

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LORNE NELS DAVID IVERSON

RESPONDENT

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS
REPRESENTED BY THE MINISTER OF FISHERIES AND
OCEANS, and PACIFIC HALIBUT MANAGEMENT
ASSOCIATION OF B.C.**

DEFENDANTS

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

**SUBMISSIONS OF PLAINTIFF TO MOTION TO STRIKE WRIT OF
SUMMONS AND STATEMENT CLAIM**

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Part I — Overview of Plaintiff's Submissions:

- 1) The plaintiff's statement of claim was filed on November 20, 2007.
- 2) The plaintiff, a halibut fisherman, claims damages suffered in connection with actions taken by or on behalf of the Minister of Fisheries (the "Minister") that reduced by 10% his entitlement to his individual halibut fishing quota (the "Quota") and assigned that portion of his Quota to Pacific Halibut Association of British Columbia (the PHMA). Under the Quota allocation scheme developed by the Minister, the plaintiff, if he wished to avail himself of his portion of the 10% of his quota, was required to purchase it from the PHMA by paying additional fees to the PHMA. The PHMA in turn paid the Minister funds raised by the resale of the Quota and the Minister used these funds for departmental activities.
- 3) The plaintiff's action is framed as an action in restitution for unjust enrichment, in conversion and in either breach of contract or negligence, misfeasance in public office as well as an action to recover an authorized tax. The Statement of Claim also seeks declaratory relief; however, the plaintiff is now abandoning its pursuit of declaratory relief which was not central to its claims.
- 4) The defendant, the Attorney General of Canada on behalf the defendant, Her Majesty the Queen in the Right of Canada, as represented by the Minister of Fisheries and Oceans ("Canada" and/or the "Minister") seeks an order to strike out the plaintiff's Writ of Summons and Statement of Claim pursuant to Rules 14(6) and 19(24) the *Rules of Court*¹ on the basis that:
 - a) The proceeding lies with the exclusive jurisdiction of the Federal Court pursuant section 18 of the *Federal Courts Act*²;

¹ *Supreme Court Rules of Court*, R.S.B.C.

² *Federal Courts Act*, R.S.C., 1985 c. F-7

- b) The proceeding for damages requires as a condition precedent a judicial review application pursuant to the decision in *Canada v. Grenier*³ decision to determine whether the minister acted unlawfully;
 - c) The tort claims contained in the Statement of Claim disclose no reasonable cause of action against the Minister; and,
 - d) The plaintiff's damages claims are an abuse of process.
- 5) The defendant, the Pacific Halibut Management Association of B.C. ("PHMA") seeks similar relief in a companion motion.
- 6) In these written submissions the defendants will be referred to together as the Applicants.
- 7) In its submissions, the PHMA mirrors the Minister's arguments that the proceeding lies within the exclusive jurisdiction of the Federal Court and that a prerequisite to the prosecution of the claim for damages is a judicial determination declaring the administrative decisions of the Minister invalid or unlawful, following the *Grenier* line of authority. The PHMA further argues that the plaintiff's claim against PHMA is "an abuse of process and collateral attack on the valid and existing decisions of the Minister to award it portion of the halibut quota".
- 8) In answer, the plaintiff submits that:
- a) Both Applicants mischaracterize the substance of the plaintiff's claims in order to fit it into exclusive jurisdiction of the Federal Court under section 18 of the *Federal Courts Act* and the rule in *Grenier*, notwithstanding that the plaintiff admits sloppy pleading in seeking a declaration in its prayer for relief in the first instance;

³ *Canada v. Grenier*, 2005 FCA 348

- b) At the core of the plaintiff's claims against the Minister of Fisheries are classical common law causes of action that lie within section 17 of the *Federal Courts Act* which allows claims to proceed against the Crown by way of an action and provides concurrent original jurisdiction between the Federal Court and the Superior Courts of the provinces and the plaintiff relies on the ruling of Justice Martineau in *Robert Arsenault & 27 Snow Crab Fisherman v. Her Majesty the Queen*⁴ a recent decision of the Federal Court on a motion to strike pleadings in a claim for damages against the Minister for misuse of quota allocation;
- c) The plaintiff further submits that the principle in *Grenier* and the other cases relied on by the Applicants stand for the proposition that, where (and in the plaintiff's view only where) a reviewable administrative or ministerial decision must be reviewed and invalidated in order to support a claim for an award in damages, a party is bound to proceed by means of judicial review under section 18 of the *Federal Courts Act* as a prerequisite to any action for damages;
- d) In the within case, the plaintiff is not challenging the constitutionality of the Minister's statutory discretionary power over licensing under the *Fisheries Act*⁵. The plaintiff is not even challenging the assignment of Quota to the PHMA. Those decisions in themselves are valid and the plaintiff's claims for damages do not depend on invalidating them. Nor is the plaintiff seeking a review of those decisions. Indeed, other than declarative relief, which the plaintiff is no longer pursuing (see below) there is no substantive relief that can be given to the plaintiff under section 18 of the *Federal Court Act*.
- e) Instead, the plaintiff claims damages and restitution resulting from actionable common law torts committed by the Minister by his misuse of the funds generated from the sale of Quota. By misusing the funds, the plaintiff contends that the

⁴ *Robert Arsenault et al v. Her Majesty the Queen*, 2008 FC 299 under appeal to the Federal Court of Appeal

⁵ *Fisheries Act, R.B.C., 1985, c. F-14, s. 7*

Minister acted unconstitutionally in exercising his otherwise constitutional discretion.

- f) While the plaintiff admits to sloppy pleading in asking for a declaration in paragraphs (a) and (b) of the prayer for relief in its Statement of Claim, the prayer for declaratory relief can be, and has now been, deleted from the Statement of Claim, without undermining the substance of the claim, which is that the minister misused the funds raised by the scheme of assigning quota to the PHMA.
- g) The plaintiff hereby notifies the Applicants of its intention to amend its statement of claim accordingly and, if deemed necessary and appropriate, seeks an order of this Court to do so.
- h) In the alternative, and in further answer to the Applicant's contention that judicial review is required in respect of the claim for damages resulting from the illegal use of the fishing resource to fund the Minister's departmental activities, the plaintiff says the taking of quota to finance DFO's departmental activities has been found to be unlawful as was decided in 2006 by the Federal Court of Appeal in *Larocque c.. Canada (Ministre des Pêches & Océans) (Larocque)*⁶ and by the Federal Court in *Assoc. des Crabiers Acadiens c. Canada (Procureur général)*⁷, (*Assoc. des Crabiers Acadiens*).
- i) Moreover, the seminal test for a motion to a pleading as stated by the Supreme Court of Canada in *Hunt v. Carey Inc. (Hunt v. Carey)*.⁸ is the "plain and obvious test"; the statement must be found to be certain to fail as it contains a "radical defect". In the plaintiff's submission, this test applies to all of the arguments made by the Applicants in their motions to strike.

⁶ *Larocque c.. Canada (Ministre des Pêches & Océans)* 2006 FCA 237, [2006] F.C.J. No. 985 (F.C.A.)

⁷ 2006 FC 1241, [2006] F.C.J. No. 1566 (F.C.)

⁸ [1990] 2 S.C.R., 959

- j) For the foregoing reasons, the plaintiff's action is properly before this Honourable Court pursuant to the concurrent jurisdiction provided to the provincial superior courts, pursuant to section 17(1) of the *Federal Courts Act*⁹; and it is not caught by the clear terms of section 18 of the *Federal Courts Act* or the rule in *Grenier*.

Part II — Statement of Facts

- 9) The plaintiff agrees with paragraphs 8, 9 10, 11, 12, 13, 14 and 15 of the statement of facts contained in the Minister's Written Submissions.
- 10) In response to paragraphs 16 and 17 of the Minister's Submissions, the plaintiff says there is no evidence properly before this court on a motion to strike that support statements made in this paragraph.
- 11) The plaintiff says that in a motion a strike the relevant facts are those plead in the Statement of Claim which is assumed at this stage to be proven. Those facts are:
 - a) The plaintiff was the holder of a licence issued to him by the Minister (hereinafter the "Licence") permitting him to fish for halibut in the waters of British Columbia.
 - b) The Licence was issued to him under the *Fisheries Act* R.S.C. 1985, c. F-14 and associated regulations.
 - c) The Licence entitled the plaintiff to receive each year from the Minister an individual vessel quota (hereinafter the "quota") that was assigned to him from the Total Allowable Catch for halibut for Canada, as determined by the Minister. The quota represented the amount of halibut that the plaintiff could catch and sell in that year. The plaintiff had to pay a fee to the Minister for the quota.
 - d) During the year 2001 the Minister instituted the practice of withholding 10% of the entire quota to be granted to the holders of halibut licences in British Columbia and assigning it to the PHMA.
 - e) During the year 2001, the Minister issued a halibut licence, No. 437, in the name of PHMA representing the 10% of the entire withheld halibut quota.

- f) The plaintiff, if he wished to avail himself of his portion of the 10% of his quota, was required to purchase it from the PHMA by paying an additional levy.
- g) The said practice continued in each year from 2001 through to 2006. In each year the plaintiff paid the Minister for his quota and then paid the PHMA an additional levy to access the 10% of his quota assigned to the PHMA.
- h) On February 6, 2001 the Minister and the PHMA entered into a "Joint Project Agreement" the purposes of which were expressed to be to (*inter alia*):
 - i) Ensure the proper management of the commercial halibut fishery;
 - ii) Provide adequate funding and resources; and,
 - iii) Carry out all other activities necessary in support of the fishery ...
- i) Under the agreement, the obligations of the PHMA included both paying funds to the Minister and performing various activities ("representing payments in kind") under the heading "FISHERIES MANAGEMENT" including (*inter alia*):
 - i) Fund Fisheries and Oceans Canada activities as identified in the agreement;
 - ii) Fund and ensure the operation of an independent dockside monitoring program; and,
 - iii) Fund and ensure independent data entry ... of validated landings and other data as requested by DFO ...
- j) During the period March 31, 2001 to March 31, 2002, the PHMA agreed to pay the sum of \$836,635 directly to the Minister and to expend \$400,000 to third parties on the independent dockside monitoring program.

- k) In each year between 2002 and 2006 the PHMA agreed to pay further sums directly to the Minister and it agreed to expend funds to third parties for programs directed and requested by the Minister.
- l) In other words, part of the funds paid to the PHMA by halibut licence holders was remitted by PHMA directly to the Minister and used to fund government fisheries management activities.
- m) A further part of the funds paid by the plaintiff was used by the PHMA to pay for fisheries management activities that it conducted as agent for (or partner of) the Minister.
- 12) As stated below, the plaintiff intends to amend its Statement of Claim by deleting the order sought for declaratory relief contained in paragraphs (a) and (b) in the prayer for relief.
- 13) The substance of the plaintiff's claims is set out at paragraph 20 of the Statement of Claim:
20. The plaintiff says that in assigning 10% of the quota to the PHMA for resale to the plaintiff, and contracting with PHMA to either remit the funds or use them for fisheries management, the Minister:
- a. Appropriated a public resource that did not belong to him to finance fisheries management activities;
 - b. Violated the provisions of the *Financial Administration Act* R.S.C. 1985, c. F-11, in particular sections 19 and 32;
 - c. Levied a tax unauthorized by parliament;
 - d. Collected monies from the plaintiff without legislative or constitutional authority;
 - e. Converted to his ministry's use monies and/or halibut quota belonging to the plaintiff; and,
 - f. Illegitimately used his power, either tortiously or contractually or both, to coerce the

plaintiff into paying excessive and unlawful fees.¹⁰;

And the prayer for relief, minus sub-paragraphs (a) and (b);

a) An accounting and restitution ...

b) Return of funds unlawfully converted by the Applicants;

c) Restitution of monies collected from the plaintiff by the Applicants without legislative or constitutional authority

d) Damages for misfeasance in public office;

¹⁰ Statement of Claim, dated 20 November 2007

Part III — Statement of Issues

21. The issues on this application are:

- a. Whether the Federal Court has exclusive jurisdiction over the plaintiff's claims?
- b. Whether a judicial review application is a prerequisite to a damages claim against the Minister and PHMA?
- c. Whether the tort claims disclose a reasonable cause of action or are an abuse of process?
- d. Whether the Applicant has met the "plain and obvious" test for a motion to strike?

Part III — Argument

Introduction:

22. The Applicants advance an argument that mischaracterizes most of the plaintiff's claims. Paragraphs 1 through 90 of the Minister's written submissions are directed to their position that a judicial review is a prerequisite the plaintiff's action for damages.
23. Neither Applicant refers in their written submissions to the seminal test of the Supreme Court of Canada in *Hunt v. Carey*.
24. The plaintiff says that the *Grenier* line of authority simply stands for the proposition that where an allegedly illegal or *ultra vires* administrative or ministerial decision must be reviewed and invalidated in order to support a claim for an award in damages, then a party must proceed by means of judicial review as a prerequisite to any action for damages. That is not the case here.
25. In the within case, the plaintiff is not challenging the scope of the Minister's discretionary power under the *Fisheries Act* to issue licenses. He is not challenging the constitutionality of the Minister's statutory discretionary power over licensing under the *Fisheries Act*. The plaintiff is not even challenging the assignment of the Quota to the PHMA. Those decisions in themselves are valid and the plaintiff's claims for damages do not depend on invalidating them. Nor does the plaintiff seek a review of those particular decisions.
26. Rather, the plaintiff claims that the Minister committed actionable common law torts against the plaintiff by misusing the funds generated by the Quota allocation scheme. The plaintiff contends that during an otherwise valid exercise of his discretion, he misappropriated a public resource and used it to finance fisheries activities; and he collected monies from the plaintiff and converted to his

Ministry's use monies and/or halibut quota belonging to the plaintiff. By misusing the funds, the plaintiff contends that the Minister acted unconstitutionally in exercising his otherwise constitutional discretion.

27. Accordingly, the plaintiff is pursuing claims against the Minister for negligence, restitution and related causes of action that give rise to damages.

The Exception to the Federal Courts exclusive jurisdiction over the claims against the Minister?

28. The plaintiff says its claims fall within Section 17 of the *Federal Courts Act*¹¹, which provides:

17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

29. The plaintiff's damages claims are framed in restitution, negligence and related independent common law causes of action that exist independently of the legality of the Minister's decision(s) from an administrative law perspective.
30. If the plaintiff proves its allegations in its Statement of Claim, he will be entitled to monetary relief independent of whether or not the administrative provisions allowing the Minister to allocate Quota have been invalidated under s.18 of the *Federal Court Act*.
31. The plaintiff is not asking this Court to stop the Minister from allocating Quota to the PHMA. Nor (now that the plaintiff has abandoned its claim for declaratory relief) does the plaintiff require any relief that the Federal Court can give under s.18 of the *Federal Courts Act*. All the plaintiff is seeking now is common law damages.

¹¹ R.S., 1985, c. F-7, s. 17; 1990, c. 8, s. 3; 2002, c. 8, s. 25.

32. While the plaintiff agrees with the Applicant that in certain circumstances, as in *Grenier*, actions in damages would amount to collateral attacks at ministerial discretion, that is not the case here. The within claim is an action for damages resulting from tort claims and other causes of action that are independent of the minister's exercise of discretion.
33. The plaintiff also agrees with the PHMA position that PHMA will only be liable for the plaintiff's claims if the Minister is found liable. The action against the PHMA absent the claim against DFO would be collateral attack.
34. The plaintiff respectfully submits that based on the foregoing, and the relevant provisions of the *Federal Courts Act*, the plaintiff is properly before this Honourable Court by way of an action in negligence and restitution (because the taking of quota constitutes unjust enrichment of the Crown) and other independent common law causes of action against the Minister pursuant to the concurrent jurisdiction provided in section 17(1) of the *Federal Courts Act*.

The Grenier Case - Circumstances Requiring Prior Judicial Review:

35. The Applicants submit that the *Grenier* case stands for the proposition that a prerequisite to any damage claims against a federal entity -- in this case, the Minister -- is a judicial review application in Federal Court, pursuant to section 18 of the *Federal Courts Act*.
36. The plaintiff submits that the Appellant's contention unduly broadens the scope of section 18 of the *Federal Courts Act*; and conversely, unduly narrows that of section 17 of the *Federal Courts Act*.
37. A careful review of the decision in *Grenier* demonstrates that the premise that an application for judicial review is a prerequisite to an action for damages is limited

only to cases where the lawfulness of the decision of the administrative body from an administrative law perspective is in question. As stated by the Court in *Grenier* at paragraph 20:

For the reasons expressed below, I think the conclusion our colleague, Madam Justice Desjardins, arrived at in *Tremblay, supra*, 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**. [Emphasis Added]

And at paragraph 25:

...
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..." [Emphasis Added]

38. In *Renova*¹² the Federal Court, in its application of *Grenier*, properly held that in order to decide whether a plaintiff must proceed by way of judicial review it was first necessary to ascertain the true nature of the remedy sought. The Court determined that, since the relief sought directly challenged the legality of the administrative body's actions, judicial review, pursuant to section 18 of the *Federal Courts Act*, was the proper procedure:

As I stated above, I would characterize **the nature of the relief sought by the Respondent as declaratory**, the Court of Appeal in *Grenier*, above, clarifies and affirms that, in such circumstances, proceeding by way of an action is not an option... The plaintiff therefore can only challenge the legality of the Wheat Board's actions by way of an application for judicial review and not through an action.¹³ [Emphasis Added]

39. The Court in *Renova Holdings Ltd. v. Canada (Canadian Wheat Board)* recognized that although a claim challenging the legality of the administrative body's action must proceed by way of judicial review, the existence of purely tortious claims, not related to the legality of the body's decision, may properly proceed by way of an action as stated a paragraph 39:

¹² *Renova Holdings Ltd. v. Canada (Canadian Wheat Board)*, (2006) 286 F.T.R. 20 eC

¹³ *Renova, supra* note 3, at 39

In addition to challenging the legality of the Wheat Board's actions, the plaintiff in his statement of claim, also claim negligence for breach of duty of care and a breach of fiduciary duty. On the original motion to strike and in this appeal, the plaintiff gave notice that they wish to amend their statement of claim by adding allegations that the Applicants by 'negligence and administrative misfeasance in public office and abuse of public office' breached the duty of care owed to the plaintiff. The plaintiff seek various remedies, including pecuniary, exemplary and punitive damages. For the purpose of this appeal, I have considered the statement of claim as if it contained the proposed amendments, as did the Prothonotary. As opposed to the matter of the legality of the Wheat Board's actions discussed earlier in these reasons, I am of the opinion that the above allegations and the remedies sought are properly before the Court by way of an action. I now turn to consider the Applicants' motion to strike the above claims. [Emphasis Added]

40. In *Oak Island International Group Ltd. v. Canada (Attorney General)*¹⁴, the Attorney General of Canada brought a motion to strike before the Nova Scotia Supreme Court claiming that the Court did not have the jurisdiction to entertain the plaintiff's claim for damages prior to the conclusion of successful judicial review in the Federal Court of Canada. Since the superior courts of each province share the concurrent jurisdiction given to the Federal Court pursuant to section 17 of the *Federal Courts Act*, the Court held at paragraph 19 the plaintiff's claims were properly before it by way of an action:

Section 18.1 of the Federal Court Act would apply only if Oak Island was seeking to have DFO's decision to change the licensing requirement reviewed or if it was seeking declaratory relief. Oak Island, however, is not asking for this type of relief. Rather, the causes of action pleaded by Oak Island are independent torts for which it claims damages. [Emphasis Added]

The Robert Arsenault case:

41. The application of the *Grenier* case and some of the other case law relied on by the Applicants were recently reviewed by the Federal Court in *Robert Arsenault v. Her Majesty the Queen*¹⁵, a case now under appeal to the Federal Court of Appeal. The following passages of Mr. Justice Martineau are pertinent to the within action:

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 *Tremblay c. R.*, 2004 FCA 172, [2004] F.C.J. No. 787 (F.C.A.).

¹⁴ *Oak Island International Group Ltd. v. Canada (Attorney General)*, (2003), 212 N.S.R. (2d) 286 (eC)

¹⁵ *Robert Arsenault v. Her Majesty the Queen*, 2008 FC 299, Docket T-378-07

...

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*.

...

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 (F.C.) (*Peter G. White Management Ltd.*), 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 & Government Services)*, [1995] 2 F.C. 694 (Fed. C.A.), 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 Décarý in *Gestion Complexe Cousineau (1989) Inc.* 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]

...

...

42 In *Genge v. Canada (Attorney General)*, 2007 NLCA 60, [2007] N.J. No. 335 (N.L. C.A.), 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.

The Nu-Pharm Inc. case:

42. Since providing their written submissions, the Minister forwarded to the plaintiff, the case of *Nu-Pharm Inc. v. Her Majesty the Queen*¹⁶, a case from Federal Court of Appeal that reviews the decision in *Grenier* and concludes at paragraph 30 that:

30 Thus, *Grenier*, *supra*, is to the effect that because decisions of a federal board can only be challenged by way of a judicial review application commenced pursuant to sections 18 and 18.1 of the *Federal Courts Act*, any action which seeks a relief in damages on the premise that such decisions are unlawful will not be allowed to proceed unless the decisions have been challenged by way of a judicial review application. Conversely, if the action does not seek to challenge the validity or lawfulness of a decision of a federal board, the action will be allowed to proceed and to run its course. [Emphasis Added]

31 That, in my view, is what *Grenier*, *supra*, stands for and the question which must be asked and answered in order to dispose of the appeal is whether the appellant, by its action, seeks to challenge the lawfulness of a decision rendered by a federal board. The determination of that question requires that we answer two other questions, namely, whether the decisions of the Director General constitute decisions of a federal board and whether Nu-Pharm's action constitutes a collateral attack on or an indirect challenge to the decisions of a federal board.

43. The plaintiff submits that its claims do not seek to challenge the validity of lawfulness of any particular decision of a federal board, and thus its damages claims should be allowed to run their course.

Plaintiff's Claim for Restitution for Unjust Enrichment:

44. The plaintiff claims from the Minister restitution for unjust enrichment. The Minister garnered funds from the sale and/or appropriation of quota that were applied to a variety of management and social programs. Without these funds, the Minister would have necessarily had to cover the expenditures from the

¹⁶ *Nu-Pharm Inc. v. Her Majesty the Queen*, 2008 FCA 227

departmental budget. The plaintiff alleges that the value in money of the quota allocated to the PHMA has been sold and/or appropriated and is an enrichment to the Minister to the extent that the plaintiff paid for that quota than he would have otherwise.

45. The plaintiff therefore respectfully submits that but for allocation of quota to PHMA for funding various ministry activities, the British Columbia TAC of halibut for the years 2000-2006 would have been allocated entirely among those holding valid licences in B.C. with no additional charges or levies to the plaintiff. The plaintiff alleges that he was required to pay for his quota than would otherwise be case. The plaintiff claims his additional amount constitutes an unjust enrichment to the Minister.

46. The plaintiff respectfully submits that there is no juristic reason preventing the establishment of a claim for unjust enrichment. Further, the Court in both *Larocque* and *Acadiens* has found that there is no legal or statutory basis for the Minister to allocate quota to DFO for its own funding purposes. Accepting that as the law, there can be no legal or statutory juristic reason preventing a finding of unjust enrichment.

TEST FOR MOTION TO STRIKE

47. The test to be applied in determining whether to strike pleadings on a motion to strike was clearly set out by the Supreme Court of Canada in *Hunt v. Carey*¹⁷ as follows:

While this court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the 'plain and obvious' test. Justice Estey, speaking for the Court in *A.G. Can. v. Inuit Tapirisat of Can.*, [1980] 2 SCR 735 at 740, 115 D.L.R. (3d) 1, 33 N.R. 304 [Fed.], stated:

As I said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that 'the case is beyond doubt' *Ross v. Scottish Union and National Insurance Co.*

...The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.*, a cause of action 'with some chance of success' is it plain and obvious that the action cannot succeed? ... It would seem then that as general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiff.

48. The Supreme Court of Canada stated that the threshold for striking a claim is that it must be certain to fail:

[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 [...]

49. Nor does the novelty of the cause of action militate against the plaintiffs, according to the Supreme Court of Canada. As Justice Wilson stated in *Hunt v. Carey* above at paragraph 52:

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. [Emphasis added]

¹⁷ *Hunt v. Carey*, [1990] 2 S.C.R. 959 (eC)

50. The plaintiff submits that this “plain and obvious” test also applies to questions of jurisdiction, as out by the Federal Court at paragraph 24 in the *Arsenault* case in which the Minister argued that the “plain and obvious” test was not applicable:

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. R.*, 2005 FCA 29, [2005] F.C.J. No. 108 (F.C.A.), leave to appeal to the Supreme Court of Canada refused (2005), 346 N.R. 195 (note) (F.C.A.).

51. Applying the “plain and obvious” test the Court in *Arsenault* concluded at paragraph 55 that:

55 At this stage, the acts 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.

52. The plaintiff submits that based on the Statement of Claim before this Court in the within action, it is not “plain and obvious” that the plaintiff’s causes of action have no chance of success.

Minster’s Appropriation Of Quota Funds Has Already Been Found Unlawful:

53. The plaintiff’s claim is an action based on the Minister misappropriating quota to fund DFO management activities. In fact, it has been preceded, as the Applicant says is necessary, by a judicial review of such actions by the Federal Court of

Appeal: the Minister's authority to allocate quota in this manner has already been challenged and invalidated in *Larocque* and *Acadiens*. Specifically, this particular action challenges an invalid decision by the Minister that has already been adjudged to be so on judicial review, thus satisfying the Applicant's pre-condition to a successful action on such grounds.

54. As the Federal Court of Appeal stated in *Larocque*:

‘Without appropriating public funds [the Minister] appropriated public domain. This cannot be.’

55. The plaintiff submits that the decision in *Larocque* invalidates ministerial decisions that result in the allocation of quota for DFO financing purposes. The case reaffirmed the public law principle that the disbursement of public funds must be authorized by legislation.

56. While it is true that the Minister has absolute discretion over the issuing of licenses and leases for the fishery, the *Fisheries Act* does not grant him such broad financing power that he can avoid the requisite principles of public law.

57. This issue has already been determined on judicial review. As stated by the Court at paragraph 44 in *Robert Arsenault*:

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 *Assoc. des Crabiers Acadiens*. 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 *Assoc. des Crabiers Acadiens*, 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. [Emphasis Added]

58. The plaintiff submits that any decision by the Minister to allocate quota for financing purposes for the DFO represents an appropriation of the public domain without either legislative authority or prior appropriation of public funds. The plaintiff says no further judicial review on this point is necessary.
59. What remains is the determination, by action, of the Applicant's liability for damages for acts that must be considered by this Honourable Court to be illegal as a matter of *res judicata*.

Constitutionally Invalid Exercise of otherwise Constitutional Ministerial Discretion:

60. Moreover, the plaintiff submits that the Minister's actions in allocating quota to DFO for financing purposes is a constitutionally invalid exercise of otherwise constitutional ministerial discretion.
61. In *Lavers v. British Columbia (Minister of Finance)*¹⁸ the Court of Appeal Mr. Justice Lambert stated the following on the question of the jurisdiction of the British Columbia Supreme Court over a matter concerning the constitutionality of taxes and levies:

I agree with Chief Justice McEachern that the decisions of the Supreme Court of *Canada in A-G Canada v. Law Society of B.C. (the Jabour Case)*, 1982 CanLII 29 (S.C.C.), [1982] 2 S.C.R. 307, and *Canada Labour Relations Board v. Paul L'Anglais Inc.*, 1983 CanLII 121 (S.C.C.), [1983] 1 S.C.R. 147 confirmed that the Supreme Court of British Columbia has jurisdiction, as a Provincial court of general original jurisdiction, to declare that a particular application of federal legislation is contrary to the Constitution. I have no doubt that the principle confirmed by those decisions applies to declarations respecting applications of the Charter to federal legislation in the same way as to declarations respecting applications of ss. 91 and 92 of the Constitution to federal legislation. Nor do I think that those two decisions can be confined to cases of the total unconstitutionality of particular federal legislation as opposed to cases of the unconstitutional application of otherwise constitutional legislation. In both the *Jabour* case and the *L'Anglais* case the legislation in question was constitutional. It was the particular application in question that was said to be beyond the powers of Parliament. In that respect this case is indistinguishable from those two cases. [Emphasis Added]

¹⁸ *Lavers v. British Columbia (Minister of Finance)*, (1989), 64 D.L.R. (4th) 193 (B.C.C.A.)

62. Another answer to *Grenier* is that the Supreme Court of British Columbia has jurisdiction to rule on an unconstitutional application of an otherwise constitutional discretion.

No Taxation Without Representation:

63. The plaintiff further submits that the allocation of quota to DFO for its own financing purposes was in violation of the constitutional principle that there shall be no taxation without representation and is in violation of principles of public law.
64. The ruling of the Supreme Court of Canada in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*¹⁹, establishes that the principle of “no taxation without representation” is central to our conception of democracy and the rule of law”. As stated in the headnote of that decision by the Supreme of Canada:

When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would thus condone a breach of this most fundamental constitutional principle. As a result, a taxpayer who has made a payment pursuant to *ultra vires* legislation has a right to restitution.

65. In the plaintiff’s submission, the *Kingstreet* case establishes a common law cause action to recover unconstitutional taxes and on the basis of this principle the plaintiff has to pursue its claims.

¹⁹ *Lavers v. British Columbia (Minister of Finance)*, [2007] 1 S.C.R. 3, 2007 SCC 1

Part IV — Conclusion

66. The plaintiff submits that the Applicants have not met the test for a motion to strike.
67. Nor have the Applicants established that this Honourable Court has no jurisdiction to hear the plaintiff's claims.
68. In the plaintiff's submission, not all actions against the Crown must be preceded by judicial review. Had Parliament intended that be the case, it would have been made clear within the *Federal Courts Act*. Instead, in the very plain terms of sections 17 and 18 of the Act, it created two clearly distinct avenues to give jurisdiction to this honourable Court: one for actions brought under section 17 and the other for judicial review proceedings under section 18.
69. The substance of the plaintiff's Statement of Claim relates to claims arising from the common law of claims of tort and equitable claims of restitution. These are precisely the matters over which Parliament mandated jurisdiction to this Honourable Court by section 17 of the *Federal Courts Act*.
70. The facts alleged can clearly lead to liability in tort or restitution or other independent causes of action. Whether they are proven by evidence is a matter for the trial judge and cannot be decided in the current motion.
71. The fact remains that the outcome of the plaintiff's claim (be it successful or not) will not impact the legality or validity of the administrative decisions made by the Minister. The quotas he awarded will be unchanged. The claim will merely determine his liability under tort law independent of his Ministerial discretion.

Part V — Orders Requested

The plaintiff requests the following orders from this Honourable Court:

1. The Applicant's motion to strike the plaintiff's Statement of Claim is dismissed; and,
2. In the alternative, grant leave to the Plaintiff to file and serve an amended Statement of Claim to address any deficiencies therein within 30 days of the present order.

DATED at Vancouver, British Columbia, this 16th day of December, 2008.

All of which is respectfully submitted by

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Plaintiff's Table of Authorities

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