Date: 20080516

Docket: T-1502-06

Citation: 2008 FC 616

Ottawa, Ontario, the 16th day of May 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JEAN-GILLES CHIASSON, MARC COUTURE, PÊCHERIES JEAN-YAN II INC., AURÉLIEN HACHÉ, ROBERT F. HACHÉ, SUCCESSION RICHARD ALLAIN, ROLAND ANGLEHART JR., HÉLIODORE AUCOIN, ALBERT BENOÎT, ROBERT BOUCHER, ELIDE BULGER, GÉRARD CASSIVI, LUDGER CHIASSON, MARTIN M. CHIASSON, LUCIEN CHIASSON, ROBERT COLLIN, ROMÉO G. CORMIER, CIE 2973-0819 QUÉBEC INC., LES CRUSTACÉS DE GASPÉ LTÉE, CIE 2973-1288 QUÉBEC INC., CIE 3087-5199 QUÉBEC INC., LINO DESBOIS, DONALD DUGUAY, DENIS DUGUAY, CAROL DUGUAY, MARIUS DUGUAY, CHARLES-AIMÉ DUGUAY, RANDY DEVEAU, EDGAR FERRON, LIVAIN FOULEM, SIMON J. GIONET, JOCELYN GIONET, CLAUDE GLONEST, AURÈLE GODIN, GREGG HINKLEY, JEAN-PIERRE HUARD, DONALD R. HACHÉ, GUY HACHÉ, JACQUES E. HACHÉ, JEAN-PIERRE HACHÉ, JASON-SYLVAIN HACHÉ, GAËTAN HACHÉ, RENÉ HACHÉ, RHÉAL HACHÉ, ALBAN HAUTCOEUR, FERNAND HAUTCOEUR, JEAN-CLAUDE HAUTCOEUR, VINCENT JONES, RÉJEAN LEBLANC, CHRISTIAN LELIÈVRE, ELPHÈGE LELIÈVRE, JEAN-ELIE LELIÈVRE, JULES LELIÈVRE, DASSISE MALLET, DELPHIS MALLET, FRANCIS MALLET, JEAN-MARC MARCOUX, ANDRÉ MAZEROLLE, EDDY MAZEROLLE, GILLES A. NOËL, LÉVIS NOËL, SERGE NOËL, ONÉSIME NOËL, NICOLAS NOËL, MARTIN NOËL, RAYMOND NOËL, FRANCIS PARISÉ, DOMITIEN PAULIN, SYLVAIN PAULIN, CLAUDE POIRIER, LES PÊCHERIES SERGE-LUC INC., PÊCHERIES RAY-L. INC., LES PÊCHERIES DENISE QUINN SYVRAIS INC., PÊCHERIES FRANÇOIS INC., PÊCHERIES J.V.L. LTÉE, PÊCHERIES JIMMY L. LTÉE, PRODUITS BELLE-BAIE LTÉE, ROGER PINEL, SUCCESSION JEAN-PIERRE ROBICHAUD, ADRIEN ROUSSEL, JEAN-CAMILLE ROUSSEL, MATHIAS ROUSSEL, STEVEN ROUSSY, MARIO SAVOIE, JEAN-MARC SWEENEY, MICHEL TURBIDE, RÉAL TURBIDE, DONAT VIENNEAU, FERNAND VIENNEAU, LIVAIN VIENNEAU, RHÉAL VIENNEAU

Applicants

and

**ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR ORDER AND ORDER

[1] What should be done with the proceeds of the essentially illegal sale of snow crab?

[2] On April 5, 2006, Her Majesty the Queen in right of Canada, represented by the Minister of Fisheries and Oceans, reached an agreement with the Association des Pêcheurs de Poissons de Fond Acadiens Inc. (APPFA) regarding enhanced management of the snow crab fishery in Areas 12, 18, 25 and 26. The APPFA was to implement various projects and pay the Minister $1,500,000 to be spent on certain specific goals. In exchange, the APPFA was to be issued a fishing licence with an allocation of 1000 metric tons of snow crab.

[3] On June 23, 2006, after the APPFA had paid the money to the Minister, the Federal Court of Appeal disallowed a similar arrangement for the 2003 fishing season (*Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, [2006] F.C.J. No. 985). Writing for the Court, Mr. Justice Décary cited the Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans*), [1997] 1 S.C.R. 12, stating that "Canada's fisheries are a 'common property resource', belonging to all the people of Canada" and that "it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest."

[4] In *Larocque, supra*, Décary J. reached the following conclusion:

> [26] In short, I determined that the Minister financed his scientific research program without first appropriating the funds necessary and by misappropriating, for all intents and purposes, resources that do not belong to him. He confused public funds and the public domain. Without appropriating public funds he appropriated public domain. This cannot be.
>
> [27] I would allow the appeal, I would set aside the judgment by the Federal Court, I would allow the application for a declaratory order and I would declare that the Minister of Fisheries and Oceans did not have the power to finance his Department's scientific research by issuing licences to fish and sell snow crab. I would award costs to the appellant in this Court and in Federal Court.

[5] At that point, the Minister had already spent $477,326 of the amount of $1,500,000 received from the APPFA, with a balance remaining of $1,022,674. The Department completed the remaining projects for the 2006 fishing season by financing them with public funds, which the Federal Court of Appeal held should have been done in the first place. Immediately following *Larocque*, the applicants contacted the Department, arguing that the amount received from the APPFA in exchange for an allocation of 1000 metric tons did not belong to the Department, and that it should have been distributed among the licence-holders for the 2006 fishing season given the reduction in their share of the allocation.

[6] It is worth noting that several of the applicants identified in the notice had been parties in *Larocque* and had been represented by the same counsel.

[7] The Department referred the matter to the Department of Justice, which refused the request in letters dated July 18 and 24, 2006. Counsel representing the Minister of Justice pointed out that

Larocque did not affect the 2006 project and that the deadline for appealing to the Supreme Court had not yet passed. Leave to appeal had never been sought.

[8] This application for judicial review was filed on August 16, 2006, and subsequently amended twice. As the case currently stands, the applicants are seeking a) a declaration that the Minister illegally used or sold 1000 metric tons of snow crab to finance departmental research activities and that he is illegally holding the proceeds of the sale of snow crab; b) a writ of *mandamus* forcing the Minister to return the illegally held money to the applicants in proportion to the percentage of the total allowable catch (TAC) allocated to each applicant according to the distribution formula set out in the Management Plan announced on March 30, 2006; and c) if necessary, an order extending the time limit set out in subsection 18.1(2) of the *Federal Courts Act*.

THE ISSUES

[9] The first issue is which decision should be judicially reviewed. If it is the decision dated April 5, 2006, in which an agreement was reached with the APPFA, the deadline for applying for judicial review has passed, since the application had to be filed within 30 days following the decision. Nevertheless, the Court has discretion to extend this time limit. However, if the decision is the one set forth in the letters from the Minister of Justice, the application for judicial review was filed within the prescribed time limits.

[10] As for the second issue, the applicants are seeking to determine whether the Minister illegally used or sold 1000 metric tons of snow crab to finance its research activities. This is a

settled issue. In *Association des crabiers acadiens v. Canada (Attorney General),* 2006 FC 1241, 301 F.T.R. 297 rendered on October 18, 2006, Mr. Justice Martineau, following *Larocque*, held that the policy implemented in 2005 was also illegal. This policy was the same as the one implemented in 2006, except that the third party was different and the fishing licence was for a different harvest. As for what was done in 2006, the Minister now recognizes that he acted in excess of the powers conferred by Parliament in the *Fisheries Act.*

[11] The third point is to determine who is entitled to the amount of $1,500,000. Does all or part of this amount belong to the applicants? If yes, is it a claim for damages, and therefore not available as a remedy in the context of a judicial review? Or if not, is there reason to issue a writ of *mandamus*?

THE IMPUGNED DECISION

[12] I am satisfied that the decision subject to judicial review is not contained in the letters from the Minister of Justice from July 2006. The purpose of those letters was to deny any responsibility; they did not constitute an administrative decision. To hold otherwise would mean that any letter refusing a request related to allegations of tort or breach of contract must be a decision subject to judicial review! Thus, the impugned decision originated in a news release issued on March 30, 2006. The relevant excerpt is the following:

> The total allowable catch (TAC) will be set at 25,869 tonnes (t) if enhanced management activities are in place. "I am aware that industry was looking for a higher level of TAC. However, I believe it is important to apply a prudent approach, as the biomass is currently decreasing and a more cautious approach is likely in 2007," stated the Minister. The Department is presently reviewing proposals received for enhanced management activities. If these activities do not proceed, the TAC will be set at 20,862 t. The Department's review will be completed in the coming days and further information will be provided to industry.

[13] The condition that a management activity be enhanced was satisfied by the contract signed with the APPFA on April 5, 2006. The applicants were well aware of this decision and were late in filing their application for judicial review in August 2006.

SHOULD AN EXTENSION BE GRANTED?

[14] The case usually cited is *Canada (Attorney General) v. Hennelly,* [1999] F.C.J. No. 846, 244 N.R. 399. In that decision, the Federal Court of Appeal set out a non-exhaustive list of criteria for determining whether granting the necessary extension of time is justified. At paragraph 3 of the judgment, Mr. Justice McDonald wrote the following:

> The proper test is whether the applicant has demonstrated
>
> a. a continuing intention to pursue his or her application;
>
> b. that the application has some merit;
>
> c. that no prejudice to the respondent arises from the delay; and
>
> d. that a reasonable explanation for the delay exists.

[15] In that case, the extension was denied because there was no continuing intention to pursue the application. The applicants had inadvertently neglected to file the application within the prescribed time limit. Paragraph 4 of the judgment is equally important:

> Any determination of whether or not the applicant's explanation justifies the granting of the necessary extension of time will turn on the facts of each particular case.

[16] The Federal Court of Appeal had already dealt with this concept in greater detail in *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] F.C.J. No. 144, [1985] 2 FC 263. In that case, the Court of Appeal found that there was a period of at least several months in respect of which it was not established that Mr. Grewal or his counsel had a continuing intention to pursue the application. The applicant was caught up in an imbroglio of immigration affairs and was pursuing several files simultaneously, much like in this case, where the applicants, or at least most of them, have challenged almost every action of one minister after another over the intervening years. In *Grewal*, as in this case, a final judgment was rendered while part of the dispute was still outstanding.

[17] Mr. Chief Justice Thurlow, with whom Mr. Justice Mahoney agreed, wrote as follows: "The underlying consideration, however, which, as it seems to me, must be borne in mind in dealing with any application of this kind, is whether, in the circumstances presented, to do justice between the parties calls for the grant of the extension."

[18] In his concurring reasons, Mr. Justice Marceau added that the applicant's justification for his delay is subject to the consideration of whether "in view of all of the circumstances of the case and in order to do justice between the parties, the grant of the extension is called for." He went on to state the following:

> My difficulty in placing reliance on the general principles here comes from the fact that this application is intended to regularize the proceedings already properly before the Court aimed at setting aside the deportation order which was the immediate and necessary consequence of the decision of the Board, a decision that, we now know, was made in contravention of the supreme laws of Canada.

[19] The Minister now admits that his 2006 decision, like his 2003 and 2005 decisions, was *ultra vires*.

[20] I shall grant the extension. As my analysis will show, I am of the view that the applicants have successfully made their case, that there is no prejudice to the respondent and that there exists a reasonable explanation. Filing an application for judicial review in April or May 2006, before the Court of Appeal had rendered its decision in *Larocque*, would have been a waste of judicial resources. The state of the law in April 2006 was such that Mr. Justice de Montigny held in *Larocque,* 2006 FC 694, [2005] F.C.J. No. 891, at the trial level, that the program for issuing fishing licences fell within the Minister's authority under section 7 of the *Fisheries Acts*.

<u>IS THERE AN OBLIGATION TO PAY THE APPLICANTS?</u>

[21] As the illegality of the Minister's action is no longer an issue, a decision must be made regarding what is to be done with the amount of $1,500,000. There are three possibilities: a) that the money remain in the hands of the Department; b) that all or part of the money be returned to the APPFA; or c) that the money be distributed proportionally among those who had their allocations reduced to enable the Minister to issue a fishing licence to the APPFA for 1000 metric tons of snow crab.

[22] I am of the view that the applicants who are part of the traditional midshore fleet (Quebec and New Brunswick) have successfully made their case. The Minister publicly announced that they

would receive 65.182% of the TAC, which they received. However, the TAC was reduced by about 4% to accommodate the contract signed with the APPFA.

[23] It is true that the applicants have no proprietary right in the snow crab and that under section 7 of the *Fisheries* Act, the Minister had the authority to revoke earlier indications that fishing licences would be issued (*Comeau's Sea Foods Ltd.*, *supra*). However, in *Comeau's Sea Foods Ltd.*, the Minister had not revoked his decision in order to finance a project illegally, as is the case here. Mr. Justice McIntyre wrote the following at paragraph 9 of *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2:

> Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not [page 8] been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

The Court would normally apply the standard of patent unreasonableness (*Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, 2003 SCC 63, [2003] 3 S.C.R. 77), but the applicable standard must now be that of reasonableness *simpliciter* (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9).

[24] I am also of the opinion that an analogy can be drawn with the decision of the Supreme Court in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3. In that decision, the Court decided that taxpayers who had paid *ultra vires* taxes were entitled to recover them, thereby rejecting the rule formulated by Mr. Justice La Forest in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 prohibiting the recovery of unconstitutional taxes. The

action is based more on a constitutional principle than on the concept of unjust enrichment. In this case, the applicants did not pay directly, but it is arguable that they paid indirectly through the reduction of their allocations.

[25] An examination of the applicants' record was necessary because it is one of the criteria to be considered in determining whether the Court should grant the extension. However, it would be inappropriate for me to make any comment beyond my finding that they have made their case, since I would be getting into the area of damages, and this Court lacks jurisdiction to order such a remedy in the context of an application for judicial review.

[26] The Minister did not specifically argue that the Crown should retain the fees charged for the fishing licence. However, the logical conclusion of the argument that the applicants had not applied within the time limit is that the amount must remain in the hands of the Crown. Based on *Larocque*, *supra*, I do not hesitate to find that the Crown has no right to an amount belonging to a third party. It is analogous to the concept of escheat.

[27] Nor did the Minister argue that the amount should be returned to the APPFA. He expressed concern about the possibility that the APPFA might begin legal proceedings. The APPFA was not a party in these proceedings, so it would be inappropriate to comment on any rights it may have. However, it should be noted that the Minster may "refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court" under section 18.3 of the *Federal Courts Act* and

rules 320 and following of the *Federal Courts Rules* regarding references from a federal board, commission or other tribunal.

<u>DAMAGES</u>

[28] The applicants who lost the opportunity to fish could only be in a better position if they were the owners of the snow crab. An owner with a right to possess the property also has the right to recover it from a third party who has unlawful possession of it. In reality, these snow crab no longer exist. It is arguable that the APPFA never had a right to fish properly speaking because the Minister did not have the right either (*Nemo Dat Quod Non Habet)*. An owner would have a claim in restitution against the Minister to recover the proceeds of the sale of the snow crab. This would involve a claim in tort for the proceeds (see *Benjamin's Sale of Goods*, 7th edition, paragraphs 7-001 and following; and *Remedies: The Law of Damages*, 2nd edition, Jamie Cassels and Elizabeth Adjin-Tettey, chapter 7).

[29] It is trite law that the remedy of a claim for compensation in damages is beyond the Federal Court's jurisdiction in the context of an application for judicial review under section 18.1 of the *Federal Courts Act* (*Chaudhry v. Canada (Attorney General),* 2005 FCA 310, [2005] F.C.J. No. 1624; *Al-Mhamad v. Canada (CRTC),* 2003 FCA 45, [2003] F.C.J. No. 145; *Raymond Lussier v. Robert Collin*, [1985] 1 FC 124 (FCA)).

<u>WRIT OF *MANDAMUS*</u>

[30] It follows that the writ of *mandamus* is not applicable in this case. In any case, I am not satisfied that the criteria for ordering a writ of *mandamus* have been met (*Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FC 742, [1993] F.C.J. No. 1098 at paragraph 42; aff'd [1994] 3 S.C.R. 1100). One of the criteria is that the applicant have no other recourse. In my opinion, such recourse exists, namely, a tort action seeking damages; indeed, many of the applicants have commenced such an action (*Anglehart*, T-2171-07).

DECLARATION

[31] In this case, I am prepared to declare that the Minister illegally used or sold 1000 metric tons of snow crab to finance departmental research activities and is illegally holding the proceeds of the 2006 sale.

[32] The significance of such a declaration, stating that the Minister acted in excess of his authority, should not be underestimated. We can safely assume that once a statute, regulation or particular course of conduct has been declared *ultra vires*, the Minister will respect the state of law and that further proceedings such as applications for judicial review will not be necessary.

[33] Madam Justice Mactavish held as follows in *Tihomirovs v. Canada (Minister of Citizenship and Immigration)* 2006 FC 197, [2006] 4 F.C.R. 341:

> [119] As the respondent pointed out, the Minister is obliged to follow the law. As a consequence, should the Court ultimately declare that the regulation in question is *ultra vires*, and that members of the proposed class are entitled to have their applications for permanent residence assessed in accordance with the criteria set out in the *Immigration Act*, the Minister will be obliged to act

> accordingly. This will be the case, whether or not individual members of the proposed class assert their right to have their applications treated in this fashion.
>
> [120] As a result, there is no need to ensure that all of the members of the proposed class be party to a class action in order to derive a benefit from a favourable decision in Mr. Tihomirovs' case. Moreover, requiring that notice be given of the litigation and of the court's resolution of the common question will only add unnecessary cost and delay to the process.

[34] The leading case in this area is *LeBar v. Canada*, [1989] 1 FC 603, [1988] F.C.J. No. 940, in which Mr. Justice MacGuigan of the Federal Court of Appeal reviewed the fundamental principles of the declaratory judgment, starting with the original decision in *Dyson v. Attorney General*, [1911] 1 KB 410. He stated the following at paragraph 11 of his decision:

> In my opinion, the necessity for the Government and its officials to obey the law is the fundamental aspect of the principle of the rule of law, which is now enshrined in our Constitution by the preamble to the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982 c. 11 (U.K.)]. This aspect was noted by A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., E.C.S. Wade, 1959, pages 193, 202-203, and was authoritatively established by the Supreme Court in its *per curiam* decision in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at page 748: [1]
>
>> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.

COSTS

[35] Given that the reasons are favourable in part to both parties, I will not rule as to costs.

ORDER

THE COURT ORDERS AND DECLARES that:

1. The extension of time requested for filing this application for judicial review is granted.
2. The application for judicial review is allowed in part.
3. The Minister illegally used or sold a fishing licence for 1000 metric tons of snow crab to finance departmental research activities.
4. The Minister is illegally holding the proceeds of the 2006 sale of 1000 metric tons of snow crab.
5. There is no need for a writ of *mandamus.*
6. Without costs.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1502-06
STYLE OF CAUSE:	JEAN-GILLES CHIASSON ET AL. v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 28, 2008
REASONS FOR ORDER AND ORDER:	The Honourable Mr. Justice Harrington
DATED:	May 16, 2008

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