its decision in **Chaoulli v. Quebec (Attorney General)** (2005), 335 N.R. 25; 2005 SCC 35, on June 2005, after the hearing on the defendants' motion in this case. The **Chaoulli** case dealt with whether the prohibition on citizens purchasing private health care insurance violated the **Canadian Charter of Rights and Freedoms** or the **Quebec Charter of Human Rights and Freedoms**. The Attorney General of Quebec, joined by the Attorney General of Canada and many other intervenors, argued that lifting the prohibition could divert scarce resources away from the public health care system thereby jeopardizing or undermining that system. The plaintiffs maintained that the excessive wait times for the delivery of services violated the right to life and security of the person protected by section 7 of the **Canadian Charter** and the rights to life and personal inviolability protected by section 1 of the **Quebec Charter**. The Court concluded the evidence showed there were some patients on non-urgent waiting lists who were in such pain they were unable to enjoy any real quality of life. They also concluded there were others who, although they were on the urgent waiting lists, died before getting the required treatment. The majority declared that the effects of the excessive wait times violated the rights guaranteed by the **Quebec Charter of Human Rights and Freedoms** and they struck down the prohibition on citizens acquiring private health care insurance.

[41] It appears to me that the **Chaoulli** decision signals a fundamental shift in the balance between the legislative or executive branch of government and the judicial branch. Binnie and LeBel, J.J. (dissenting, Fish, J., concurring) express that "The resolution of such a complex fact-laden policy debate does not fit easily within the institutional competence or procedures of courts of law." Courts will now be required to determine what is the nature of constitutionally required "reasonable health services". At paragraph 163, the dissenting judges ask:

> "What is treatment 'within a reasonable time'? What are the benchmarks? How short a waiting list is short enough? How many MRIs does the Constitution require? The majority does not tell us. The majority lays down no manageable constitutional standard. The public cannot know, nor can judges or governments know, how much health care is 'reasonable' enough to satisfy s. 7 of the **Canadian Charter of Rights and Freedoms** ('**Canadian Charter**') and s. 1 of the **Charter of Human Rights and Free-**

doms, R.S.Q. c. C-12 ('**Quebec Charter**'). It is to be hoped that we will know it when we see it."

This case will present the Supreme Court of Prince Edward Island with a similar dilemma.

[42] Finally, many of the statements in the statement of claim plead evidence as opposed to facts. This gives the document a distinctly political tone. I direct that the statement of claim be redrafted in accordance with appropriate rules of pleading.

Conclusion

[43] In summary, the defendants' motion to strike the statement of claim is dismissed. The plaintiffs, after making amendments called for in the preceding paragraph, may proceed with their claim against the Attorney General of Canada only. Her Majesty the Queen in Right of Canada and the Minister of Fisheries and Oceans (Canada) are to be removed as named defendants in this action. Costs on this motion shall follow the cause.

Application dismissed.