

IN THE SUPREME COURT OF CANADA
(On appeal from the Court of Appeal for Newfoundland and Labrador)

BETWEEN:

BGI ATLANTIC INC., BARRY GROUP INC.

APPLICANT
(Respondent)

-and-

JAMES MATCHIM

RESPONDENT
(Appellant)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(James Matchim, Respondent)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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Part I — Statement of Facts

1. This is a completely individual-based fact-based factual-fight leave to appeal (even though the Applicant believes it's an appeal in the affidavit they fail to explain why they're so late in getting around to filing their Leave after the deadline's passed).

Ref.: Affidavit by Pat McGuiness, Respondents' Factum p. 6, "...extend the time for such an appeal [sic]."

2. It's a he-said she-said fight between Newfoundland crabber Jimmy Matchim senior, his wife Angie, and son Jimmy junior on one side, and Karl Sullivan fish processor VP on the other side.

3. The only other side is a one-sided oral trial judgment — one-sided because the C.A. below lists all the evidence the trial judge failed to refer to or consider (see para. 10 below).

4. All facts. No law (apart from the single Newfoundland case the C.A. said the trial judge got wrong).

5. A shortened chronology (the C.A. below holding "The trial judge did not summarize much of the background evidence in his decision and made no specific findings...", among reasons the trial judge was overturned) is as follows:

- Jimmy Matchim was a Newfoundland crabber in April 2003 who needed financing to buy fishing licences, and got bank financing on the basis Seafreez Foods Inc guaranteed the loan (Seafreez not a party below, but a sub of Barry Group Inc., one of the Respondents).
- by signing a Supply Agreement and Trust Agreement, Jimmy agreed to: transfer certain fishing licences to Seafreez/Barry; sell his crab catch to Seafreez/Barry while guarantees and other obligations remained outstanding; the price to be "the fair market price"/ "the then prevailing fair market price".

- if they could not agree on the price, arbitration was to settle it — but when Seafreez/Barry sued Jimmy for money due, and Jimmy counterclaimed for crab delivered not paid, Barry declined to plead arbitrate-instead-of-litigate, and continued to fully litigate against Jimmy.
- crab price was set for the crab season between the processors and crabbers on an industry-wide basis, with individual crabbers and processors making separate side-deals if the crabber would sell only to that processor — and be paid a 40¢ – 60¢ “bonus” per pound.
- Seafreez/Barry’s Karl Sullivan offered Jimmy 60¢, which Jimmy accepted — for the rest of the season, not just until the processors initially “shutdown” the bonus when they felt they’d enough crab in early June.
- after the shutdown, because Jimmy could only land his crab at Seafreez/Barry’s, Jimmy was assured (in each of 2003, 2004 & 2005) he’d continue to get his 60¢.
- in 2005 Jimmy decided to refinance his crabbing operation other than with Seafreez/Barry, was able to end the Supply and Trust Agreements, and made a deal to land his crab at a different processor.
- Jimmy still hadn’t been paid his 60¢.
- Seafreez/Barry sued him, and Jimmy had no choice but to counterclaim for the 60¢, which he did. Seafreez/Barry said the 60¢ was entirely discretionary, they didn’t have to (and would not) pay the market price (fair or otherwise) and did not in fact pay.
- Seafreez/Barry wouldn’t settle, and it went to a 2-day trial.

Ref.: C.A. below, paras. 3-5, 8-9, 11-13, 15-17

Part II — Statement of Issue

6. Is this a case of national importance?
7. The judgments below make it plain this case is one based on its individual facts, entirely local in nature, and can only be figured out on a who-said-what-to-whom-and-when basis.

Part III — Argument

8. The trial judge in his oral judgment held (or didn't hold):
- did not say whether the issue for him was intent to contract, and consideration for contract (both obviously had to be dealt with in contract/breach of contract case)
 - on the one hand, there was an “expectation” to the 60¢, but on the other hand, it was not contractual
 - only made a single sentence reference to all of the evidence put forward by Seafreez/Barry’s main witness, Sullivan
 - made no reference at all to Jimmy’s evidence, nor his wife Angie
 - and offered no analysis at all of the Supply and Trust Agreements (the basis on which Jimmy was to get his 60¢, because he could only land his crab there and nowhere else)
 - but contradictorily, when another processor agent, called Littlejohn, gave evidence he’d made a “commitment” and was “making a promise” to other crabbers, then his company “failed to deliver” on that commitment, forcing him to “go back on [his word]” (knee-breaking it was called) (to pay a 40¢ bonus), the trial judge somehow said this meant “no legal obligation”
 - the trial judge then referred to another Newfoundland crabbing case for guidance *Philpott v. Sullivan* which the C.A. said was completely different from what happened here, and “cannot...be of any assistance to...the current case”.

Ref.: C.A. below, paras. 21-22, 25, 30, 25-26, 48, 57

9. The C.A.:
- when Jimmy heard the processors were not going to pay the monopoly bonus, Jimmy drove to St. John’s to meet with Seafreez/Barry’s Sullivan, who said: “Don’t worry you’re going to get your 60¢...I’ll look after you”, so Jimmy went and bought another fishing licence.

- the trial judge: didn't refer to any of this evidence; did not attempt to reconcile it with what Sullivan said; did not decide credibility — as the C.A. said, you “would have expected...these matters [to] have been addressed”.
- nor did the trial judge refer to evidence dealing with the specific arrangement between Jimmy and Sullivan — just left it all out.
- generally speaking, “agreements made in a commercial setting are more likely to be regarded as having been intended by the parties to be legally binding”.
- while the trial judge noted the putative contract was not in writing and that somehow this was “significant” (as if oral contracts cannot also be contracts), the trial judge: failed to refer to in any substantive way, or rely on, the written agreements between Jimmy and Seafreez/Barry; failed to consider the significance of those agreements imposing a “fair market” price instead of an industry price; failed to consider that the arbitration clause clearly meant Seafreez/Barry could not unilaterally decide price.
- when the trial judge appeared to have concluded that a commitment to pay a price that treated Jimmy fairly couldn't amount to a legal commitment, the C.A. said that is clearly “not correct”.
- the trial judge also failed to consider the obvious issue of consideration for the contract, the C.A. holding that Jimmy on one side committing to sell only to Seafreez/Barry and to no-one else, and Seafreez/Barry committing to pay 60¢, supplied the consideration.

Ref.: C.A. below, paras. 59, 63-65, 67, 70, 76-90

10. The C.A. concluded the trial judge made six specific serious mistakes (“palpable and overriding”):

- no. 1: mischaracterizing the Jimmy-Sullivan evidence as discretionary
- no. 2: failing to even attempting to resolve evidentiary conflicts between Jimmy senior, Angie, and Jimmy junior on the one hand and Sullivan on the other
- no. 3: failing to look at the Supply and Trust Agreements vis-à-vis their relationship to the 60¢

- no. 4: extrapolating his “perceptions” of the industry without focussing on the Jimmy-Sullivan arrangement
- no. 5: failing to consider evidence indicating a reasonable person would view what happened as intent to contract
- and no. 6: failing to deal with the existence of consideration.

Ref.: C.A. below, para. 91

11. Overturn the trial judge and do the right thing, or order a new trial? C.A.:

“The events...occurred over six years ago. The amount at issue is not large. There has already been a trial and an appeal at, no doubt, considerable cost. If this case were returned for retrial, the total costs of the litigation could exceed the amount at stake”.

Overturn the trial judge, and do the right thing was therefore what the C.A. decided. Jimmy’s counterclaim (for the 60¢) was set-off against money otherwise owing by Jimmy to Seafreez/Barry.

Ref.: C.A. below, paras. 95 & 120

12. The Respondent filed three separate affidavits to explain why they’re so late in filing their Leave after the deadline.

13. The first, Derek Butler affidavit contradicts itself on the same page by:

- on the one hand saying “he [sic] value of the fishery” is strong (“beyond prior levels”)
- and on the other hand saying “there are extremely poor margins for the industry”.

Ref.: Respondents’ factum, p. 4 (paras. 3 and 8 respectively)

14. The second, Pat McGuinness affidavit believes they’re filing a late appeal, instead of a leave to appeal.

Ref.: Respondents’ factum, p. 6

15. The third affidavit is sworn — somewhat surprisingly — by the main trial witness (Karl Sullivan) for the Respondent. In addition to giving more reasons why he’s late (he got busy, para. 4), he cannot resist re-arguing the facts of the case (even going back to discoveries), and saying the C.A. below got it all wrong, or worse (worse, he says, there were arguments the C.A. “never permitted [him] to address” — as if you can’t write whatever arguments you want in your C.A. factum — para. 12):

- “There was no evidence before the Court of Appeal that justified...the decision” (para. 6)
- “There was absolutely no evidence before the court” to support (the crystal-clear evidence) of a bidding war (para. 9)
- “That again, is incorrect. This point was addressed in discovery...” (para. 11)
- And, “With all due respect...” — to speak plainly, the respect this affiant has for the C.A. is thinly veiled (para. 7).

16. The most honest — and telling — paragraph of the affidavit is paragraph 2 where he says that after the C.A. decision came down, he’d

“been advised by my counsel at the trial and appeal levels that there was unlikely to be a basis for seeking leave to appeal”.

17. Points for honesty, at least in the affidavit. If you don’t like the advice your trial and C.A. lawyer is giving you, then you change to another lawyer. What happened here. But at least points for honestly telling it the way it is: “unlikely to be a basis for seeking leave to appeal”.

Ref.: Respondent’s factum, pp. 8-11

18. One final thing: Karl Sullivan’s affidavit refers to the C.A. judgment below as being a “majority” one. Wasn’t: all three judges agreed on the reasons why the trial judge had to be overturned, one judge would’ve given a different disposition. No big deal, just like this Leave Application, no big deal. C.A. called it the way it is, the Respondent doesn’t like the way it is/was.

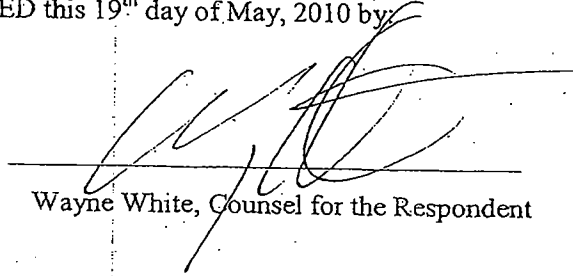
Part IV — Submissions as to Costs

19. The Respondent seeks the costs of responding to this Application for Leave to Appeal.

Part V — Order Sought

20. That Leave to Appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of May, 2010 by:


Wayne White, Counsel for the Respondent

Part VI — Table of Authorities

None.

Part VII — Statutory Provisions

None.