

## Licence Trusts and Frustration of Contract

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As discussed in a previous article published in the July 2002 issue of *Fisherman Life*, when dealing with fishing licence disputes between private (non-government) parties, the courts have freely embraced the trust concept in order to get around the position taken by the Department of Fisheries and Oceans that licences are not property. As a result, particularly on the east coast where restrictions on the transfer of licences are numerous, trust agreements have proliferated to the point where people frequently pay out large sums of money on the strength of such agreements. A recent decision of the New Brunswick Court of Queen's Bench in the case of *Doucette v. Jones* 2005 NBQB 144, illustrates the dangers of relying upon these trust agreements and how on at least one occasion, a court came the rescue of a party doing so.

This case involved a fish harvester from Prince Edward Island who in 1999 entered into an agreement to purchase a snow crab licence from a New Brunswick fish harvester for \$1.5 million dollars. As a non-resident of New Brunswick the purchaser did not qualify to hold the licence in his own name, so he entered into an agreement to have the seller hold the licence in trust for him until he moved to New Brunswick and lived there for a sufficient number of years to qualify as a new entrant to the New Brunswick fishery. Upon signing the agreement, he advanced \$1.2 million to the seller and then paid all but the last \$11,000 over time. All went well in 1999 to 2001 when he was either able to fish the licence as a substitute operator for the seller or was able to work as crew member for the seller. Unfortunately in 2001 the government of New Brunswick wrote to the Minister of Fisheries and complained that certain New Brunswick snow crab licences were being sold to persons from P.E.I. in contravention of the DFO owner operator policy and core policy. As a result, prior to the commencement of the 2002 fishing season, DFO took action by writing to the seller of the snow crab licence and advising him that the licence would be in jeopardy unless he cancelled the trust agreement with the purchaser. After the seller effectively cancelled the trust agreement and began fishing the licence himself in 2002, the purchaser wrote to the Minister of Fisheries advised him of the trust agreement and the \$1.4 million dollars that he had advanced and asked him to re-issue the licence to him. In refusing his request, the Minister said as follows:

*While it is noted that you have entered into a legal arrangement with the current licence holder, I must advise you that Fisheries and Oceans Canada (DFO) does not recognize these types of arrangements when dealing with licence issuance. As you are aware, licences are issued as a privilege: a privilege which does not confer any property or other rights that can be legally sold, bartered, or bequeathed.*

*Moreover, the action taken by you and Mr. Vincent Jones represents, in effect, an attempt to circumvent existing licensing policy. I would be most inappropriate for DFO to condone such activity.*

Finding himself in the unenviable position of having paid \$1.4 million dollars for only three years use of a snow crab licence, the purchaser commenced a legal action claiming his purchase contract had been frustrated and sought relief under the *Frustrated Contracts Act* of New Brunswick.

Under this Act and similar legislation in both England and all of the provinces of Canada except Nova Scotia and Saskatchewan, a claimant must first prove that its contract has been frustrated according to the common law rules regarding frustration of contracts. Once that has been established, the legislation sets out a flexible set of rules for relieving the parties from the consequences of the frustration in accordance with the principles of restitution and unjust enrichment.

With respect to an initial finding of frustration, the most recent decision of the Supreme Court of Canada says that “[f]rustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes ‘a thing radically different from that which was undertaken by the contract’” (*Naylor v. Ellis* [2001] 2 S.C.R. 943). In applying this test, the courts will not find a contract to be frustrated just because it has become more expensive to perform. Under the common law, once a court finds a contract has been frustrated, it is deemed by the court to be discharged or ended with the result that money paid before the discharge must be returned and any debts for money not yet paid are extinguished. Under the frustrated contracts legislation of the various provinces, the courts are given more flexibility in the type of remedies they can tailor. For example, under common law if there has been partial performance of a contract, the money paid cannot be returned. Under the legislation, the court has the discretion to make adjustments when there has been partial performance so as to do justice between the parties.

Getting back to *Doucette v. Jones*, after reviewing the law of frustration the court concluded that the purchase contract had been frustrated “because DFO/MPO exercised its ministerial discretion in such a fashion that it renders the transfer of the licence to Henri Doucette impossible”. As a result, the court then set the matter down for a further hearing on how the losses should be adjusted pursuant to the terms of the *Frustrated Contracts Act*.

One issue that does not appear to have been raised before the court in this case was the constitutional applicability of the provincial *Frustrated Contracts Act*. As a result of the decision of the Supreme Court of Canada in *Ordon v. Grail Estate* [1998] 3 S.C.R. 437, the application of provincial statutes such as the *Frustrated Contracts Act* to matters governed by Canadian maritime law is in doubt. This could mean that the common law would apply instead of the *Frustrated Contracts Act* so as to deny the purchaser a refund of any of the \$1.4 million paid under his partially performed contract for the purchase of

the crab licence. Fortunately, *Ordon v. Grail Estate* would specifically allow the court to reform the outdated common law rules applying to frustrated contracts, although it is not entirely clear just what these reforms would be.

It is comforting to see the courts have once again come to the rescue of someone who has run afoul of the Department of Fisheries and Ocean's unrealistic position that licences are not property and can be terminated without regard to vested interests.

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