

Federal Court



Cour fédérale

**Date: 20070727**

**Docket: T-895-07**

**Citation: 2007 FC 781**

[ENGLISH TRANSLATION]

**BETWEEN:**

**ASSOCIATION DES CRABIERS ACADIENS INC.,  
JEAN-GILLES CHIASSON, in his personal capacity and in his capacity as  
president of the Association des crabiers acadiens inc.,  
ASSOCIATION DES CRABIERS GASPÉSIENS INC.,  
MARC COUTURE, in his personal capacity and in his capacity as  
administrator of the Association des crabiers gaspésiens inc.,  
ASSOCIATION DES CRABIERS DE LA BAIE,  
DANIEL DESBOIS, in his personal capacity and in his capacity as  
administrator of the Association des crabiers de la Baie,  
and ROBERT F. HACHÉ**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR ORDER

### PROTHONOTARY MORNEAU

[1] This is a motion by the applicants under Rule 318 of the *Federal Courts Rules* (the Rules) for the Court to order the respondent, the Attorney General of Canada, to send them all the documents required in their notice of application for judicial review.

### Context

[2] The applicants consist mainly of three associations of traditional snow crab fishermen.

[3] On May 24, 2007, they initiated an application for judicial review (the Application), in which the decision referred to is identified at the outset by the applicants as follows:

[TRANSLATION]

### **APPLICATION**

#### **A) THE DECISION REFERRED TO**

This application for judicial review concerns the adoption, by the Minister of Fisheries and Oceans (the “**Minister**”), of a fisheries management plan for snow crab in the Southern Gulf (the “**Plan**”), which was publicly announced on or around April 25, 2007. (...)

[4] This text indicates that the decision referred to is the adoption of the Plan.

[5] Since we have reached the step, in terms of drafting, of addressing its purpose (see page 6 of the Application), the applicants appear to specify the particular aspects of the Plan that they are attacking through the Application and, on the other hand, they appear to widen the scope of the Application to include the various decisions related to implementing these aspects of the Plan.

[6] Essentially, the applicants express the following in the Application:

[TRANSLATION]

That this honorable Court allow the application for judicial review and cancel and invalidate the abovementioned aspects of the Plan and/or all decisions made pursuant to said aspects of the Plan, (...)

[7] To put this into context, the aspects of the Plan to which the applicants refer mainly concern closing fishing areas and fisheries licensing that reflect a maximum number of catches allocated among traditional fishermen and First Nation fishermen and non-traditional fleets.

[8] Finally, the applicants contest that the respondent can claim the solicitor-lawyer privilege to oppose disclosing a sentence in one of the documents sent to the applicants under Rule 318.

## Analysis

[9] For the purposes of this motion, I intend to keep in mind, as required by Rule 302 and the jurisprudence that applies under normal circumstances, that the Application is limited and is in fact, as worded, limited to a single decision, in this case the Minister's adoption of the Plan.

[10] Consequently, I do not intend to keep in mind that the Application also encompasses a series of decisions made as a result of the Plan's adoption and that the applicants describe the motion under review as follows:

[TRANSLATION]

all the decisions, orders, leases, permits and/or licences granted, renewed and/or amended, partially or completely, as a result of the adoption of the Plan and/or according to the parameters established in the Plan.

[11] Furthermore, with respect to the decision referred to, namely the adoption of the Plan, I consider that the applicants can only request the documents that were before the Minister when the Plan was adopted.

[12] That is, from my point of view, the measure to be applied through prevailing case law. The applicants were in fact reminded of this stream of jurisprudence during a past challenge that they filed concerning a snow crab fishing plan and where the applicants sought to have access to all the

relevant documents (meaning an action) and not only to the documents before the decision-maker when the decision was made.

[13] In *Association des crabiers acadiens et al v. Her Majesty the Queen*, 2004 FC 23, my colleague Tabib said the following at paragraphs [23] et [24]:

[23] I adopt the reasons stated by Associate Prothonotary Giles in *Ecology Action Centre Society v. Canada (Attorney General)*, [2001] F.C.J. No. 1588, adopting the rules set out by the Court of Appeal in *Canada v. Pathak*, [1995] 2 F.C. 455:

[6] . . . What is relevant is what was before the decision maker when he was reaching his decision . . . it does not include everything dealing with the subject which may have crossed his desk at a prior time. It certainly does not include everything in his department or area of responsibility.

[24] In David C. Bevan's statement the respondent disclosed documents [TRANSLATION] "which were in the possession of the Minister of Fisheries and Oceans when he took the decision which is at issue [in this application]". In the present state of the record the applicants have not established to the Court's satisfaction that the other documents requested, even if they were otherwise in the possession of the Minister or his Department and might have been relevant to the decision, are in fact documents relevant for the purposes of Rule 317, in that they were taken into account by the Minister in reaching his decision.

(Emphasis added)

[14] Thus, we can certainly not consider here that the position taken by my colleague is tantamount to acknowledging that all the documents consulted by the Minister at any point during the process of setting out or designing the Plan must be sent under Rules 317 and 318.

[15] If the documents sent by the Minister to date under Rule 318 did not allow the Minister, according to the applicants, to adopt some aspects of the Plan, they will be able to validate these points when they explain their position on the merits. However, I do not think that this position of the applicants forces the Minister to send everything that could have been brought to his attention when the Plan was set out in a way that would allow the applicants to support their main claim that there are parameters in the Plan that are not mentioned in the sent documents.

[16] Here in the Application, the applicants are requesting they be sent:

[TRANSLATION]

1. All the documents, memos, memorandums, electronic messages, briefings, reviews (scientific or other), notices, news releases, and factsheets that pertain to the design, development, and/or adoption of the Plan and the Variation Order, in addition to all the correspondence from and/or addressed to the Minister, the deputy minister, the assistant deputy minister – fisheries management, and to the directors general and the public servants in the Gulf and Quebec regions and/or the National Headquarters concerning these items.

[17] I agree with the respondent in that this request for documents to be sent is similar in nature to a data and document search that we find at the interlocutory stage of an action rather than during a application for judicial review.

[18] Quite recently, namely on June 8, 2007, the Federal Court of Appeal in *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, stated that it disagreed with requests for documents under Rules 317 and 318, which stand out clearly from this process in the actions. At paragraphs [20] and [21], the Court of Appeal states the following:

[20] In closing, the Court would like to express its disapproval for document disclosure requests drafted in terms as vague as the one at issue. Judicial review does not proceed on the same basis as an action; it is a procedure that is meant to be summary. There is therefore a series of limits on the parties as a result of this distinction. Evidence is brought by affidavit and not by oral testimony. There is less leeway for preliminary procedures such as discovery of evidence in the hands of the parties and examination on discovery. If such proceedings do prove to be necessary, the Rules provide that a judicial review may be transformed into an action.

[21] It is in this context that we find section 317 of the Rules dealing with the request for disclosure of material. The purpose of the rule is to limit discovery to documents which were in the hands of the decision-maker when the decision was made and which were not in the possession of the person making the request and to require that the requested documents be described in a precise manner. When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case.

(Emphasis added)

[19] Here, Mr. David Bevan's statement or certificate dated June 18, 2007, indicates that the applicants were sent all the documents that were before the Minister when the Plan was adopted.

[20] The applicants' application to have the sought documents sent will therefore be dismissed.

[21] Furthermore, since I reviewed the sentence in a document that the respondent considers to be a legal opinion, I am satisfied that this is not actually the case and, consequently, this sentence will have to be disclosed to the applicants within the next ten (10) days.

[22] For all these reasons, excluding what is indicated in the previous paragraph, this motion by the applicants will be otherwise dismissed, with costs in the cause.

**“Richard Morneau”**

---

Prothonotary



Federal Court



Cour fédérale

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-895-07

**STYLE OF CAUSE:**

ASSOCIATION DES CRABIERES ACADIENS INC.,  
JEAN-GILLES CHIASSON, in his personal capacity and in his  
capacity as president of the Association des crabiers acadiens inc.,  
ASSOCIATION DES CRABIERES GASPÉSIENS INC.,  
MARC COUTURE, in his personal capacity and in his capacity as  
administrator of the Association des crabiers gaspésiens inc.,  
ASSOCIATION DES CRABIERES DE LA BAIE,  
DANIEL DESBOIS, in his personal capacity and in his capacity as  
administrator of the Association des crabiers de la Baie,  
and ROBERT F. HACHÉ  
Applicants  
and  
ATTORNEY GENERAL OF CANADA  
Respondent

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** July 23, 2007

**REASONS FOR ORDER:** PROTHONOTARY MORNEAU

**DATED:** July 23, 2007

**APPEARANCES:**

Patrick Ferland FOR THE APPLICANTS

Ginette Mazerolle FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Heenan Blaikie FOR THE APPLICANTS  
Montréal, Quebec

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada

Ottawa, Ontario