Federal Court Cour fédérale

Date: 20171214

Docket: T-1906-16

Citation: 2017 FC 1144

Ottawa, Ontario, December 14, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

BARRY GROUP INC., PRIDE VENTURES INC., 67108 NEWFOUNDLAND & LABRADOR INC. AND GAUVIN AND NOEL COMPAGNIE LTEE

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD, THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Minister of Fisheries, Oceans and the Canadian Coast Guard [the Minister] on October 14, 2016, to close the 2016 Atlantic mackerel fishery and on October 21, 2016, to maintain that closure [the Decision].

[2] As explained in greater detail below, this application is dismissed, because the Applicants have not demonstrated that the Decision, which the Court has found to be legislative in nature, was made in bad faith or based on irrelevant or erroneous considerations so as to constitute an unreasonable decision.

II. Background

[3] Barry Group Inc., Pride Ventures Inc., 67108 Newfoundland & Labrador Inc., and Gauvin and Noel Compagnie Ltee. [the Applicants] are holders of commercial fishing licenses which allow them to fish for Atlantic mackerel using purse seine gear on vessels over 65 feet in length.

[4] The Atlantic mackerel fishery consists of a commercial fishery, a recreational fishery, a personal use bait fishery, and food, social and ceremonial fisheries. The management of these fisheries by the Department of Fisheries and Oceans [DFO] is assisted by input from the Atlantic Mackerel Advisory Committee [AMAC], a committee composed of representatives of the fishing industry, the processing industry, the Provinces of Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, the Ecology Action Centre, and DFO. Meetings of the AMAC are held at least every two years, at which the stakeholders in the mackerel fishery provide input on management considerations affecting the fishery. The last AMC meeting was held on April 20, 2016, and attended by representatives of the Applicants.

[5] In 2007, the Minister adopted a policy document, entitled the Integrated Fisheries Management Plan [IFMP], with respect to the management of the Atlantic mackerel fishery. The IFMP is described as an evergreen document with no set expiry.

[6] Mackerel is a migratory stock which is present in different regions of Atlantic Canada and Québec at different times. The volume of the stock present may also vary from year to year. The commercial mackerel fishery, in which the Applicants participate, takes place in four relevant DFO regions (the Gulf, Maritimes, Newfoundland and Labrador, and Québec regions) and is competitive, meaning that there are no quotas, allocations, or catch limits assigned to individual licenses, through license conditions or otherwise. There is, however, a total allowable catch applicable to the commercial mackerel fishery [TAC] which is set by the Minister each year, following consultation with the AMAC. While the commercial fishery is managed by geographical areas, called mackerel fishing areas [MFAs], with the fishing season opening at different times in different MFAs, the commercial TAC applies to the entirety of the commercial mackerel fishery and is not divided between MFAs. The Applicants fish in MFA 4R, along the west coast of Newfoundland.

[7] The commercial mackerel fishery is prosecuted by two fleets, one composed of ships under 65 feet [the Under 65 Fleet] and the other of ships over 65 feet [the Over 65 Fleet]. (The parties agree that, while both the Under 65 Fleet and the Over 65 Fleet fish in what would be considered an inshore area and both employ mobile gear, the Under 65 Fleet is sometimes referred to as an inshore or fixed gear fleet and the Over 65 Fleet as an offshore or mobile gear fleet.) The Applicants are the only members of the Over 65 Fleet. The IFMP contemplates a

sharing of the commercial TAC between these two fleets, with 60% for the Under 65 Fleet and 40% for the Over 65 Fleet. The legal significance of the 60/40 split, and whether that split had any application to the 2016 fishery, are principal points of contention between the parties. They will be explored in the Analysis section of these Reasons.

[8] Between 2007 and 2016, the TAC for the commercial mackerel fishery was lowered from 75,000 metric tons (mt) to 8000 mt. Up to 2015, the TAC was never reached. However, this changed in 2016. The Under 65 Fleet began fishing for mackerel when the commercial fishing season opened in the different MFAs at various times throughout the months of May to September. The Applicants decided to wait until October to begin fishing, with a view to landing a higher quality product, as mackerel have a better fat content later in the season, which results in a higher price per pound.

[9] The means by which DFO monitors landings by the Under 65 Fleet, and the accuracy and timeliness of the resulting data, varies in the different regions. In early October 2016, DFO realized that mackerel landings in the Newfoundland and Labrador region were unexpectedly high. It subsequently began to assemble landings data for the other regions (Gulf, Maritimes, and Québec).

[10] By October 14, 2016, DFO had identified that landings by the Under 65 Fleet were approaching the entire 8000 mt TAC. On that date, representatives of DFO in the four regions held a conference call to discuss these circumstances, following which they recommended that DFO’s Regional Directors General [RDGs] issue Variation Orders [VOs] closing the fishery in

their respective regions. The VOs were issued under the authority of s 6 of the *Fishery (General) Regulations*, SOR/93-53 [the Regulations], made under the *Fisheries Act*, RSC 1985, c F-14 [the Act], and participants in the fishery, including representatives of the Applicants, were advised of the fishery's closure. DFO officials then reviewed landings data received from the various regions, which revealed that the entirety of the TAC had already been caught, as a result of which a notice was issued to all members of the AMAC, including the Applicants, on October 21, 2016, confirming the decision of DFO that the commercial mackerel fishery would remain closed for the year.

[11] The closure of the commercial mackerel fishery did not affect the recreational fishery or the bait fishery, the catch from which is not included in the commercial TAC. DFO does not record recreational fishing landings. Under the bait fishery, fishers holding bait licenses are permitted to harvest mackerel for use as bait in other higher value fisheries such as lobster. Catches from the bait fishery cannot be legally sold. While bait fishers' compliance with reporting requirements is poor, raising questions as to the reliability of DFO's data with respect to the bait fishery, DFO estimates that landings in that fishery are in the range of 20,000 mt annually.

[12] The VOs and the subsequent confirmation that the commercial mackerel fishery would remain closed represent the Decision under judicial review in this application. While the closure of the fishery on October 14, 2016, was effected by a number of VOs, and the closure was subsequently confirmed on October 21, 2016, both parties agreed that these can all be

characterized as effectively one decision and are therefore suitable for consideration in one application for judicial review.

[13] By the time of the fishery's closure on October 14, 2016, the Over 65 Fleet had caught only 150 mt of mackerel. The Applicants' arguments challenging the Decision arise from the fact that, notwithstanding the 60/40 sharing arrangement contemplated by the IFMP, almost the entirety of the TAC was caught by the Under 65 Fleet. They calculate that, because they were unable to harvest 40% of the TAC, they sustained losses in the range of $3-4 million.

III. Issues

[14] The Applicants characterize the issues for the Court's consideration as follows:

A. Is the Decision a legislative decision or an administrative decision?

B. If the Decision is legislative, is it reasonable, i.e. was there:

   i. Bad faith;

   ii. Non-adherence to statutorily mandated natural justice; or

   iii. Consideration of factors irrelevant or extraneous to the statutory purpose?

C. If the Decision is administrative, applying the applicable standard of review:

   i. Is the substantive decision reasonable?

   ii. Was natural justice correctly applied?

[15] The Respondent frames the issues as follows:

A. The standard of review is reasonableness;

B. The decision to close the fishery was reasonable;

C. The alleged reallocation of quota was not a decision that can be judicially reviewed;

D. There was no breach of procedural fairness;

E. There is no remedy available.

[16] I consider the issues as articulated by the Applicants to represent a suitable framework for consideration of the parties' respective arguments, i.e. determining whether the impugned Decision is legislative or administrative in nature, which affects the standard of review, and then applying the resulting standard of review to the parties' arguments relevant to that standard. In the event this leads to a finding that there has been a reviewable error, I would add the final issue raised by the Respondent, i.e. the question of whether the Court, even if it finds a reviewable error, should decline to grant the application because there is no remedy available in relation to a fishing season that is now closed.

IV. Evidence

[17] In support of their position in this judicial review, the Applicants have filed an affidavit by William Barry, the Director and Chairman/CEO of one of the Applicants, Barry Group Inc., who deposes as to his knowledge of the Atlantic mackerel fishery, the IFMP, and events surrounding the decision to close the fishery in October 2016, with supporting documentation.

[18] The Respondents rely on an affidavit of Brian Lester, the Assistant Director of Integrated Resource Management with DFO, whose responsibilities include overseeing the Atlantic mackerel fishery. Mr. Lester is also the chairperson of the AMAC. He provides information on the nature and history the fishery, how it is managed, the role of AMAC in 2015 and 2016, and events surrounding the decision to close the fishery in October 2016, again with supporting documentation.

[19] Both affiants were cross-examined on their affidavits, and the transcripts were included in the record before the Court. Details of the evidence, to the extent material to the Court's decision, are canvassed in the Analysis portion of these Reasons.

V. Analysis

A. *Is this a legislative decision or an administrative decision?*

[20] The Applicants argue that the Decision is administrative, not legislative, in nature. The Respondents take the opposite position. It is necessary for the Court to address this question, because it affects the standard of review to be applied to the Decision.

[21] The Applicants rely on the test, for whether an act is legislative or administrative in nature, as set out by this Court in *Ecology Action Centre Society v Canada (Attorney General)*, 2004 FC 1087 [*Ecology Action Centre*] at para 50:

> [50] The decision which is challenged here is a legislative decision. A legislative act differs from an administrative act and that difference is discussed in *De Smith Judicial Review of*

> *Administrative Action* (S.A. De Smith & J.M. Evans, 4th ed. (London, England: Stevens, 1980)) at page 71 as follows:
>
> A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

[22] Applying this test, the Applicants argue that the decision in the present case was an administrative one because, of all the participants in the commercial Atlantic mackerel fishery, only the Applicants were affected by its closure. They take this position because, by the time of the Decision, the Under 65 Fleet had already exceeded its 60% allocation of the TAC as contemplated by the IFMP. They submit that the only decision to be made by DFO on October 14, 2016, was how to deal with the interests of the Over 65 Fleet and whether to allow the Applicants to fish their 40% allocation. Therefore, they argue, the Decision was made in reference to a particular case and should be characterized as administrative in nature.

[23] The case law cited by the parties, however, largely (although not entirely) supports a conclusion that variation orders are legislative acts. In *Ecology Action Centre*, at para 52, Justice Heneghan relied on the decision in *Gulf Trollers Assn. v Canada (Minister of Fisheries and Oceans)*, [1987] 2 FC 93 (FCA) at para 102, in concluding that a variation order represents the exercise of power delegated under the Regulations to the RDGs and is in the nature of subordinate legislation. Similarly, in *Spinney v Canada (Attorney General)*, 183 FTR 71 (FCTD) at para 60, Justice Blais described a variation order as a legislative act.

[24] In support of the contrary proposition, that variation orders can be administrative in nature, the Applicants rely on the decision of the Newfoundland Supreme Court, Trial Division, in *R v Corcoran* (1999),181 Nfld & PEIR 341 [*Corcoran*], in which the appellant referred the Court to *R v Drake (EJ) et al* (1996), 139 Nfld & PEIR 136 (Nfld PC) [*Drake*], and *R v Brown*, [1989] NSJ No 134, Action C.Sb. 2664B, NS County Court (unreported) [*Brown*]. The Court in *Corcoran* considered this argument but, after applying the same test as described above in *Ecology Action Centre*, concluded that the variation order in question was a promulgation of a general rule of conduct without reference to particular cases and was therefore a legislative act.

[25] The Applicants submit that is necessary to look at the facts of a particular case in order to assess whether a variation order is a legislative or administrative act in that case. They rely on the fact that the Court undertook such an analysis in *Corcoran*, rather than simply accepting that variation orders are by their nature automatically legislative. It appears that there is very little authority supporting a conclusion, following application of the applicable test, that a variation order is an administrative act. *Drake* does not appear to contain any analysis of this question at all. While *Brown* did conclude that the variation orders in question were administrative measures, *Brown* is a County Court decision and does not appears to have applied the test described in *Ecology Action Centre* and *Corcoran*. Nevertheless, I accept that, when the issue is raised in a particular case, it is appropriate for the Court to conduct an analysis under the applicable test, rather than automatically adopting the position that a variation order is legislative in nature.

[26] I also note the Applicants' submission that the interests of the Applicants were specifically referred to during the October 14, 2016, conference call that led to the issuance of the VOs. The notes of the participants in the October 14 call, which were attached to Mr. Lester's affidavit, support this submission, as there are references to the Applicants and the contact details for their representatives. These notes also include references to the 60/40 split of the TAC and, in Mr. Lester's own notes, to the "fixed fleet" (meaning the Under 65 Fleet) having exceeded their quota. The Applicants also point out that it can be inferred from some of the notes from the October 14 call that one option being considered during the call was closing the commercial fishery only for the Under 65 Fleet.

[27] The evidence clearly supports a conclusion that the effect of the closure upon the Over 65 Fleet was discussed during the October 14, 2016 call. Indeed, it would be odd if that point had not been discussed, as the evidence includes a letter sent by Mr. Barry to Mr. Lester the previous day, advising that the Over 65 Fleet expected to start fishing shortly and were hopeful of harvesting 3200 mt (i.e. 40% of the TAC). While not as clear, it may also be that the possibility of closing the commercial fishery only for the Under 65 Fleet was discussed.

[28] However, applying the test from *Ecology Action Centre*, I am unable to conclude that the Decision in the present case can be characterized as an administrative act. The Decision that was taken closed the commercial mackerel fishery for all participants, described by the Applicants as approximately 15,000 commercial fishers, throughout the four regions through which the fishery is managed. I acknowledge that the Decision had a particular effect upon the Applicants, as the fishing activity of the Over 65 Fleet had only just begun. However, the members of the Under 65

Fleet were also affected by the Decision, as their fishing activity was curtailed at the same time as that of the Applicants. In my view, the fact that a variation order of general application has a particular effect upon a particular participant or set of participants in the fishery, or affects some participants more than others, does not in itself change the nature of that decision such that it can be characterized as an administrative act.

[29] My conclusion is that the Decision is legislative in nature and is therefore subject to review in accordance with the standard of review applicable to legislative acts, as discussed in the next portion of these Reasons.

B. *If the Decision is legislative, is it reasonable?*

(1) Standard of Review

[30] The parties agree that the applicable standard of review is reasonableness and that, in the context of decisions of a legislative nature, this standard requires consideration of whether the decision has been made in bad faith, without adherence to statutorily mandated natural justice, or based on factors irrelevant or extraneous to the statutory purpose (see *Maple Lodge Farms v Canada*, [1982] 2 SCR 2). I concur with this articulation of the standard to be applied by the Court in the present case.

[31] While the Applicants presented arguments that the Decision was made in a procedurally unfair manner, because it affected their interests without any consultation, these arguments were premised on the Court concluding that the Decision was administrative in nature. They

acknowledge that, in the context of a legislative decision, the only scope for raising procedural issues arises where the decision-maker did not adhere to statutorily mandated requirements of natural justice. The Applicants do not argue there was any such requirement breached in the present case.

[32] However, the Applicants do assert that, even if the Decision is found to be legislative in nature, it was unreasonable because it was made either in bad faith or based on irrelevant or erroneous considerations. The Applicants do not allege malice on the part of DFO, and they acknowledge that the error they allege involves bad faith at the "lower end of the scale" and is perhaps better characterized as based on irrelevant or extraneous factors. The thrust of the Applicants' position is that the Decision to close the commercial Atlantic mackerel fishery in essence represents a re-allocation of an entitlement from the Over 65 Fleet to the Under 65 Fleet, done in response to a problem faced by DFO of DFO's own making, because it did not monitor and manage the fishery sufficiently to prevent the Under 65 Fleet from catching the entire TAC.

(2) DFO's Management of the Commercial Mackerel Fishery in 2016

[33] It is an uncontested fact that the full TAC had never been caught prior to 2016. It is also uncontested that DFO's methods of monitoring mackerel catch levels in the commercial fishery vary in different regions, with the Newfoundland region being the only one that employs a dockside monitoring program that provides landing data to DFO on a daily basis. As Mr. Lester explains in his affidavit, the Newfoundland region traditionally accounts for approximately 80% of overall mackerel landings. The landings in the other regions are monitored through other methods (a combination of fisher logbook monitoring, monitoring of purchase slips from buyers,

and hail-ins from vessels on a periodic or seasonal basis). As such, the timeliness within which the data becomes available to DFO varies from almost real time, in the case of dockside monitoring, to availability only after the end of the season. Mr. Lester states that, because the commercial mackerel landings had never approached the full TAC, there had never been any need from DFO's perspective to change the type, or increase the frequency, of monitoring. Because DFO was not concerned about landings being too high in 2016, it maintained the previous monitoring practices in that year.

[34] The Applicants' position is that DFO should have been alert to the potential for a problem in 2016 and should have monitored the fishery more closely. They point to the Memorandum for the Minister dated May 25, 2016 [the 2016 Memorandum], which provided options to be considered for the level at which to set the 2016 TAC and DFO's recommendation, which was to reduce the TAC to 6000 mt from the 2015 level of 8000 mt. However, the Memorandum noted that fishing effort in western Newfoundland was down in 2015 due to lack of fish and commented that it would be difficult to ensure that even the reduced TAC would be respected if fish were present off of western Newfoundland, given that catch reporting for some fleets does not occur until after the fishing season has ended. The Minister ultimately made the decision to keep the TAC at the 2015 level of 8000 mt as had been recommended by the AMAC. Nevertheless, the Applicants argue that the Memorandum demonstrates that DFO was aware that, if fish were present in the waters of western Newfoundland in 2016, the TAC could be exceeded and DFO would have a challenge managing compliance with the TAC because of shortcomings in its monitoring methods.

[35] The Applicants also point to evidence of catch levels in years prior to the 2016 season demonstrating that, in 8 of the 9 prior years, the landings of the Under 65 Fleet exceeded the 4800 mt level represented by 60% of the 8000 mt 2016 TAC. They argue that, while DFO had clearly identified the necessity to closely monitor mackerel landings in the event that fish were present off the west coast of Newfoundland, it failed to do so.

[36] Turning to the events that unfolded in October 2016, it appears uncontroverted that it was on October 5, 2016, that DFO first learned that the Under 65 Fleet were experiencing favourable catch levels, when they received an email from the Fisheries Food and Allied Workers Union [FFAW], asking to meet to discuss a possible increase to the TAC. Mr. Lester's affidavit attaches an email received from a DFO employee in the Newfoundland region, Erin Dunne, on that date, forwarding the FFAW's request and advising that, as of that morning, 1216 mt of mackerel had been landed. Mr. Lester then asked for projections for the Newfoundland region based on current catches, and Ms. Dunne responded on October 6, 2016, providing a 2016 year-to-date figure of 1472 mt, in comparison to 690 mt harvested by the Under 65 Fleet in Newfoundland in 2015.

[37] Mr. Lester states that this information was a surprise to him and that he alerted DFO management at headquarters in Ottawa of the need to follow Newfoundland's mackerel landings more closely. On October 11, 2016, DFO headquarters asked the regions to provide their mackerel landings data. Ms. Dunne provided a report on that date which indicated that 3240 mt had been landed in Newfoundland but also states in an email that over 3400 mt had been landed. On October 12, 2016, another DFO employee combined the 3240 mt figure from Newfoundland with figures from the Gulf and Québec to generate a total figure of 4607 mt. An October 13,

2016, email from Mr. Lester refers to information from the regions indicating that landings from the Under 65 Fleet were at 5600 mt.

[38] As of 8:30 am on October 14, 2016, commercial mackerel landings plus estimates of landings not yet entered in DFO's system totalled approximately 7829 mt for all regions, 4166 mt of which had been caught in Newfoundland. Following the conference call on that date, it was recommended to the RDGs that the commercial fishery be closed as of 10:00 pm that night and the VOs to that effect were issued. The Over 65 Fleet had caught only 150 mt of mackerel by the time of the closure. During the following week, DFO resource management reviewed the landings data received from the regions and concluded that the entire TAC had been caught. As a result, DFO confirmed on October 21, 2016, that the commercial fishery would remain closed.

[39] The Applicants take the position that this sequence of events demonstrates that DFO was "asleep at the switch." They say that DFO's catch monitoring methods are inadequate and that it failed to engage in any active monitoring of the mackerel fishery in the 2016 season prior to October 5 and then did not gather data quickly enough, or make a decision quickly enough, to prevent the Under 65 Fleet from catching the entire TAC. This had the effect of transferring to the Under 65 Fleet the allocation of 40% of the TAC to which the Applicants say they were entitled.

[40] The Respondents acknowledge that DFO's monitoring methods vary in different regions and that some of the reporting of catch levels was not timely, but they dispute the Applicants' allegation that this amounts to inadequate management of the fishery. The Respondents submit

that the level of resources to devote to the management of this particular fishery is a matter of policy within the purview of DFO. They say that catch rates were unexpectedly strong in 2016 and, when it became aware of this, DFO assembled data and closed the fishery once the TAC was reached. The Respondents take the position that the Applicants' expectation of harvesting 40% of the TAC is based entirely on the IFMP, which the Respondents characterize as a policy document that did not confer any legal rights on the Applicants. The Applicants' licensing documents do not provide the members of the Over 65 Fleet with any particular allocation or quota, only a right to participate in the competitive Atlantic mackerel fishery, along with the Under 65 Fleet, until the entire TAC is caught. Therefore, say the Respondents, DFO managed the fishery in 2016 in a manner which respected the TAC, and the 60/40 split reflected in the IFMP was legally irrelevant to that process.

[41] In my view, it is fair for the Applicants to characterize the events of October 2016 as having caught DFO by surprise. Mr. Lester acknowledges this. While the methodology and timing of DFO's monitoring of the commercial mackerel fishery in 2016 were adequate to enable it to close the fishery by roughly the time the TAC was reached, they did not enable DFO to manage the fishery such that a 60/40 split between the Under 65 Fleet and the Over 65 Fleet was achieved. Whether this is significant to the outcome of this application is addressed below.

(3) Legal Significance of the Integrated Fisheries Management Plan

[42] This leads to consideration of the legal significance of the IFMP, and the 60/40 allocation described therein, and whether this supports a conclusion that the Decision was unreasonable. The legal significance of fisheries management policy was directly addressed in the decision of

the Federal Court of Appeal in *Arsenault v Canada (Attorney General)*, 2009 FCA 300 [*Arsenault*]. In that case, the Minister had issued a management plan which announced that the TAC for the snow crab fishery would be shared between traditional crab fishers, First Nations, and new entrants to the fishery, resulting in a reduction of the percentage of the TAC to which the traditional crabbers had been entitled in previous years. The management plan also contemplated financial assistance to the traditional crabbers to compensate them for their share of the TAC which was being transferred to First Nations. However, to implement this arrangement, DFO required the traditional crabbers to sign an agreement which included a release of claims against the Crown. The traditional crabbers refused to sign these releases and brought an application before the Federal Court, seeking a writ of *mandamus* compelling the Minister to pay them the financial assistance contemplated by the management plan.

[43] The Federal Court allowed the application in part, concluding that the Minister was legally bound to implement the management plan. On appeal, Justice Nadon, writing for the majority, described the question for the Federal Court of Appeal as whether the management plan had created an enforceable legal duty. He concluded that the Federal Court had erred in treating the management plan as akin to the issuance of a license under s 7 of the Act such that the Minister had a legal duty to implement the plan as announced unless revised or revoked under the specific statutory conditions found in s 9. The Federal Court of Appeal held that the plan was not a binding legal document and was not enforceable (para 33). Justice Nadon described the management plan as an expression by the Minister of the policy and practice he had decided to adopt or intended to adopt for the coming year (para 34) and as an expression of the Minister's intent or a guideline with respect to those matters discussed therein (para 38). The

Court allowed the appeal, concluding that there was no basis for a finding that the Minister was bound to implement the management plan (paras 44-45).

[44] I note that Justice Pelletier issued concurring reasons in *Arsenault*, concluding that, to the extent the management plan represented decisions taken, it was not a policy, i.e. a guide to future decision-making. As decisions had been taken and only their implementation remained, it could not be said that the management plan created no legal duties (para 49). Justice Pelletier nevertheless reached the same conclusion as the majority, that the appeal should be allowed, but for the reason that the management plan could not be interpreted as fixing all the terms of the compensation plan such that there was no scope for introduction of a condition that the recipients of compensation sign a release (paras 54-55).

[45] I am of course bound by the decision of the majority in *Arsenault*. The majority's reasoning is in keeping with that of the Supreme Court of Canada in *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 [*Comeau*], which considered a situation where the Minister had authorized the issuance of offshore lobster fishing licences to the appellant but ultimately failed to issue those license. The Supreme Court concluded that the authorization to issue the license did not confer upon the appellant an irrevocable legal right to a license and, until the license was issued, the Minister remained entitled to reconsider his earlier decision to issue it (para 43). Indeed, in his concurring reasons in *Arsenault,* Justice Pelletier referenced the explanation in *Comeau* of the highly discretionary nature of fishing licences, concluding that the traditional crabbers had no legal right to any particular amount of quota.

[46] However, I must address one aspect of the present case which I consider to diverge somewhat from the circumstances considered in *Arsenault* or *Comeau.* As I read both those authorities, after making the announcement on which the litigation turned, the Minister expressly made an additional or different decision, i.e. to require execution of releases in *Arsenault* and to not issue the lobster licenses in *Comeau*. In the present case, it is more difficult to identify a decision, at least an express decision at the ministerial level, to depart from the 60/40 allocation contemplated by the IFMP.

[47] The Respondents rely on the fact that the 2016 Memorandum, which formed the basis of the Minister’s decision to set the 2016 TAC at 8000 mt, makes no mention of the IFMP or the 60/40 split. They argue that this demonstrates there was no intention to implement a 60/40 split for the 2016 season. I have difficulty with this submission, as it is clear that the 60/40 split was the subject of discussion during the October 14, 2016, conference call which resulted in the closure of the fishery. As the Applicants point out, the notes of the participants in that call include references such as “8000t Atlantic wide TAC 60/40 split <65’ inshore 4800t offshore >65’ 3200t”; “FG has exceeded their 4200t”; “120t landed by Barry to date allotted 40%”; and “the fixed fleet exceeded their quota.” The Applicants also refer to a note by one of the DFO employees reading “this is a problem of our own making.” This is consistent with the Applicants’ position that, because of how and when DFO gathered and analyzed data on commercial mackerel landings, it found itself in the unexpected situation where, notwithstanding the 60/40 split contemplated by the IFMP, the Under 65 Fleet had caught more than 60% of the TAC.

[48] The Applicants emphasize Mr. Lester's evidence that the IFMP was adopted and implemented in 2007 and has not been modified since. The IFMP describes itself as an evergreen plan with no set expiry date. I also note that, after referring to the IFMP, Mr. Lester's affidavit further refers to the TAC for the commercial Atlantic mackerel fishery as being shared 60/40 between the Under 65 Fleet and the Over 65 Fleet. Given the extent to which the DFO employees involved in the management of the mackerel fishery appear to have regarded the 60/40 split as current policy, it is difficult to conclude that the 2016 Memorandum evidences a decision by the Minister to depart from that policy.

[49] On the other hand, it appears that the 60/40 allocation of the TAC was never implemented through the licenses issued for the commercial mackerel fishery, either in 2016 or in previous years. The Applicants do not contest the fact that their licensing documents do not include any such allocation. As acknowledged by Mr. Barry in cross-examination, his expectation that the Over 65 Fleet would receive 40% of the TAC comes from the IFMP, not from the applicable license. One can speculate that the policy of a 60/40 allocation was never implemented because, prior to 2016, there had never been a year where catch levels reached the TAC. As such, the 60/40 split was not particularly relevant until 2016, when the combination of a relatively low TAC and an increase in the abundance of the resource allowed the Under 65 Fleet to catch almost the entire TAC by the time the Over 65 Fleet began fishing. However, there is no evidence before the Court on why the policy was not implemented in the Applicants' fishing licenses.

[50] The Applicants argue that, notwithstanding there is no quota allocation reflected in their license documents, the Minister's 2016 decision to set the TAC at 8000 mt represents an allocation of 3200 mt to the Over 65 Fleet due to the evergreen status of the IFMP and the fact that the Minister did not indicate an intention to depart from the IFMP. It is clear from *Comeau* and *Arsenault* that policies are not binding on the Minister, who may decide to depart from such policies. However, the Applicants submit that Minister did not make any such decision and that the RDGs, who issued the VOs, didn't have the authority to vary the allocation of the TAC. Their position is that the effect of the VOs was to do exactly that, by retroactively sanctioning the fact that the Under 65 Fleet had caught almost the entire TAC and by preventing the Over 65 Fleet from catching its share.

[51] I consider the Applicants' argument to raise a point not expressly addressed by the jurisprudence upon which the parties rely, i.e. whether a policy addressing quota allocation, which has not been expressly renounced by the Minister, can create a legally enforceable right to that allocation. My view is that it cannot. As explained in *Arsenault*, a policy remains a non-binding expression of intent. Certainly, it would be inconsistent with *Arsenault* to regard the quota allocation contemplated by the IFMP as akin to the issuance of a license under s 7 of the Act. I would also regard a result, whereby the IFMP was treated as conferring a legally enforceable right to the contemplated allocation, as amounting to an application of the doctrine of legitimate expectations to enforce substantive expectations. As submitted by the Respondents, this is a proposition which the Federal Court of Appeal has expressly considered in the fisheries context and concluded to be barred by the jurisprudence of the Supreme Court of Canada (see *Canada v 100193 P.E.I. Inc.*, 2016 FCA 280 at para 18, referencing *Reference Re Canada*

Assistance Plan (BC), [1991] 2 SCR 525 at p 557 and *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 at para 97).

[52] I therefore agree with the Respondents' position that the IFMP, and the 60/40 quota allocation reflected therein, represent policy which must be regarded as a non-binding statement of intent and does not give rise to enforceable legal obligations.

(4) Reasonableness of the Decision

[53] In assessing the reasonableness of the Decision, it is important to focus upon the particular decision that is under review in this case and the applicable standard of review, i.e. whether the Decision was not made in good faith or was made based on irrelevant or erroneous considerations. As noted above, the Applicants argue that the Decision amounts to a retroactive allocation of mackerel quota from the Over 65 Fleet to the Under 65 Fleet. As previously explained, I have concluded that the Applicants did not have a legal entitlement to 40% of the TAC. However, independent of that conclusion, I have difficulty with the Applicants' position that the Decision made on October 14, 2016, and later confirmed on October 21, 2016, is properly characterized as a quota allocation decision. I appreciate that the outcome of the 2016 commercial mackerel fishery was that the Under 65 Fleet caught a quantity of fish amounting to almost the entire TAC. However, by the time of the Decision, the landings by the Under 65 Fleet had already occurred. DFO was not then making a decision to re-allocate quota, but rather a decision, based on the circumstances it was then facing, to close the fishery to prevent any further harvesting of the resource by the commercial fleets. Section 6 of the Regulations clearly authorized the RDGs to vary the close times that were otherwise prescribed for the mackerel

fishery under the *Atlantic Fishery Regulations, 1985* (SOR 86-21). The Applicants' arguments, that DFO's management of the fishery contributed to the circumstances that developed in October 2016, do not change the nature of the decision, which was the closure of the fishery so that no more mackerel were caught by any commercial license holders.

[54] I am also unable to conclude that those arguments support a conclusion that the Decision was unreasonable, i.e. having been made in bad faith or based on irrelevant considerations. Evidence of the considerations underlying the Decision can be found in some of the memoranda that were issued to the RDGs following the October 14 conference call, recommending that the fishery be closed. The request in the Maritimes Region identifies the reason for the VO request as "Management Control" and provides the following rationale:

> The mackerel fishery is being closed Atlantic-wide because we are approaching the total allowable catch (TAC) that was allocated for this fishery. This TAC was determined in part through consideration of advice provided by fishing industry and other stakeholders, as well as from Aboriginal representatives, through the Maritimes Region Mackerel Advisory Committee, and the Atlantic Mackerel Advisory Committee. A conference call was initiated by NHQ with DFO representatives from each of the Atlantic Regions on Oct 14 to discuss landings to date and a possible closure, and it was agreed to close all fisheries tonight (with the possibility of a limited re-opening once we have a chance to more closely assess total landings to date, and whether there is quota remaining).
>
> This closure will apply to all commercial (including commercial communal) vessel-based mackerel fisheries, as described in Schedule X of the Atlantic Fishery Regulations in sections a), b), c) and d) of column II for each of items 17-21. It will not apply to recreational or personal bait fisheries for mackerel.

[55] The request for a VO in the Gulf Region identifies the reasons for the request as "Conservation" and "Management Control" and further states as follows:

> As per the management plan, 40% of the quota should go to the mobile gear. The mobile gear has not started fishing yet and we need to know how much was caught before opening it.

[56] The Respondents take the position that the VOs were issued because the TAC had been reached. The Applicants take issue with this characterization, arguing that the requests for the VOs demonstrate that DFO was not closing the fishery because the TAC had been caught, but rather because the Under 65 Fleet had exceeded its 60% allocation of the TAC and DFO wanted to get an understanding of how much mackerel had been caught and to figure out how to deal with fact that the Under 65 Fleet had exceeded its quota.

[57] Mr. Lester's evidence is that, as of 8:30 am on October 14, DFO's records showed that landings plus estimates of landings not yet entered into their system totaled approximately 7829 mt for all regions. He states that the recommendation to close the fishery was based on concerns for conservation and protection of the resource; that the surge in landings in Newfoundland in the preceding days and the approaching weekend would have made it impossible to analyze any new landings before the following Monday; and that, given the poor state of the stock from the last science assessment, it would not have been prudent or responsible to allow landings to rise above the previously set TAC. Mr. Lester also explains that, in the week following the closure, DFO reviewed the landings results received from the regions and determined that the entire TAC had been caught.

[58] The Court does not typically rely on the evidence of those involved in making a decision, as to why the decision was made, when that evidence is given after the fact in the course of a judicial review proceeding. However, the Applicants have not taken issue with the introduction of this evidence in Mr. Lester's affidavit, and I consider his evidence to be consistent with the documents described above that explain the reasons for the VO requests. DFO's information was that the catch levels were approaching the TAC. As the landings had accumulated quickly, DFO wanted to stop the fishery to have an opportunity to better assess its data. The request documents raise the possibility of re-opening the fishery, or perhaps re-opening it for the Over 65 Fleet, once the data had been assessed. As such, it may be an oversimplification for the Respondents to assert that the VOs were issued because the TAC had been reached. However, it appears clear that the reason for the October 14 closure was to avoid landings exceeding the TAC before DFO had an opportunity to better assess its landings data and that the closure was maintained on October 21 because that assessment revealed that the whole TAC had been caught.

[59] Consistent with the reasons indicated on the VO request documents, the considerations underlying the Decision were conservation and management of the resource. These were clearly relevant considerations, and I find no basis to conclude that the Decision was not made in good faith. The Applicants point out that the closure of the commercial fishery did not affect the recreational or bait fisheries. Given the evidence that the bait fishery resulted in annual landings of approximately 20,000 mt, the Applicants argue that the fact the bait fishery remained open is inconsistent with conservation being the reason for the commercial closure. I find little merit to that submission. The 2016 Memorandum identified factors for the Minister's consideration, including concerns with the state of the stock and uncertainly as to the size of the harvest from

the recreational and bait fisheries, in making the decision on the level for the 2016 TAC for the commercial fishery. Once the commercial TAC had been set at that level, it is entirely consistent with a conservation objective for DFO to be concerned about the possibility of that TAC being exceeded, even though mackerel could still be harvested in the recreational and bait fisheries.

[60] Finally, I note again the Applicants' argument that it can be inferred from some of the notes of the October 14 call that discussions during that call included the possibility of closing the commercial fishery only for the Under 65 Fleet. Even if this was discussed as an option, I do not find it to undermine the reasonableness of the Decision, which was to close the entire commercial fishery to prevent landings in that fishery from exceeding the TAC.

[61] As the Applicants have not demonstrated that the Decision was made in bad faith or based on irrelevant or erroneous considerations, I find that the Decision is reasonable and that this application for judicial review must be dismissed.

[62] Having concluded that the Decision is legislative, not administrative, in nature, it is unnecessary for the Court to consider the Applicants' arguments that are premised on the Decision being characterized as administrative. Having found that the application for judicial review must be dismissed, it is also unnecessary to consider the Respondent's argument that, even if the Court found a reviewable error, it should decline to grant the application because there is no remedy available in relation to a fishing season that is now closed.

VI. Costs

[63] The parties advised the Court at the hearing that they would provide post-hearing written submissions on costs, following an effort to agree on the amount of costs to be awarded to the successful party. The parties subsequently provided such submissions, which indicate they have agreed that, should the application for judicial review be dismissed, the Applicants should pay costs in the amount of $6,230.00 plus $4,012.11 in disbursements. My Judgment will reflect these amounts.

JUDGMENT IN T-1906-16

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed and the Applicants shall pay the Respondents costs in the amount of $6,230.00 plus $4,012.11 in disbursements.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1906-16
STYLE OF CAUSE:	BARRY GROUP INC., PRIDE VENTURES INC., 67108 NEWFOUNDLAND & LABRADOR INC. AND GAUVIN AND NOEL COMPAGNIE LTEE V HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD, THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CORNER BROOK, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	NOVEMBER 2, 2017
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	DECEMBER 14, 2017

APPEARANCES:

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