Federal Court Cour fédérale

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[ENGLISH TRANSLATION]

Ottawa, Ontario, October 19, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ROLAND ANGLEHART JR. ET AL.

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

JUDGMENT AND REASONS

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I. Overview

[1] To the delight of seafood lovers, the commercial snow crab fishery has been operating in the southern Gulf of St. Lawrence since the 1960s, and it is doing well. This fishery has been regulated since 1975, first under a limited entry regime and later under an individual quota [**IQ**] regime.

[2] The plaintiffs are 97 of the 130 members of the traditional mid-shore fleet of crab fishers in Area 12 in the southern Gulf of St. Lawrence—or their assigns or management companies, as applicable—who fished under the limited entry regime and were subsequently assigned an IQ. They are residents of New Brunswick, Quebec, Nova Scotia, and Prince Edward Island.

[3] They are suing Her Majesty the Queen in Right of Canada for actions performed by the Minister of Fisheries and Oceans [the **Minister**] and by Fisheries and Oceans Canada officials [**DFO**] from 2003 to 2006, which allegedly reduced their IQ by 35%.

[4] Under a July 23, 2008, order rendered by Richard Morneau, Prothonotary, the proceedings were divided into two phases; the first will examine the general issues involving all plaintiffs, and the second will examine issues pertaining to each of the plaintiffs individually. I am examining the first of these two phases, and I must rule on the nature of the plaintiffs' rights, on whether they have legitimate expectations, and on the three causes of action the plaintiffs refer to: expropriation, unjust enrichment, and misfeasance in public office.

II. Background and history

A. *1975 – Change from an unregulated fishery to a limited entry fishery*

[5] The first recorded snow crab landings in the southern Gulf of St. Lawrence occurred in the 1960s. Until 1975, this fishery was open to all and subject to very few constraints. Commercial snow crab harvesters had no quotas, and the fishery at the time was a so-called competitive fishery, meaning that every fisher attempted to catch as much crab as possible before the end of the fishing season.

[6] In November 1973, the Department of the Environment, which was responsible for fisheries and ocean sciences at the time, announced the adoption of a limited entry regime for the snow crab fishery in the southern Gulf of St. Lawrence. A snow crab advisory committee was established, made up of fishers, producers (or processing plant owners), federal officials, and provincial officials from the affected provinces. The first meeting took place in May 1974. When the limited entry regime came into effect in 1975, the minister implemented the advisory committee's recommendation that, from 1975 until snow crab stocks were able to support greater fishing effort, only the fishers who fished snow crab on board a vessel in at least one year from 1970 to 1974 inclusively would be eligible for a licence.

[7] There were two objectives to this regime: to control the fishing effort in this area, and thus conserve the stock status, and to ensure the profitability of the fleet.

[8] From 1975 to 1989, the snow crab fishery in area 12 remained a competitive fishery. However, starting in 1984, DFO set an annual total allowable catch [**TAC**], which it announced at the start of each fishing season. The impact of the competitive fishery regime in combination with a TAC was felt, and certain fishers acquired more advanced vessels and gear so they could fish more of the TAC; it was a race for the resource.

[9] Starting in 1987, crab landings dropped. They fell to 7,900 tonnes in 1989, and there was a significant resurgence of white or soft-shell crab. Since soft-shell crabs are moulting and have no commercial value, Area 12 fishers asked DFO to close the fishing season ahead of schedule, and they went home early.

[10] Around the same time, DFO held industry consultations with the different fishers' associations in preparation for establishing a new commercial fishing regime in Eastern Canada. This regime came into effect in January 1989. One of its provisions was to limit the number of fishing licences based on biological and economic considerations.

B. *1990 – Change from a limited entry fishery to an IQ regime*

[11] In the winter after the 1989 fishing season, fishers' associations and the snow crab advisory committee held numerous meetings to discuss the crisis facing the industry that year. Several options were put forth, including a complete closure of the fishery for the 1990 season. They also discussed additional management measures to implement to better conserve the biomass and avoid future collapse.

[12] The minister at the time also decided to take the opportunity to introduce one of the recommendations from a 1982 report entitled *Navigating Troubled Waters – A New Policy for the Atlantic Fisheries – Highlights and Recommendations – Report of the Task Force on Atlantic Fisheries* (Exhibit 27) [commonly known as the **Kirby Report**], which was to implement an IQ regime. IQs were already being used in other fisheries and were seen as a responsible, sustainable way to manage the resource.

[13] This option was presented in advisory committee meetings, and the idea caught on. Representatives of the Association des pêcheurs professionnels acadiens [**APPA**] quickly spoke in favour of IQs. However, representatives of the Association des pêcheurs de crabe du Québec [**APCQ**] and the Association des crabiers et hauturiers du nord-est du Nouveau-Brunswick [**ACHNE**] were more reluctant. Many APCQ and ACHNE fishers had recently purchased larger vessels and were quite successful in the competitive fishery. They were less than pleased about having their catches limited by an IQ.

[14] The supporters of the IQ regime were able to convince the opponents that the new regime was the only way to ensure the short-term profitability of the fleet, and that it would not only allow there to be a 1990 fishing season, but also create a more structured fishing season and better promote the long-term conservation of the biomass. For APPA, this system also protected New Brunswick’s historical shares, which were being overtaken by Quebec.

[15] In fact, the sharing formula was subject to more debate than the IQ regime itself. The more successful fishers wanted the IQ to be set based on historical catches, whereas the others (mainly the APPA members) supported equally distributed IQs. Several sharing formulae were examined before Minister Bernard Valcourt announced an 80–20 formula in the 1990 Fishing Plan (Exhibit 87): 80% of the TAC would be shared equally, and 20% would be distributed based on the historical catches of each fisher.

[16] In the 1990 Fishing Plan, the minister also announced the licence condition that traditional fishers in Area 12 would have to use the services of dockside monitors and at-sea observers. Dockside monitors are responsible for weighing landings to ensure that fishers do not go over their IQs, and at-sea observers accompany the crew and take samples to determine catch composition—size, claw height, percentage of soft-shell crabs, etc. The data collected were forwarded to DFO's science department.

[17] Another consequence of the 1989 crisis was that DFO obtained additional financing from the Treasury Board for 1990–1995 and adopted the Atlantic Fisheries Adjustment Program [**AFAP**], under which a scientific vessel was purchased for snow crab and an annual trawl survey program and soft-shell crab protocol were implemented.

[18] Trawl surveys are performed using a net attached to a vessel. This net scrapes the sea floor at a width of 20 metres. Catches are sampled, and the data collected are forwarded to DFO's science department. Biologists consider trawl surveys one of the best techniques in the world for estimating crab biomass. They are used to study not only the biological development of

crab—reproduction, growth, diseases, etc.—but also various trends. Since trawl surveys are performed after the fishing season, the commercial biomass for the following season can be estimated, as can the increase in juvenile crabs, which will make up the commercial biomass in years to come.

[19] The soft-shell crab protocol adopted in 1990 divided Area 12 into four large sectors. If the percentage of soft-shell crabs in a given sector went over 20%, the sector was closed for the rest of the season. White or soft-shell crabs are crabs that have not yet stopped growing. They generally moult once a year. After growing for about nine years, crabs moult one last time and develop claws at the ends of their front legs. Only adult male crabs may be fished. They reach commercial size one year after their last moult. They may be fished in the following three to four years, and then they become mossy—and lower quality—and die.

[20] Traditional fishers praised AFAP because it contributed to knowledge of the life history of snow crab, provided information on the location of the biomass, and could be used to anticipate catches in future years.

[21] The traditional fleet in Area 12 had 130 fishers in 1990, and the TAC, or the portion of the TAC reserved for this fleet, is still distributed among them according to the same formula or IQ regime.

C. *Crisis in the groundfish and lobster fisheries—temporary wealth and resource sharing*

[22] The 1989 crisis and the knowledge acquired through AFAP made fishers feel accountable and take an interest in resource management.

[23] As for DFO, it was facing new challenges in the 1990s: the collapse of the Atlantic groundfish fishery, the emergence of Aboriginal claims to commercial fisheries, the collapse of the biomass in certain fisheries combined with an abundance of mollusks and crustaceans (especially crab, since crab biomass benefited from new management measures, and shrimp), and the new government's significant budget cuts.

[24] DFO officials and traditional fishers in Area 12 developed close collaboration. Overall, fishers were quite happy with the IQ system, which was a significant culture change. People were now working together; departures from the dock were more structured and there was room for uncertainty. One of the members of ACHNE apparently understood the benefits of this new regime when his vessel broke down at the start of the season. He had time to repair it before going out to catch his IQ. This would not have been possible under a competitive regime.

[25] From 1990 to 1995, the TAC grew considerably, even though the exploitation rate set by DFO remained conservative. The exploitation rate is the percentage of the biomass that makes up the TAC. On average, it was 38.5% in the 1990s. Below is the annual TAC in metric tonnes (mt) for the crab fishery in the first half of the decade:

- 1990: 7,000 mt
- 1991: 10,000 mt

- 1992: 11,200 mt
- 1993: 14,500 mt
- 1994: 20,000 mt
- 1995: 20,000 mt

[26] In these same years, lobster and groundfish stocks decreased, leading to a moratorium on the cod fishery in 1993. At the time, everyone believed, incorrectly, that the moratorium would be short lived.

[27] DFO was under increasing pressure to issue new crab licences to cod fishers affected by this situation. As they were part of the same fishers' associations at the time, cod fishers asked for help directly from their crab fisher colleagues.

[28] Traditional fishers in Area 12 were nervous; there were rumours about new licences being issued in 1993. According to Gastien Godin, then Director General of APPA, they were developing several plans to [TRANSLATION] "protect their territory." One of the ways to do so, in their opinion, was to enter into a long-term agreement with DFO.

[29] In 1993, Minister John Crosbie issued a five-year fishing plan that could be modified if the annual TAC increased by more than 10% or there were significant changes in the crab fishery (Exhibit 122). Traditional fishers were reassured, since they did not believe the TAC would increase by more than 10%.

[30] Over the course of 1994, tensions rose in fishers' associations representing cod and crab fishers. Scientists announced a significant increase in biomass, and crab fishers feared that new licences would be issued. To avoid increasing the fishing effort, traditional fishers offered to share the wealth rather than the resource. Their proposal, which DFO accepted, was to issue a licence to fish 2,000 mt of crab to a newly created entity. Since it would not own any vessels, this entity would have the 2,000 mt of crab fished by crab fishers it designated, which would pay part of their resulting profits to a fund for the cod fishers. The plan was that, of the anticipated value of $1.50 per pound, 30 cents would go to the crab fisher and the rest to the fund. As it happened, the price per pound was $2.60, and the crab fisher kept $1.40 while $1.20 was added to the fund.

[31] AFAP expired after the 1994 fishing season, and DFO began discussions with traditional fishers for them to take over and, through a joint project agreement, continue to fund the trawl survey and soft-shell crab protocol. Given the provisions of the *Fisheries Act*, RSC 1985, c F-14 (which will be discussed below), DFO informed fishers that it could not tie financing of scientific activities to resource sharing, as they wanted, and that financing could not be conditional on an agreement by DFO to stabilize fishing effort (Exhibit 162.1).

[32] Under these circumstances, the government tabled Bill C-115 to modify the *Fisheries Act* (Exhibit 639) so that DFO could enter into long-term joint project agreements with different fisheries, in which it could associate co-management of the fishery with the minister's discretion under the Act. However, neither this bill nor bill C-62, tabled in 1996, was ever adopted in the House of Commons.

[33] The "Joint agreement between the snow crab fishing industry and Fisheries and Oceans Canada on stock assessment of the snow crab and other related research in the Southern Gulf of St. Lawrence (areas 12, 18, 19 and 25/26)" [**1995 Joint Project Agreement**] was entered into on March 3, 1995 (Exhibit 171). One of the provisions of this five-year agreement was that, for 1995, crab fishers would contribute $600,000 to scientific research on snow crab.

[34] Crab fishers saw a clear advantage to continuing to work with DFO and maintaining the annual trawl survey, since DFO's results are used to determine the future biomass and crab concentration areas. They also thought their partnership with DFO would contribute to finding an acceptable fishing plan for 1995 and avoid sharing the resource. They attempted to submit a unanimous proposal to their cod fisher colleagues for a new wealth sharing formula for the 1995 fishing season, but were unable to. Although ACHNE members did not give their consent, a proposal of this type was submitted to the fishers' associations and DFO at the March 30, 1995, advisory committee meeting.

[35] The crab fishers' optimism was short lived, because at this advisory committee meeting, several attendees were requesting new access to the snow crab fishery and asking for resource sharing rather than wealth sharing. After heated argument, representatives of certain crab fishers' associations demanded that DFO throw the new access applicants out of the meeting. According to Gastien Godin, the [TRANSLATION] "harm had already been done," and Minister Brian Tobin rejected their proposal.

[36] Minister Tobin announced his fishing plan on April 13, 1995, and for the first time, he temporarily shared the resource. Out of a TAC of 20,000 mt, 15,500 mt were assigned to traditional fishers in Area 12, and 4,500 mt were assigned to new access applicants (Exhibits 178, 179 and 180). Although the minister specified that this was a temporary, one-time measure to help resolve the groundfish crisis, traditional fishers were greatly disappointed, and they withdrew from the 1995 Joint Project Agreement.

[37] After the fishing season, discussions continued on a new long-term agreement between crab fishers and DFO. The context was favourable, since the government had tabled a second bill, mentioned above, to modify the *Fisheries Act* and allow DFO to associate resource management with the partnerships it entered into with different fishers' associations (Exhibit 641).

[38] On February 8, 1996, DFO and crab fishers entered into a five-year agreement in principle with three components: i) resource sharing above a defined gross income level for traditional fishers; ii) the creation of a fund for non-traditional fishers to rationalize their fishery; and, iii) the participation of traditional fishers in financing DFO activities (Exhibits 214, 216.1 and 217).

[39] However, since Bill C-62 was not in effect—in fact, it died on the order paper after the 1997 election—DFO did not ratify the agreement in principle with crab fishers. As long as there is no change to the *Fisheries Act*, DFO is forced to use a two-pronged approach: implementing an integrated fisheries management plan that complies with the minister's discretion under the

Fisheries Act, and, if applicable, a joint project agreement to fund DFO activities subject to the *Financial Administration Act*, RSC 1985, c F-11.

[40] On April 18, 1996, Minister Fred Mifflin announced the 1996 fishing plan, which maintained the temporary sharing of the resource (Exhibit 226). Once again, traditional fishers were very disappointed, and plant workers joined them in violent protests. Plant workers feared that the temporary sharing would mean landings would go to other plants, and that as a result they would not be able to work enough hours to qualify for employment insurance. The fishers refused to go to sea. They filed an application for an interim injunction to prevent the fishing plan from being executed. The application was rejected, and the fishers discontinued their request with the defendant's consent.

[41] Following a meeting between traditional fishers, Minister Mifflin, and New Brunswick Premier Frank McKenna, a resolution was found and the fishing season began, quite late, at the end of May. The parties agreed to enter into a multi-year agreement for the start of the 1997 fishing season.

[42] While this multi-year agreement was in the works, DFO and crab fishers in areas 25 and 26, two coastal areas north of Prince Edward Island, were entering into discussions to integrate these areas into Area 12. Fishers on Prince Edward Island were struggling, and they wanted DFO to eliminate the border. According to DFO scientists, areas 12, 25 and 26, as well as areas 18 and 19, two coastal areas north of Nova Scotia, were all part of the same biological snow crab unit, and there was no logical reason to separate them. This issue was therefore included in

discussions on entering into a multi-year agreement, and Area 12 crab fishers accepted the integration as an acceptable compromise.

[43] On May 1, 1997, DFO and traditional crab fishers in areas 12, 25 and 26 entered into a "Five-Year Co-Management Agreement" (Exhibits 241 and 250) [**1997 Joint Project Agreement**]. Robert Haché, a representative of the Association des crabiers acadiens Inc. [**ACA**], confirmed that although fishers did not truly negotiate this agreement, it [TRANSLATION] "suited them to a certain point." The document was divided into two separate parts with the explicit goal of complying with the provisions of the *Fisheries Act* that, despite two bills tabled by the government, had still not been amended.

[44] The first part of this agreement contained the Integrated Fisheries Management Plan, meaning the management measures themselves, which set out the TAC and IQs, the implementation of an ice committee, the season opening and closing dates, and soft-shell crab monitoring. An improved soft-shell crab monitoring protocol was introduced in this agreement. Rather than dividing Area 12 into four large sectors, areas 12, 25 and 26 were divided into 280 grids (there were 350 grids in the entire southern Gulf). If the percentage of soft-shell crabs in a given grid went over 20%, the grid was closed for the rest of the season.

[45] Also in this Five-Year Co-Management Agreement, crab fishers agreed for the first time to temporary resource sharing. A sharing formula was adopted wherein the resource would be shared only when profits surpassed $500,000 for the traditional mid-shore fleet. The first 2,000 metric tonnes above this amount would be assigned to non-traditional fishers, and the

excess would be shared 60–40 between traditional crab fishers (60%) and the new access fleet (40%). As a result, temporary resource sharing occurred in 1995, 1996, 1997 and 2001.

[46] Also under the Five-Year Co-Management Agreement, a Solidarity Fund was implemented to help processing plant workers. This was an initiative of the traditional fishers, with the support of DFO, under which they would contribute 15 cents per pound of crab fished to a fund to provide work to plant workers who needed it to complete the required number of weeks to be eligible for employment insurance. At the time, some saw this as a hidden tax imposed by the Government of New Brunswick, while others saw it as a way for crab fishers to honour a promise made to plant workers in exchange for their support in the 1996 conflict. Either way, the auditor general's second report in 1999 (Exhibit 642) contains a section entitled *The Solidarity Funds—Imposition of a Fee That May Not Be Contemplated in Legislation*. It indicates that it is inappropriate for DFO to ensure that a given fisher has contributed to the Solidarity Fund before issuing their licence conditions for the year and thus their IQ.

[47] The second part of the Five-Year Co-Management Agreement contained the Joint Project Agreement and set the financial and non-financial contributions of DFO and fishers' associations to certain DFO activities.

[48] According to Pat Chamut, Assistant Deputy Minister—Fisheries Management, DFO, the 1997 Joint Project Agreement was an important part of the history of crab fishery management in Area 12, both because it ended the 1996 conflict and demonstrated the ability of DFO and crab fishers to work together to manage this fishery, and because it demonstrated that such a joint

project agreement was possible without requiring modifications to the *Fisheries Act*. At least that was the belief at the time!

D. *The* Marshall *decision*

[49] On September 17, 1999, the Supreme Court of Canada rendered its judgement in *R v Marshall*, [1993] 3 SCR 456. The Court affirmed the First Nations right stemming from treaties signed in 1760 and 1761 to practise commercial fishing in pursuit of a "moderate livelihood."

[50] The Treasury Board allocated an initial budget of $160 million to implement a vast federal government initiative to integrate First Nations in Canada into the commercial fishery for all species [**Marshall Initiative**]. The initial phase of this initiative was completed in a few months, and DFO went back to the Treasury Board with a detailed plan including a comprehensive program for buying back licences from traditional fishers and a program to train First Nations in commercial fishing. DFO was allocated a budget of $500 million for this second phase of the Marshall Initiative, which spanned from 2000 to 2007.

[51] DFO decided to buy back licences rather than issue new licences. Everyone agreed that this was the most harmonious way to integrate First Nations into the commercial fisheries that had operated as limited entry fisheries for a number of years.

[52] DFO entered into intense negotiations with 33 First Nations in the Atlantic Region in order to come to agreements and allocate them a portion of the annual TAC of the various fisheries practised there. A number of them were especially interested in snow crab.

[53] Unfortunately for DFO, the buyback program did not meet its objectives for the crab fishery.

[54] First, since the program was not ready for the 2000 fishing season, fishers suggested DFO borrow a portion of their annual TAC to meet its commitments to First Nations and give this quota back to them in 2001, once the program was implemented. DFO accepted, and 1,060 mt of crab were taken off the TAC to be assigned to licences issued to members of First Nations. Starting in 2001, the tonnage allocated to First Nations and to temporary licences under the 1997 Joint Project Agreement was taken from the TAC before quotas were allocated to traditional fishers based on their IQs. From 1,060 mt, the amount was reduced to 911 mt and then 888 mt in later years. Finally, instead of this tonnage being returned to traditional fishers, they were compensated at $2.00 per pound under an agreement with DFO.

[55] Under its licence buyback program, DFO had to determine the value of a snow crab licence. Since the fishery became a limited entry fishery, the only way to enter it has been through succession or by acquiring an existing licence. DFO was aware of these transactions but not of the financial details. However, the ministère de l’Agriculture, des Pêcheries et de l’Alimentation du Québec [**MAPAQ**] had determined that a snow crab licence was worth $1,250,000.00 in 1999. Based on MAPAQ’s assessment, DFO’s initial offer to traditional crab fishers in 2000 was for $13,000 per metric tonne (equivalent to an average price per permit of $1.4 or $1.45 million). Since there was little interest in this offer, DFO quickly raised it to $18,000 per metric tonne. DFO was able to buy back one licence in 2000 and eight in 2001.

[56] In 2001, DFO was still 400 mt of snow crab short of meeting its commitments to First Nations. A committee was implemented to study this issue and, aware that the TAC was falling, traditional crab fishers suggested that DFO change the basis of its evaluation and use a percentage of the IQ rather than tonnage. DFO accepted and set its buyback price at $2.6 million per percentage point (see for example the offer in Exhibit 390).

[57] DFO was still unable to buy back any additional snow crab licences in 2002 and 2003. However, during this same period, certain sales by mutual agreement took place at a price higher than that offered by DFO. For example, Daniel Dubois, a fisher on the Gaspé Peninsula, received an offer of $3.5 million, which he refused.

[58] Faced with the failure of its program, DFO started to explore other options starting in 2003. One licence was bought back in 2004, and the program, which was initially supposed to end on March 31, 2004, was extended, first until March 31, 2006, and then until March 31, 2007. In 2005, negotiations with First Nations had come to a close. In 2006, DFO was still 10.8% short of its initial objective of 15.8% of the TAC of snow crab to meet its commitments, and it was unable to buy back any additional licences.

[59] DFO determined that $37.4 million was required to acquire this portion of the TAC from traditional fishers. DFO developed its final solution, and $37.4 million was taken from the balance of the budget allocated by the Treasury Board to the Marshall Initiative and distributed provincially, prorated for each fishers' IQ. In 2007, all of the plaintiffs signed the financial aid agreement submitted by DFO (see for example Exhibit 606). In fact, DFO was buying back a

part of each fishers' IQ, and the fishers were giving up this part in future. These agreements contained a release, which will be discussed below.

E. *Urgent demands from Area 18 crab fishers*

[60] Minister Robert Thibault took office on January 15, 2002.

[61] In the advisory committee meeting held on February 19, 2002, Fred Kennedy, spokesperson for the Area 18 Crab Fishermen's Association, informed traditional crab fishers in Area 12 and DFO representatives that crab fishers in Area 18 were applying to be integrated into Area 12 with 5.32% of the TAC, the same percentage as awarded to area 25 and 26 crab fishers starting in 1997. Fred Kennedy had been working for this association since 1999, and he was chosen to represent it with DFO. In the 1990s, crab fishers in Area 18, who were struggling to catch their TAC, tried in vain to gain access to Area 12. Their objective was therefore to gain access to starting in the 2002 season. Traditional fishers in Area 12, who were not informed that Area 18 crab fishers would be participating in the February 19, 2002, advisory committee meeting, were opposed to this integration, especially at 5.32% of the TAC.

[62] Minister Thibault announced his first fishing plan on April 8, 2002 (Exhibits 360 and 365), and on April 12—since the 1997 Joint Project Agreement had expired the previous year—he signed a new Joint Project Agreement with fishers' associations [**2002 Joint Project Agreement**] (Exhibit 366). This one-year agreement outlined the financial and non-financial participation of DFO and fishers' associations in DFO activities related to the snow crab fishery; it said nothing about management of the fishery.

[63] Also in April 2002, Minister Thibault held an initial meeting with Fred Kennedy, who presented the demands of Area 18 crab fishers. This meeting was followed by a second meeting in July 2002, in Petit-de-Grat, Nova Scotia, attended by, on the one hand, Fred Kennedy, Bill Broffy, president of the Area 18 Crab Fishermen's Association, and two Area 18 fishers, and on the other hand, Minister Thibault and his colleague Rodger Cuzner, a Liberal MP.

[64] At this time, Minister Thibault publicly confirmed that, barring a very convincing argument to the contrary, he was in favour of integrating Area 18 with Area 12.

[65] However, during the 2002 fishing season, when he was asked whether Area 18 crab fishers could have access to Area 12 to complete their landings for the current year, he went with the recommendation of his senior officials to not reopen the 2002 fishing plan, especially because the 2002 Joint Project Agreement, which bound DFO to the traditional crab fishers' associations in Area 12, was in effect.

F. *New permanent access*

[66] In 2002, Minister Thibault met with representatives of the Maritime Fishermen's Union [**MFU**], who wanted the temporary access to the crab fishery that some of their lobster and groundfish fishers had to become permanent. The MFU planned to use the revenue generated by the snow crab fishery and other revenue to create all sorts of activities, such as ecotourism, to get workers out of the lobster and groundfish fisheries. This is known as rationalization, which means removing a number of fishers from a given fishery to ensure the profitability of those who

remain. For Minister Thibault, the lobster and groundfish fishers' associations wanted a permanent access regime in order to self-rationalize.

[67] In a meeting held in May 2002 in Shippagan, New Brunswick, between Minister Thibault and traditional crab fishers in Area 12, the minister expressed for the first time his desire to resolve once and for all the issue of new access to the snow crab fishery. The minister informed traditional crab fishers that he was prepared to sign a multi-year agreement with them, but that this agreement would have to include permanent access for lobster and groundfish fishers.

G. *The negotiations leading to the 2003 fishing plan*

[68] In fall 2002, DFO asked traditional crab fishers whether they were interested in negotiating a multi-year agreement, and they were. Crab fishers nominated Rémi Bujold, consultant, to represent them, and Jim Jones, Regional Director General (DFO), was nominated as chief negotiator for DFO.

[69] The first negotiation meeting was held on December 16, 2002. At the start of the meeting, Jim Jones informed fishers that the minister wanted permanent access and that they would discuss not the principle itself but the level of access. Crab fishers were still unsure what was meant by permanent sharing, but for Jim Jones, it was clear: it meant a constant share every year for the new access fleet. The Marshall Initiative and the integration of Area 18 were also discussed, and crab fishers agreed with DFO to submit an initial multi-year agreement proposal.

[70] After this first meeting, Minister Thibault wrote to Fred Kennedy, inviting him to meet with Area 12 fishers to explain his point of view. However, he informed him that he found 5.32% high, since historically, catches by fishers in areas 25 and 26 were higher than those in Area 18, and could not be used as a reference point.

[71] On January 20, 2003, crab fishers submitted their agreement proposal, which included three years of co-management (Exhibits 405.2 and 678). They also suggested sharing the resource as follows: the first 20,000 metric tonnes would go to traditional crab fishers (this number would include the First Nations' share), the next 2,000 metric tonnes would go to new access fishers, and the excess, if there was any, would be shared with 70% going to traditional crab fishers and 30% to new access fishers. This proposal completely rejected the integration of Area 18.

[72] The second negotiation meeting was held on January 24, 2003. In the morning, Minister Thibault was at the mid-shore conference, and his main topic of discussion was his desire to implement permanent resource sharing in the crab fishery. The minister set the tone for the negotiation meeting that was held that afternoon. All issues were discussed, and Jim Jones reacted to the January 20 proposal. He clearly stated that the issue of access to the resource was a problem. The meeting did not go especially well, but the parties still hoped to arrive at an agreement before the fishing plan was announced.

[73] The third meeting was held on February 14, 2003. Jim Jones repeated that the minister was committed to implementing a permanent resource sharing regime; Dominic Leblanc, MP for Beauséjour, had even announced this a few days before the meeting. Jim Jones stated for the first time that the objective was for 10 to 20% of the TAC to go to the new access fleet. The Marshall Initiative was also a significant issue at this meeting, and there was concern about the lack of success of the licence buyback program.

[74] On February 17, 2003, Jim Jones wrote to Rémi Bujold, repeating that he was concerned that crab fishers' position on permanent sharing had not changed (Exhibit 412). On March 10, 2003, he repeated this again when he informed crab fishers that he could not discuss their January 20 proposal until they made progress on the crucial issue of resource sharing (Exhibit 421).

[75] After this third meeting, crab fishers held a press conference, which, according to Jim Jones, further damaged the tone of negotiations.

[76] The final meeting was held on March 25, 2003. At the start, Jim Jones informed participants that he intended to give DFO's position on the January 20, 2003, proposal and deliver a verbal counter-proposal to the crab fishers. He confirmed that DFO was in agreement with all aspects of the proposal pertaining to the crab fishers' financing of its activities. However, this proposal did not meet the minister's objectives for permanent sharing and the integration of Area 18. He informed them that the only item he was able to discuss with them was the percentage of the TAC that would be allocated to new access applicants and Area 18

crab fishers. At the end of the meeting, Robert Haché asked Jim Jones what DFO's counter-proposal had in it for them, to which Jim Jones answered, the possibility of implementing an Individual Transferable Quota [**ITQ**] regime. If crab fishing businesses were no longer profitable under the new measures, this type of regime would allow them to buy a portion of another crab fisher's IQ to increase their income.

[77] No progress was made at this meeting. Jim Jones suggested that if Rémi Bujold was able to get crab fishers to agree to permanent sharing of 10% of the TAC, he would try to convince the minister. He also suggested that crab fishers meet with the minister to attempt to find a resolution.

[78] A meeting was scheduled for April 8, but Monique Baker, Crustacean Management Officer (Gulf Region) with DFO, did not wait for this meeting and started drafting the decision note to the minister in preparation for the 2003 fishing plan (Exhibit 440).

[79] On April 2, 2003, Rémi Bujold wrote to the association representatives that negotiations had failed (for example, Exhibits 425 and 426.1). He also restated his concern about their lack of desire to truly negotiate.

[80] At the April 8, 2003, meeting, Minister Thibault repeated that there would be permanent sharing and that crab fishers would have to accept this for productive discussions to be able to occur. He informed that initially, quotas would be issued to fishers' associations, which would distribute them to their members, but eventually, he planned to implement an ITQ regime. He

believed that the transferability would allow fishers to recover some of the lost quota. Fishers, however, did not draw the same conclusions.

H. *The 2003 fishing plan*

[81] On Friday, May 2, 2003, the minister announced his "Three-Year Snow Crab Management Plan for the Southern Gulf" (Exhibits 441 and 443). This plan integrated Area 18 into Area 12, except for a buffer zone along the Area 19 boundary, and assigned 4.7081% of the TAC of the new combined area to Area 18 fishers. It also reserved 15% of the TAC for new access fishers' associations for the three years covered by the fishing plan, and stated that the purpose of this sharing was to support rationalization. However, the TAC and management measures would be set every year. For 2003, the minister set the TAC at 17,148 mt; 11,702 mt were allocated to traditional fishers in Area 12 (including the former areas 25 and 26), 578 mt were allocated to fishers in Area 18, 2,701 mt were allocated to First Nations, and 2,167 mt were allocated to new access associations and fishers.

[82] Since negotiations with traditional fishers were unsuccessful, there was no joint project agreement, the regular soft-shell crab protocol was reinstated (Area 12 was divided into four large sectors), and there would be no trawl survey after the fishing season.

[83] Contrary to a well-established practise, crab fishers were not notified in advance of the contents of the fishing plan. They were informed through the media and received the fishing plan only at the end of the day on Friday. Jim Jones admitted that it was an embarrassing situation for local DFO representatives.

[84] Crab fishers' associations tried without success to calm their members down, and they informed them that they would ask the courts to strike down the fishing plan. But the fishers reacted immediately and violently. Over the weekend, protests broke out, and angry crab fishers set fire to buildings and patrol vessels and vandalized local DFO offices. They also threatened to boycott the fishing season.

[85] On Monday, May 5, 2003, traditional fishers in Area 12 held an emergency meeting to discuss the situation. The minutes from this meeting (Exhibit 444) show that they maintained their position: no integration of Area 18, no sharing in 2003, and 20,000 mt for traditional fishers and First Nations. A demand to this effect was delivered to the minister by Rémi Bujold; it informed him that if he accepted, crab fishers were prepared to fund scientific activities and the management program. The minister refused, and Rémi Bujold was dismissed. That afternoon, the minister told the media that he was prepared to increase the TAC by 3,000 to 4,000 mt if crab fishers would sign a joint project agreement with DFO.

[86] Crab fishers submitted a new proposal to the minister (Exhibit 466, p. 9): if the minister increased the TAC to 21,600 mt, they would agree to integrating Area 18 without removing the buffer zone. This new proposal was discussed at a meeting between the minister and crab fishers. The minister repeated that he would increase the TAC by 3,000 mt to 4,000 mt if traditional crab fishers would sign a joint project agreement stating that they would provide $1.7 million to fund DFO activities. He specified that this increase would also be shared with new access and Area 18 fishers, but that the $1.7 million would be paid only by Area 12 traditional fishers. A written

offer was submitted to fishers the same day (Exhibit 469). This offer was also refused, but crab fishers conceded to go to sea, and the season, though late, occurred as usual.

I. *The use of part of the TAC to fund DFO activities*

[87] In 2003, since there was no joint project agreement between DFO and crab fishers, DFO developed a plan to fund the trawl survey performed after each season. It decided to use 50 mt of snow crab (for an approximate value of $300 000), not fished by First Nations, to fund the trawl survey. DFO issued a call for proposals and awarded the contract to Joey Desveaux.

[88] In 2004, DFO also decided to use part of the TAC to fund its activities. In his fishing plan (Exhibit 498), Minister Geoff Regan announced that 400 mt would be used to fund various DFO activities. Several DFO departments were consulted, and they estimated the costs of various activities. DFO again issued a call for proposals (Exhibit 635), and the Regroupement des pêcheurs professionnels des Îles-de-la-Madeleine [**RPPIM**] was awarded the contract. DFO and RPPIM signed a joint project agreement (Exhibit 531.1), which stated that RPPIM would contribute $1.5 million to the following DFO activities: the trawl survey, the improved soft-shell crab protocol, scientific analysis and increased catch monitoring. It also stated that RPPIM would manage its allocation of 400 mt of crab by awarding quotas to fishers in exchange for compensation.

[89] DFO followed the same process for 2005. Its call for proposals (Exhibit 553) stated that it was seeking $1.9 million to fund its research activities and that a 480 mt snow crab allocation would be made available to the successful bidder to distribute to its members. The Acadian

Groundfish Fisherman's Association [**AGFA**] was awarded the contract and signed a joint project agreement with DFO (Exhibit 560).

[90] AGFA was also awarded the contract in 2006 under the same process (Exhibit 630) and signed a joint project agreement under which AGFA would contribute $1.5 million to fund DFO activities in return for an allocation of 1,000 mt of snow crab (Exhibit 590).

J. *The legal proceedings*

[91] Initially, the plaintiffs filed an application for judicial review before this Court to have the 2003 fishing plan declared illegal and revoke it. This application was then discontinued, and this case was established on July 11, 2007. In their case, the plaintiffs are asking the defendant to be ordered to pay to them:

> a) Compensation for the loss of profits experienced in 2003, 2004, 2005, 2006, 2007 and 2008 on the grounds of acts by DFO.
>
> b) Compensation for the drop in value of the plaintiffs' fishery enterprises.
>
> c) General and punitive damages.
>
> d) Damages for loss of future income.
>
> e) Restitution of the value of benefits appropriated by DFO to the plaintiffs' detriment.
>
> e.1) Compensation for the plaintiffs' rights or interests that were either expropriated by DFO or of which the plaintiffs were deprived.
>
> f) Interest calculated on the amount of damages pre-judgement and post-judgement.
>
> g) Costs and disbursements.

h) All other relief that this Court may consider fair and equitable.

III. Issues and remedies sought in this phase of the case

[92] In a document entitled [TRANSLATION] "Concise joint list of issues to be decided in the proceedings" and signed by the parties on May 29, 2013 (Trial Record, tab 13), the parties listed the following issues to be decided in the first phase of hearings:

> [TRANSLATION]
>
> **Regarding expropriation**
>
> **WHEREAS**, in the second phase, individual evidence about the plaintiffs' conduct, behaviour, knowledge, beliefs, and personal views relevant at any time may negate their individual rights to compensation based on the alleged expropriation; and
>
> **WHEREAS** the plaintiffs demonstrate and establish, in the second phase, the extent and value of the rights and commercial assets they allege were expropriated from them;
>
> A) Is the behaviour of the minister of Fisheries and Oceans Canada and its officials (collectively DFO) likely to constitute an expropriation of the portion of rights or bundle of rights or commercial assets alleged by the plaintiffs? In particular:
>
> i) Are the alleged rights, alleged bundle of rights (or a portion thereof) and alleged commercial assets "property" or a form of "property" or interest that can be expropriated? If yes:
>
> ii) Did DFO subtract a portion of the rights, the bundle of rights or the commercial assets alleged by the plaintiffs?
>
> iii) Did DFO's actions result in an appropriation of rights, the bundle of rights or commercial assets alleged by the plaintiffs? If yes:
>
> iv) For there to be expropriation, is there a legal requirement for the Crown to have kept the profit

for itself or entirely destroyed the property or interest in question?

v) If yes, did the Crown, in this case, keep the profit for itself or entirely destroy the expropriated property or interest?

vi) Is a partial deprivation of the alleged rights, bundle of rights or commercial assets likely to lead to a legal finding of expropriation?

vii) If yes, did DFO, in this case, deprive the plaintiffs of the alleged rights, bundle of rights or commercial assets?

B) If yes, does such an expropriation entail a requirement to compensate the plaintiffs?

Regarding unjust enrichment

WHEREAS the plaintiffs allege, with respect to the deprivation criterion, that they were deprived of a portion of the TAC and the resulting income;

WHEREAS the plaintiffs allege, with respect to the deprivation criterion, that the alleged allocation of the TAC decreased the value of their businesses;

WHEREAS the issue of whether the plaintiffs individually suffered deprivation or prejudice will be decided only in the second trial;

WHEREAS the extent of this deprivation or prejudice will be decided only in the second trial;

C) Did the alleged acts and omissions likely allow DFO to enrich itself without cause at the expense of the plaintiffs? In particular:

i) Did DFO enrich itself through the alleged use of snow crab to fund its activities, its rationalization programs, and its program to integrate Aboriginal fishers into the commercial fishery?

ii) Do the alleged deprivation of a portion of the TAC to which the plaintiffs allege they have a right, the resulting income, and the alleged decrease in the value of the plaintiffs' businesses likely constitute

a deprivation of the plaintiffs corresponding to the alleged enrichment of DFO?

iii) Are there legal grounds justifying the alleged enrichment of DFO?

iv) Does the defence of change of position apply to this case?

Regarding misfeasance in public office

WHEREAS the following issues will be decided, if this Court deems it necessary, in the second phase: whether the plaintiffs suffered a prejudice, whether the prejudice suffered was legally caused by the alleged tortious conduct, and whether the alleged prejudice may be subject to compensation according to the rule of law in tortious matters;

D) Does the Crown have immunity in this case from the tort of misfeasance in public office?

E) For there to be misfeasance in public office, is it necessary to establish a legal obligation of DFO of which the plaintiffs were deprived? If yes, was there one in this case?

F) Did DFO behave such that the criteria related to the common issues of tort of misfeasance in public office are met as regards the following allegations:

i) The reduction of the TAC by approximately 4,000 tonnes in 2003 to impose a financial contribution requirement on the plaintiffs in return for an increase in the TAC?

ii) The financing of DFO activities using the fishery resource?

iii) The use of snow crab to force the implementation of lobster and groundfish fishery rationalization programs?

iv) The use of snow crab for programs to integrate Aboriginal fishers into the commercial fishery?

v) The determination of the portion of the TAC to be allocated to Area 18 fishers when this area was integrated with areas 12, 25 and 26?

Regarding legitimate expectations

WHEREAS determination of whether or not the plaintiffs had legitimate expectations likely depends on the evidence that will be presented in the second phase;

G) Can the doctrine of legitimate expectations constitute a cause of action raising the possibility of damages and interest?

H) Are the alleged actions of DFO and the specific circumstances of this case likely to have caused the plaintiffs' alleged legitimate expectations?

Regarding compensation paid by the Crown

I) Does the compensation paid or payable by the Crown to certain snow crab licence holders in areas 12, 18, 25 and 26 after the 2006 fishing season constitute a total or partial barrier to the plaintiffs' claim regarding the integration of Aboriginal fishers into the commercial snow crab fishery?

[93] At the hearing, counsel for the plaintiffs filed an additional document entitled [TRANSLATION] "Findings sought by plaintiffs at first phase," which sets out the declarations they seek as follows:

[TRANSLATION]

A. REGARDING EXPROPRIATION

Allocations to Aboriginal bands

DECLARE that the reduction in IQ for each plaintiff resulting from the allocation to Aboriginal bands of the following portions of the TAC constituted an expropriation of the plaintiffs' rights for which they are entitled to compensation:

2,701 metric tonnes (t) (15.7511%) of the 2003 TAC;

4,128 t (15.5188%) of the 2004 TAC;

5,038 t (15.5802%) of the 2005 TAC;

3,933 t (15.2035%) of the 2006 TAC.

Financing of DFO operations

DECLARE that the reduction in IQ for each plaintiff resulting from the use of the following portions of the TAC to fund DFO operations constituted an expropriation of the plaintiffs' rights for which they are entitled to compensation: 400 t in 2004, 480 t in 2005 and 1,000 t in 2006.

Integration of Area 18

DECLARE that the reduction in IQ for each plaintiff resulting from the allocation of 4.7081% of the TAC to Area 18 fishers after 2003 constituted an expropriation of the plaintiffs' rights for which they are entitled to compensation.

New access and rationalization

DECLARE that the reduction in IQ for each plaintiff resulting from the allocation of 15% of the TAC to new access fishers and associations after 2003 constituted an expropriation of the plaintiffs' rights for which they are entitled to compensation.

ALTERNATIVELY, DECLARE that the reduction in IQ for each plaintiff resulting from the allocation of 15% of the TAC to new access fishers and associations from 2003 to 2006 constituted an expropriation of the plaintiffs' rights for which they are entitled to compensation.

B. REGARDING UNJUST ENRICHMENT

Financing of DFO operations

DECLARE that the use of the following portions of the TAC to fund DFO operations, and the correlative reduction in IQ for each plaintiff, resulted in unjust enrichment of the defendant for which the plaintiffs are entitled to compensation: 400 t in 2004, 480 t in 2005 and 1,000 t in 2006.

Rationalization

DECLARE that the allocation of 15% of the TAC to new access fishers and associations from 2003 to 2006, and the correlative reduction in IQ for each plaintiff, resulted in unjust enrichment of the defendant for which the plaintiffs are entitled to compensation.

Allocations to Aboriginal bands

DECLARE that the allocation of the following portions of the TAC to Aboriginal bands, and the correlative reduction in IQ for each plaintiff, resulted in unjust enrichment of the defendant for which the plaintiffs are entitled to compensation:

2,701 t (15.7511%) of the 2003 TAC;

4,128 t (15.5188%) of the 2004 TAC;

5,038 t (15.5802%) of the 2005 TAC;

3,933 t (15.2035%) of the 2006 TAC.

C. REGARDING MISFEASANCE IN PUBLIC OFFICE

Financing of DFO operations

DECLARE that DFO committed the tort of misfeasance in public office for which the defendant is liable by using 400 t of snow crab in 2004, 480 t of snow crab in 2005 and 1,000 t of snow crab in 2006 to fund its operations, thereby causing injury to the plaintiffs for which they are entitled to compensation.

Rationalization

DECLARE that DFO committed the tort of misfeasance in public office for which the defendant is liable by allocating 15% of the TAC to new access fishers and associations from 2003 to 2006, thereby causing injury to the plaintiffs for which they are entitled to compensation.

Integration of Area 18

DECLARE that DFO committed the tort of misfeasance in public office for which the defendant is liable by allocating 4.7081% of the TAC to Area 18 fishers after 2003, thereby causing injury to the plaintiffs for which they are entitled to compensation.

Reduction in 2003 TAC

DECLARE that DFO committed the tort of misfeasance in public office for which the defendant is liable by reducing the TAC from 21,621 t to 17,148 t in 2003, thereby causing injury to the plaintiffs for which they are entitled to compensation.

Punitive damages

DECLARE that the plaintiffs are entitled to punitive damages.

[94] Counsel for the defendant objects to the plaintiffs supplementing the list of issues identified at the preliminary stage of the proceedings and asks the Court to rely on the joint document dated May 29, 2013.

[95] First, I do not believe that these two documents are necessarily mutually exclusive. From the issues identified, there generally arises a certain number of conclusions to which the Court arrives. Second, I am not bound by the suggestions of counsel in this regard and will make only those findings that, in my view, arise from the evidence and the arguments presented by the parties, within the limits of this first part of the split proceedings.

[96] That said, I will first address an objection to the evidence raised by the defendant during the proceedings, which I took under reserve. I will then comment on the nature of the plaintiffs' rights, their legitimate expectations, and the three alleged causes of action, namely expropriation, unjust enrichment and misfeasance in public office on the part of the Minister and DFO officials.

IV. Analysis

A. *Preliminary issue: Objection to the filing of the Crown's notice of appeal in* Haché v. The Queen*, 2006-3736(IT)G (Exhibit 601) and of Appendix A of the outline of the plaintiffs' submissions in* Canada v. Haché*, A-44-10 (Exhibit 615)*

[97] These two pleadings pertain to Tax Court of Canada (TCC 2006-3736(IT)G; Exhibit 601) and Federal Court of Appeal (A-44-10; Exhibit 615) decisions in a case pitting Gildard Haché, a

traditional Area 12 crabber, against the Canada Revenue Agency, as a result of the former challenging a notice of assessment issued by the latter [**Haché Case**]. Gildard Haché is among the traditional crabbers who agreed to sell their fishing licences to DFO and abandon all privileges associated with the licences in exchange for payment as part of the *Marshall* licence buyback program. The authenticity of these documents is admitted for the purposes of production, but the defendant objects to their production on the ground that they have no relevance in this case.

[98] Essentially, in these documents, the federal Crown argues that Gildard Haché's snow crab licence gave him [TRANSLATION] "the right to renew the licence year after year" and that [TRANSLATION] "[this] right to renew year after year is a right exclusive to the licence holder," which means that it constitutes [TRANSLATION] "eligible capital property related . . . to the fishing enterprise" of the taxpayer (Exhibit 601, page 639). The capital gain realized during the sale of this property is therefore taxable as such under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) [**ITA**].

[99] This evidence is relevant in this case, and despite the defendant's attempt to take before this Court a somewhat different position, namely, that the fishing licence confers on the holder only rights for the year during which it was issued, all of the evidence adduced at the hearing confirms, in regards to the right to renew and the exclusivity attached to the licence, the position taken by the Crown in the Haché Case.

[100] However, the issue of whether the argument that it is property within the meaning of subsection 248(1) of the ITA, which was accepted by the Federal Court of Appeal, should have any impact on the characterization of the licence and of the rights that it confers for the purposes of the *Fisheries Act*, is entirely different. This is a question of law that cannot be the subject of an admission and that must be determined by this Court. In other words, this evidence is relevant only for the admissions of fact it contains. The defendant's objection to the evidence is therefore rejected.

B. *Nature of the rights and interests alleged by the plaintiffs underlying each cause of action*

(1) Parties' positions

[101] At the outset, the plaintiffs submit that while the causes of action raised in support of this action are not new, this is the first time that a court that has the benefit of a full factual record has to determine, on the merits, the true nature of the rights of fishing licence holders in the context of an exclusive fishery with IQs.

[102] They rely heavily on the decisions of the Supreme Court of Canada in *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 and of the Federal Court of Appeal in *Canada v. Haché*, 2011 FCA 104 in an attempt to persuade the Court that a fishing licence is property that confers on its holder a property or quasi-property right in the IQ associated with it.

[103] They acknowledge that there is a great deal of case law where, whether in applications for judicial review of federal Crown activities or other proceedings brought against the Crown, the courts recognized the Minister's broad discretion under section 7 of the *Fisheries Act*. According to the plaintiffs, however, this case law does not preclude a favourable finding by the Court in regards to each of the causes of action raised.

[104] They argue that their rights vested in 1990, when the competitive fishery was transformed into an IQ fishery, with an IQ being assigned to each plaintiff or their assign. They cite portions of the Kirby Report and comments from the Minister at that time (the Honourable Pierre de Bané) to conclude that a quasi-property right in their IQs was conferred on traditional crabbers, that is, the right to obtain, year after year, a predetermined portion of the TAC announced by DFO. They argue that when the IQ policy was adopted, the fishery went from being common property to being individual and exclusive property and that, consequently, the policy transformed crabbers' licences into true commercial assets that can be inherited, sold or otherwise transferred.

[105] The defendant, in turn, argues that the plaintiffs' snow crab licences do not entitle them to a predetermined portion of the TAC, apart from what is granted to them by licence condition, for a given year. Relying on the legislation, regulations and ample case law, the defendant submits that fisheries are a common property resource, belonging to all Canadians, and that the Minister cannot abdicate his discretion to manage Canada's fisheries to issue commercial fishing licences for each fishery.

(2) Relevant legislation

[106] The relevant provisions of the *Fisheries Act* and the *Fishery (General) Regulations*, SOR/93-53 are as follows:

Fisheries Act	*Loi sur les pêches*
Fishery leases and licences	**Baux, permis et licences de pêche**
7 (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.	**7 (1)** En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences d'exploitation de pêcheries — ou en permettre l'octroi —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.
Idem	**Réserve**
(2) Except as otherwise provided in this Act, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.	**(2)** Sous réserve des autres dispositions de la présente loi, l'octroi de baux, permis et licences pour un terme supérieur à neuf ans est subordonné à l'autorisation du gouverneur général en conseil.
Fees	**Droits**
8 Except where licence fees are prescribed in this Act, the Governor in Council may prescribe the fees that are to be charged for fishery or fishing licences.	**8** Le gouverneur en conseil peut fixer les droits exigibles pour les licences d'exploitation ou les permis de pêche à l'égard desquels aucun droit n'est déjà prévu par la présente loi.
. . .	[…]

Allocation of fish

10 (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may determine a quantity of fish or of fishing gear and equipment that may be allocated for the purpose of financing scientific and fisheries management activities that are described in a joint project agreement entered into with any person or body, or any federal or provincial minister, department or agency.

Allocation de poisson

10 (1) Le ministre peut, pour la gestion et la surveillance judicieuses des pêches et pour la conservation et la protection du poisson, déterminer une quantité de poisson ou d'engins et d'équipements de pêche pouvant être allouée en vue du financement des activités scientifiques et de gestion des pêches visées dans des accords de projets conjoints conclus avec toute personne ou tout organisme ou tout ministre, ministère ou organisme fédéral ou provincial.

Quantity in licence

(2) The Minister may specify, in a licence issued under this Act, a quantity of fish or of fishing gear and equipment allocated for the purpose of financing those activities.

Quantité visée par un permis

(2) Le ministre peut, sur le permis octroyé en vertu de la présente loi, indiquer la quantité de poisson ou d'engins et d'équipements de pêche allouée en vue de ce financement.

. . .

[…]

Regulations

43 (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

. . .

(f) respecting the issue, suspension and cancellation of

Règlements

43 (1) Le gouverneur en conseil peut prendre des règlements d'application de la présente loi, notamment :

[…]

f) concernant la délivrance, la suspension et la révocation des

licences and leases;	licences, permis et baux;
(g) respecting the terms and conditions under which a licence and lease may be issued;	**g)** concernant les conditions attachées aux licences, permis et baux;
Fishery (General) Regulations	*Règlement de pêche (disposition générales)*
Interpretation	**Définitions**
2 In these Regulations,	**2** Les définitions qui suivent s'appliquent au présent règlement.
. . .	[…]
document means a licence, fisher's registration card or vessel registration card that grants a legal privilege to engage in fishing or any other activity related to fishing and fisheries; (document)	***document*** Permis, carte d'enregistrement de pêcheur ou carte d'enregistrement de bateau accordant le privilège légal de pratiquer la pêche ou des activités relatives à la pêche et aux pêches en général. (document)
Expiration of Documents	**Date d'expiration des documents**
10 Unless otherwise specified in a document, a document expires	**10** Sauf indication contraire dans le document, celui-ci expire à l'une des dates suivantes :
(a) where it is issued for a calendar year, on December 31 of the year for which it is issued; or	**a)** le 31 décembre de l'année pour laquelle il a été délivré, s'il est délivré pour une année civile;
(b) where it is issued for a fiscal year, on March 31 of the year for which it is issued.	**b)** le 31 mars de l'année pour laquelle il a été délivré, s'il est délivré pour un exercice.
. . .	[…]
Transfer of Documents and	**Transfert des documents et**

Rights and Privileges	**droits et privilèges**
16 (1) A document is the property of the Crown and is not transferable.	**16 (1)** Tout document appartient à la Couronne et est incessible.
(2) The issuance of a document of any type to any person does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type.	**(2)** La délivrance d'un document quelconque à une personne n'implique ou ne lui confère aucun droit ou privilège futur quant à l'obtention d'un document du même type ou non.
. . .	[…]
Conditions of Licences	**Conditions des permis**
22 (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition that is not inconsistent with these Regulations or any of the Regulations listed in subsection 3(4) and in particular, but not restricting the generality of the foregoing, may specify conditions respecting any of the following matters:	**22 (1)** Pour une gestion et une surveillance judicieuses des pêches et pour la conservation et la protection du poisson, le ministre peut indiquer sur un permis toute condition compatible avec le présent règlement et avec les règlements énumérés au paragraphe 3(4), notamment une ou plusieurs des conditions concernant ce qui suit :
(a) the species of fish and quantities thereof that are permitted to be taken or transported;	**a)** les espèces et quantités de poissons qui peuvent être prises ou transportées;
. . .	[…]
(g) the vessel that is permitted to be used and the persons who are permitted to operate it;	**g)** le bateau qui peut être utilisé et les personnes qui peuvent l'exploiter;

(3) *Saulnier* and *Haché*

[107] I agree with the defendant that these decisions are not determinative in this case and offer no relevant insight into the nature of the plaintiffs' rights.

[108] In *Saulnier*, the appellant, who had granted the respondent bank a general security agreement over all present and after acquired personal property, tangible and intangible, of the appellant, denied that his four fishing licences were property that could be seized by the trustee in bankruptcy. The Supreme Court of Canada, per Justice Binnie, held that a fishing licence constituted property within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [**BIA**] and the Nova Scotia *Personal Property Security Act*, S.N.S. 1995-96, c. 13 [**PPSA**]. According to the Court, it is a major commercial asset that confers on the holder a right to engage in an exclusive fishery under the conditions imposed by the licence, and a property right in the fish harvested and the earnings from their sale. Given the specific purposes of the BIA and its broad definition of property in section 2, the bundle of rights thus conferred on the licence holder must be considered as property for the purposes of the BIA and the PPSA. Moreover, a fisher's other assets have little value without authorization to engage in commercial fishing. Consequently, in order for the purposes of the BIA to be achieved, Parliament needed to include this asset, which is not normally considered property at common law but is needed to operate a commercial fishing enterprise.

[109] However, Justice Binnie reassured the Attorney General of Canada and added that this holding should not be taken out of context:

> [48] Counsel for the Attorney General of Canada was greatly concerned that a holding that the fishing licence is property in the hands of the holder even for limited statutory purposes might be raised in future litigation to fetter the Minister's discretion, but I do

> not think this concern is well founded. The licence is a creature of the regulatory system. Section 7(1) of the *Fisheries Act* speaks of the Minister's "absolute discretion". The Minister gives and the Minister (when acting properly within his jurisdiction under s. 9 of the Act) can take away, according to the exigencies of his or her management of the fisheries. The statute defines the nature of the holder's interest, and this interest is not expanded by our decision that a fishing licence qualifies for inclusion as "property" for certain statutory purposes.

[110] This warning from Justice Binnie was well understood by the Federal Court of Appeal in *Doug Kimoto v. Canada (Attorney General)*, 2011 FCA 291. In that case, the appellants, Pacific salmon fishers, argued that the Canada-United States treaty stipulating that the United States would pay $30 million in exchange for a commitment by Canada to reduce Pacific salmon fishing effort constituted an expropriation of their rights without compensation. The Court stated as follows at paragraph 12 of its reasons:

> [12] Even if the Treaty permits the U.S. Fund to be used for a fishery-wide mitigation program, the appellants claim they have a property right in the fish that will now remain uncaught. This, they say, renders the program an expropriation which must be explicitly authorized by the FAA. In support of their argument, they rely on *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 (CanLII), [2008] 3 S.C.R. 166 (*Saulnier*). In our view, this argument is ill-founded. The appellants' proposition is the antithesis of fisheries being the common property of all, a principle deeply ingrained in Canadian law. Moreover, *Saulnier* does not advance the appellants' argument. *Saulnier* addressed the question whether a fishing licence could fall within the statutory definition of "property" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and the *Nova Scotia Personal Property Security Act*, S.N.S. 1995-96, c. 13. In holding that it could, Justice Binnie, at paragraph 48, specifically cautioned that the ruling did not expand the nature of a licence holder's interest as defined in the *Fisheries Act*, R.S.C. 1985, c. F-14 beyond the particular statutory context before the court. Consequently, this prong of the appellants' argument must fail.

[111] In *Haché*, the question, which is just as specific, was whether the $2.5 million paid to the respondent by DFO as part of the *Marshall* licence buyback program was taxable as a capital gain To answer this question, the Federal Court of Appeal had to determine whether a fishing licence constituted property within the meaning of the ITA, a question the Tax Court of Canada had previously answered in the negative. To counter the argument accepted by the trial judge to the effect that Mr. Haché's licence could not constitute property because it had expired at the time of the transaction, Justice Trudel, like Justice Binnie in *Saulnier*, brought up the commercial reality in that industry. She stated that licences were in fact renewed from one year to the next and that departmental policy protected those who already held licences to promote industry stability. In light of the evidence adduced, the Federal Court of Appeal simply concluded that based on the total amount paid by DFO, the parties had determined that the [TRANSLATION] "asking price for full licence packet" did not take into account whether or not Mr. Haché's licences were valid. Consequently, the parties were negotiating on property, and Mr. Haché was claiming this sum as consideration for the disposition of a "right of any kind whatever" within the meaning of the ITA.

[112] I therefore conclude that the scope of these decisions is limited to the legislative context in which they were rendered. They do not apply in this case and are of no assistance in determining the nature of the interests conferred by a commercial fishing licence on its holder, in an IQ or in a predetermined portion of the TAC. Instead, I find it appropriate to turn to the relevant legislation and regulations and to the interpretation given to them by the courts. Just as in *Saulnier* and *Haché*, where the courts interpreted the BIA and the ITA in light of the specific

purposes of these statutes, my task is to interpret the *Fisheries Act* in light of its intended purposes and those of the regulations thereunder.

[113] However, before I begin my analysis, I would add that I do not agree with the plaintiffs that when the fishery went from being a competitive fishery to being an IQ fishery, the Minister granted them an actual quasi-property right in the IQ assigned to each of them.

[114] First, the bundle of rights described by Justice Bennie in *Saulnier* covers a property right in the fish harvested and the earnings from their sale, not in a quota of uncaught fish. Even for the purposes of applying the BIA, the Supreme Court of Canada recognized that Canada's fisheries were a common property resource.

[115] Second, as noted below, there is a distinction between a limited-entry policy—whether it is a competitive or an IQ fishery—which flows from the Minister's broad duty to manage, conserve and develop the fishery, and the granting of a quasi-property right in this resource. While a DFO policy may favour the plaintiffs in that it provides for exclusive access to the snow crab fishery, this policy is a simple management measure that does not grant the plaintiffs any property rights in the resource or any vested right to any portion of the TAC.

(4) Nature of the rights under a fishing licence

[116] The courts have had many opportunities to formulate and follow the golden rule applicable in fishery matters, and it justifies the broad interpretation that must be given to the Minister's discretion under section 7 of the *Fisheries Act*: "Canada's fisheries are a 'common

property resource'" and "it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). Licensing is a tool in the arsenal of powers available to the Minister under the *Fisheries Act* to manage fisheries. It restricts the entry into the commercial fishery, it limits the numbers of fishermen, vessels, gear and other aspects of commercial fishery" (*Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, at paragraph 37).

[117] In several regions of Canada, fishing is an important economic activity; it generates many local jobs and economic benefits, and fish are an essential part of Canadians' diets. So the purpose of the overall policy of the *Fisheries Act* is to make the best use of this resource, or to use it in a way that advances not only these economic objectives, but also the profitability of the different fleets and the long-term conservation and protection of the resource—a tricky balance to strike.

[118] In order to achieve this balance, the Minister has a broad discretion, and the courts will not interfere in the exercise of that discretion unless the Minister acted in bad faith, violated the principles of natural justice where their application is required, or relied on considerations that are irrelevant or extraneous to the statutory purpose (*Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2; *Comeau's Sea Foods*, above, at paragraph 36; *Molaison v Canada* (1993), 73 FTC 253, at paragraph 57; *Carpenter Fishing Corp. v. Canada*, [1998] 2 FCR 548 (FCA), at paragraph 28; *Association des crevettiers acadiens du Golfe inc. v. Canada (Attorney General)*, 2011 FC 305, at paragraph 60).

[119] It is true that the evidence unequivocally shows that after the adoption of the IQ policy, the plaintiffs' licences were renewed year after year, subject to simple administrative formalities, and that these licences were subject to the same IQs as those issued to the plaintiffs after 1990. However, even though these IQs remained unchanged, the absolute number of tonnes of snow crab to which the plaintiffs were entitled fluctuated considerably after 1990. It depended on the TAC, which is set annually by the Minister based on not only the estimated biomass but also the management decisions made by the Minister after 1995, such as the decisions to issue temporary licences to groundfish fishers and First Nations, to integrate Areas 25 and 26 into Area 12, and to allocate for experimental or co-management purposes.

[120] Therefore, even though the plaintiffs' licences were renewed year after year, this does not give them a vested right to renew subject to predetermined conditions, or a vested right to a predetermined quantity of fish.

[121] In the concurring reasons of Justice Pelletier in *Canada (Attorney General) v. Arsenault*, 2009 FCA 300, this principle is articulated a little more clearly at paragraph 57: "The crabbers had no legal right to any particular amount of quota. This flows from the nature of fishing licences, in respect of whose issuance the Minister has the broadest discretion. . . ."

[122] This statement applies to the plaintiffs without any possible distinction because in *Arsenault*, the respondents were none other than Area 25 and 26 snow crab fishers who were challenging the 2006 Management Plan for Snow Crab Areas 12, 18, 25 and 26 and who wanted to be paid their share of the $37.4 million of financial assistance provided under the Marshall

Initiative, without having to sign the release requested by Department officials. They were in the same situation as the plaintiffs in that their licences had been renewed year after year and they had had the same IQs since the adoption of that policy in their areas. Leave to appeal that decision was denied by the Supreme Court of Canada.

(5) Plaintiffs' legitimate expectations

[123] The plaintiffs submit that the implementation of a policy, in favour of a small group of fishers, for issuing renewable IQ licences, created a legitimate expectation on their part that the Minister would never unilaterally add new licence holders. They add that if that had not been their understanding of their rights under such a system, they would never have agreed to help fund DFO's management and research activities through the various joint project agreements entered into over the years. They also add that the Minister reinforced their legitimate expectations by issuing, from 1995 to 2003, only temporary licences and by taking great care to inform their holders that they were not entitled to renew for the next year.

[124] First, I find it difficult to see how the Act and the regulations thereunder can justify the distinction that the Minister and the plaintiffs in this action are seeking to make between a temporary fishing licence and one that is permanent or renewable year after year. This distinction can only be derived from the limited-entry policy in force at the material time. Again, policies are not immutable; in order for the Minister to be able to retain his broad discretion to manage fisheries, it must be possible to amend them as needed, and they cannot give rise to a right for the plaintiffs (*Maple Lodge Farms*, above).

[125] Second, expectations, however legitimate they may be, cannot generate or create substantive rights or form the basis for an action in damages (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paragraph 97; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, at paragraph 68; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, at paragraphs 78–79). Again, if the choice of a fisheries management policy by the Minister had the effect of creating legitimate expectations giving rise to substantive rights, this would negate the discretion conferred on the Minister by statute.

[126] In other words, the plaintiffs could not be unaware of the law, and the evidence clearly shows that they were cognizant of it.

a) *Use of the expression* [TRANSLATION] *"quasi-property right"*

[127] Gastien Godin, former executive director of the APPA, was called to testify for the defendant in this case. He said that over the years he had warned association members numerous times that the Minister could, at any time and in his sole discretion, issue new crab fishing licences. The plaintiffs urge me to find this testimony not to be credible, and refer me to a number of letters or presentations written by Mr. Godin (Exhibits 188, 676 and 677) in which he himself describes the plaintiffs' interests in their IQs as a quasi-property right.

[128] With respect, I do not believe that these written materials are sufficient to set aside Mr. Godin's testimony. Mr. Godin is not the one who came up with the expression [TRANSLATION] "quasi-property right," used to describe the interests of traditional fishers in their IQs. The evidence shows that this expression was used for the first time in the 1982 Kirby Report

(Exhibit 27, pages 87 and 89) and that it was subsequently used by Minister Pierre De Bané in a February 17, 1983 press release in which he announced that he would engage in consultations with industry (Exhibit 28, pages 6 and 7).

[129] First, the use of this expression does not give rise to a right; it is up to Parliament to modify the nature and scope of the rights conferred by a fishing licence issued under section 7 of the *Fisheries Act*.

[130] Second, a careful reading of these documents suggests that the use of this expression relates more to a change in culture than to a change in the nature or scope of traditional fishers' rights. The idea was to make fishers accountable. The Minister wrote:

> By assuring each fisherman that he has a clear right to a specified amount of fish, we would be able to put an end to the destructive effects of the annual race for the fish – the most negative consequence of the common property problem.

[131] The point of implementing such a policy is clear here. It is also clear that the Minister was using the concept of common property in a different sense than it is used by the courts to describe fisheries. He was referring to the property (the TAC set annually) belonging to all fishers holding limited-entry licences (and not belonging to all Canadians).

[132] As explained by Pat Chamut, Assistant Deputy Minister, Fisheries Management from 1994 to 2003, the point of implementing an IQ system is not to give more rights to fishers who already have access to a given fishery (*testimony of February 1, 2016, at pages 39 and 40*):

> Because if you have – if you just have an overall quota, and you've got – let's say you've got 20 boats that can catch that quota, what

> they will do is each boat will try to out-fish their neighbour. And so what you have to do – that's why you need to get down to the level of individual quotas because otherwise you'll have the fishermen trying to race each other to catch the fish, which means higher cost to them, more threats to conservation, and a very poorly managed fishery.

[133] That said, several pieces of evidence show that the plaintiffs did not have a legitimate expectation that the Minister would never issue new Area 12 snow crab licences. Rather, the evidence shows that they knew that it was a real possibility and that their fear of this happening influenced some of the decisions they made.

b) *Commercial Fisheries Licensing Policy for Eastern Canada*

[134] The Commercial Fisheries Licensing Policy for Eastern Canada (Exhibit 58) came into effect in January 1989. This policy, which was the subject of much discussion among fishers' associations, stated that the number of licences issued would be limited on the basis of biological and economic considerations for as long as it remained in effect. It also stated that no new licences would be issued until the biomass had increased by 10%. According to Gastien Godin, he explained to association members, when he showed them this new policy, and many other times, that the fish did not belong to them and that a commercial fishing licence was a privilege afforded to a small group of individuals, even though it also gave them certain rights.

c) *Pressure from cod fishers to share the resource*

[135] Beginning in 1993, there was a growing disparity between the revenue generated by the crab fishery and that generated by other fisheries, particularly the groundfish fishery. As the

snow crab resource and snow crab prices were increasing, traditional crabbers were under pressure from their cod and lobster fisher colleagues to share the resource with them. They demanded that licences be issued in their favour. Traditional crabbers were concerned about this growing pressure, and the possibility of new licences being issued in the event of a 10% biomass increase was always on their minds. They set up a wealth sharing system specifically to keep that possibility from becoming a reality. The plaintiffs even admitted that when the eastern New Brunswick advisory committee met on January 15, 1993, crabbers repeated a rumour that new Area 12 crab licences might be issued that year. And when the APPA met on February 14, 1994, Robert Haché said: [TRANSLATION] "We have a goal, and it's to keep new licences from being issued" (Exhibit 131, page 3). If the plaintiffs had truly believed that it was impossible for the Minister to increase fishing effort, they would not have feared that new licences would be issued.

d) *1993 five-year fishing plan*

[136] The 1993 fishing plan stated that for the five years it would be in effect, no changes could be made to it until the TAC had increased by more than 10%. The APPA was pleased with this fishing plan because it ensured some stability for a five-year period. According to Gastien Godin, upon learning that the TAC would increase significantly in 1994, he warned members that this could mean that new licences would be issued (testimony of March 1, 2016, pages 123 to 125 and testimony of March 2, 2016, pages 132–133 and 138–139).

[137] When APPA crabber owner-operators met on February 17, 1995, they discussed an offensive strategy to deal with the issue of Prince Edward Island fishers wanting so-called permanent crab licences (Exhibit 133, page 5). On April 22, 1994, they agreed to submit an

agreement proposal to DFO that was conditional on no new licences being issued (Exhibit 142, page 3).

[138] When APPA crabber owner-operators met on April 27, 1994, Robert Haché admitted: [TRANSLATION] "[C]urrently there is no minister who can guarantee . . . that new licences will not be issued in future" (Exhibit 145, page 3). It is true that at the hearing, Robert Haché tried to minimize the impact of what he had said at the meetings by saying that he had been referring to temporary licences, not permanent ones. Again, this distinction flows from a management policy from the Minister, not from the *Fisheries Act* or the regulations thereunder, and there is nothing in the various policies adopted by DFO that would fetter the Minister's discretion. In any event, when confronted about his letter of response to the representative of the Cape Breton Gulf Region Fishermen's Association (Exhibit 173), Mr. Haché at least admitted that he had known since 1995 that the association in question wanted permanent access (testimony of February 10, 2016, page 95).

e) *The various joint project agreements*

[139] The plaintiffs submit that if they had not had a legitimate expectation that the Minister would not issue new Area 12 crab licences, they would never have agreed to help fund DFO's management and research activities. In my view, the evidence rather shows that they agreed to such an involvement in DFO activities specifically in exchange for temporary commitments by the Minister not to issue new, so-called permanent licences.

[140] The 1995 Joint Project Agreement (Exhibit 171) was entered into when AFAP expired. The plaintiffs found it advantageous in that the information from the trawl survey would allow them to make the best use of the biomass, get a better TAC, and know the location of the biomass. There was also the improved soft-shell crab protocol, which provided for the closure of a smaller fishing area as soon as the percentage of soft-shelled crab in catches exceeded 20. Even though traditional crabbers failed to link this agreement to management of the fishery, they wanted it to pave the way for a fishing plan that would benefit them (March 1, 2016, testimony of Gastien Godin, page 155).

[141] Instead, the Minister unilaterally introduced temporary sharing in 1995. As a result of that decision, the 1995 Joint Project Agreement, which was supposed to last until March 31, 2000, lasted only one season, terminated by frustrated traditional crabbers (February 10, 2016 testimony of Robert Haché, pages 117 and 118, and January 19, 2016 testimony of Rhéal Vienneau, page 174). Specifically, traditional crabbers terminated the 1995 Joint Project Agreement because of the Minister's decision to issue temporary licences, and they never recognized that the agreement was separate from management (April 10, 2016 testimony of Robert Haché, pages 118 and 119).

[142] This confirms that the plaintiffs signed the agreement in exchange for what they believed was an implied commitment by the Minister not to issue new licences for the duration of the agreement; they did not agree to fund DFO activities because they had a legitimate expectation that the Minister would never issue new licences.

[143] This is all the more clear when one looks at the agreement proposal negotiated in 1996, which the Minister refused to sign, and the 1997 Joint Project Agreement.

[144] The 1996 agreement proposal (Exhibits 214, 216.1 and 217) stated that traditional crabbers' commitment was directly or indirectly conditional on the Minister restricting his discretion to issue new licences to below a break-even point for traditional crabbers, set for 1996 and 1997.

[145] Though DFO made timid attempts to split the 1997 Joint Project Agreement into two parts (Exhibits 241 and 250) (this is discussed more fully below), it also linked management of the resource, including allocations and sharing arrangements, to traditional crabbers' commitments to fund DFO activities.

[146] I therefore conclude that the plaintiffs in fact never believed that the Minister would not issue new Area 12 snow crab licences, though they certainly hoped it would never happen. Already in 1993 and 1994, they expected the Minister to share the resource with other fishers, mainly groundfish fishers, and they took many steps to keep that from happening. In other words, they had no real expectations, whether legitimate or not, in this regard.

C. *First cause of action: Expropriation*

[147] Relying on a principle established nearly a century ago by the House of Lords in *Attorney-General v De Keyser's Royal Hotel Limited*, [1920] AC 508, to the effect that statutes should not be construed so as to take away the property of a subject without compensation, the plaintiffs argue that the Minister expropriated 35% of their IQs after 2003 and that they are entitled to compensation. According to them, this expropriation is the result of:

> i) the use of 15% of the TAC to fund rationalization programs for other fisheries;
>
> ii) the taking of a portion of the TAC so that the Minister could honour his commitments to First Nations during the 2003 to 2006 seasons;
>
> iii) the taking by the Minister of a portion of the TAC to fund DFO operations in 2004, 2005 and 2006.

[148] Since the plaintiffs are relying so heavily on the shares of the TAC allocated to everyone to argue that they were dispossessed or stripped of a financial benefit, it is relevant to compare the quantities, in metric tonnes, of snow crab allocated to the plaintiffs during the four years at issue to the four previous years (these figures exclude the share allocated to Area 18 fishers, but include the share allocated to First Nations when the documentary evidence did not allow for its exclusion):

> 1999 12,011 t (Exhibit 273)
>
> 2000 12,315 t (Exhibit 301)
>
> 2001 12,415 t (including First Nations' share) (Exhibit 323)
>
> 2002 19,819 t (including First Nations' share) (Exhibits 360 and 365)

2003	13,997 t (including First Nations' share) (Exhibit 443)
2004	17,360 t (Exhibit 498)
2005	21,600 t (4.1% was subtracted from 22,558 to exclude Area 18) (Exhibit 561)
2006	16,814 t (65% of the TAC) (Exhibit 581)

[149] This tells us that for the four years at issue (2003–2006), traditional fishers in Areas 12, 25 and 26 were allocated 69,771 mt of snow crab, whereas they were allocated 55,560 mt during the previous period (1999–2002).

[150] That said, in expropriation actions, the plaintiffs must show that the Crown unilaterally took their private property—usually but not always an interest in an immovable—for public purposes (R. Brown, "'Takings': Government Liability to Compensate for Forcibly Acquired Property," in K. Horsman and G. Morley, *Government Liability: Law and Practice*, Toronto, Canada Law Book, 2013, page 4-1).

[151] The plaintiffs argue that their rights in the IQs assigned to them in 1990 are the private property that was taken from them. In support of that argument, they rely mainly on the Supreme Court of Canada's decisions in *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 SCR 101 and *R. v. Tener*, [1985] 1 SCR 533, the British Columbia Court of Appeal's decision in *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324, and the Quebec Court of Appeal's decision in *Beaurivage v Québec (Ville de)*, 2004 CarswellQue 458, [2004] Q.J. No. 2496, 133 A.C.W.S. (3d) 353.

[152] According to the plaintiffs, the starting point of the analysis has to be *Manitoba Fisheries*, in which the Supreme Court held that the rules of expropriation applied even to intangible property. In that case, the appellant had been operating for many years a company that packaged and sold freshwater fish for delivery outside Manitoba and Canada. Following the passing of an Act of Parliament stipulating that, from then on, only a newly created Crown corporation could sell Canadian freshwater fish for delivery in another province or outside Canada, the appellant sued the federal Crown for expropriating the goodwill that was acquired by the new Crown Corporation. The Supreme Court stated that the goodwill of a business was one of its most valuable assets, describing it as the whole advantage of the reputation and connection of the firm, which might have been built up by years of honest work or gained by lavish expenditure of money. The Supreme Court confirmed that while it was an intangible, it belonged to the business just as much as its tangible, personal or real property. The Supreme Court therefore relied on *De Keyser* to conclude that the new statute was not to be construed so as to take away the appellant's property, even intangible property, without compensation.

[153] With respect, I do not see the parallel that the plaintiffs are attempting to draw between the rights they claim to have in their IQs and the goodwill of a business. It seems to me that the plaintiffs are confusing the nature of property (the issue in *Manitoba Fisheries*) with the nature of a right in property (the issue regarding IQs). In *Manitoba Fisheries*, there was no doubt that goodwill was part of the appellant's assets. The plaintiffs, however, do not own the IQs that were assigned to them by a DFO policy. Even though the plaintiffs view their IQs as valuable assets capable of being the subject of a transaction, the fact remains that their rights in these IQs are precarious and that the value of their licences depends on the annual biomass, market price and

the Minister's discretion whether or not to issue new licences or share the resource with other fishers. Moreover, it was not the policy establishing IQs that made it possible for the plaintiffs' licences to be sold or otherwise transferred. This was possible when it was still a competitive fishery, though it was probably harder to determine their value.

[154] That same reasoning allows me to distinguish the case before me from *Tener* and *Rock Resources*.

[155] In *Tener*, the respondents were the owners of mineral claims, granted by British Columbia, on provincial Crown lands for which they had paid $100,000. Use of a right of way to the claims was conditional on the consent of the Minister of Lands. The Province subsequently created a park on the lands and, from that point on, denied the respondents access to them. The respondents brought an action against the Province, arguing that it could not expropriate their interest without compensation. The Province denied having any obligation to compensate, mainly because the respondents' use of a right of way had always been conditional on the consent of the Minister of Lands. The Supreme Court stated that the first order of business was to determine the nature of the respondents' interest. It found that what the respondents had was one integral interest in land in the nature of a profit *à prendre* comprising both the mineral claims and the surface rights necessary for their enjoyment. It is, in a way, a dismemberment of the right of ownership that is extinguished by unity of seisin.

[156] The situation was similar in *Rock Resources*, where the creation of parks in British Columbia resulted in permanently preventing the plaintiff from exploring for or developing minerals in its claims. The Minister argued that no expropriation had occurred, since the plaintiff's use of a right of way had always been conditional on his consent. At paragraph 48, the British Columbia Court of Appeal stated that whatever the nature and scope of the plaintiff's rights, those rights were recognized as having commercial value and could be expropriated. The plaintiffs in this case argue that this statement applies to their IQ licences. With respect, I believe that when the Court commented on the nature of the plaintiff's rights, it was referring to the fact that they were conditional, and it would not have made such a comment if the plaintiff had not had any property rights or real interest in the mineral claims in question. Moreover, the Court went on to thoroughly analyze of the nature of the rights of the owners of mineral claims and the impact of an amendment made in 1997 to the *Mineral Act*, S.B.C. 1977, c. 54. Ultimately, it found that the interest of the owners of mineral claims was personal property.

[157] Those cases are distinguishable from the present case in several respects. To begin with, the owner of a mineral claim has an exclusive right, whether it is a personal or a property right, and it is generally registered in a registry. Furthermore, the property belongs to the Crown or an individual, not all Canadians. There are a number of federal and provincial statutes that confer on the owners of mineral claims personal or property rights over land owned by another. In this case, the *Fisheries Act* does not confer to the plaintiffs any property rights in their IQs, which are the result of a simple policy.

[158] I am also of the view that the Quebec Court of Appeal's decision in *Beaurivage* is of no assistance to the plaintiffs. In that case, the City of Québec had adopted an ordinance reducing from 30 to 16 the number of permits issued for the operation of calèches. Since the plaintiff held 27 of the 30 permits then existing, he sued the City for damages, demanding to be compensated for the value of the permits that had been taken from him. The Court reviewed the City's powers in this regard under the *Charter of Ville de Québec* and found that while the City had the power to limit the number of permits in circulation, it did not have the power to take away or refuse renewal of these permits without compensation. Moreover, current regulations state that renewal is automatic upon payment of fees on January 1 of each year and that the City cannot issue a new permit until a holder voluntarily withdraws. The Court therefore concluded that the City of Québec ordinance was *ultra vires* its enabling legislation.

[159] There is a huge difference between the City of Québec's powers under its *Charter* in relation to calèche permits and the Minister's broad discretion under the *Fisheries Act*, and, therefore, *Beaurivage* is simply inapplicable in this case.

[160] In my view, the reasoning of the Nova Scotia Supreme Court in *Taylor v. Dairy Farmers of Nova Scotia*, 2010 NSSC 436 (affirmed by the Nova Scotia Court of Appeal in 2012 NSCA 1) is more applicable to this action. In that case, Nova Scotia dairy farmers claimed that new regulations that affected their milk quotas and created a capped price for the exchange of their quotas were causing them injury. At paragraph 45, the Court stated that for the applicants to succeed, they needed to establish that their quotas were their property and so capable of being expropriated. At paragraph 63, the Court expressed the view that this was not the case, adding

that while quota presented a near-exclusive opportunity for profit in a market that would otherwise be open, and while it was capable of being used as security for borrowing purposes and for a transaction, it was not property capable of being subject to expropriation. It is a revocable licence that provides a conditioned entitlement to produce milk. Lastly, at paragraph 68, the Court reiterated that while quota was capable of being resold in the market, was valuable, and could be seen as property for certain statutory purposes, it was not property capable of being expropriated.

[161] That said, there are a number of additional obstacles that prevent the plaintiffs from bringing an expropriation action in the present context. In order for an expropriation to entitle the plaintiff to compensation, the plaintiff needs to have been completely—not partially or temporarily—denied any use of the property (*Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5; *A and L Investments Ltd. v. Ontario*, [1997] OJ No. 4199 (ON CA); *Granite Power Corp. v. Ontario*, [2004] OJ No. 3257 (ON CA); *Dennis v. Canada*, 2013 FC 1197 (affirmed by the Federal Court of Appeal 2014 FCA 232, leave to appeal to Supreme Court of Canada denied, No. 36208). In this case, the plaintiffs were only partially—after 1995, not after 2003—denied use of the portion of the TAC set aside for them after 1990, and when one compares the quantities obtained (in tonnes) or the revenue generated by the snow crab fishery during the period at issue to the quantities obtained (in tonnes) during the previous period, they were not deprived of any income.

[162] Lastly, regarding the specific issue of the Minister's power to reallocate a portion of the TAC to an IQ fishery, it is also appropriate to consider the decisions of this Court and of the Federal Court of Appeal in *Malcolm v. Canada (Fisheries and Oceans)*, 2013 FC 363 and 2014 FCA 130. In that case, the Minister had decided to reallocate 3% of the TAC to the recreational fishery sector, at the expense of the commercial sector. Commercial fishermen sought to have that decision set aside, but were unsuccessful. This Court dismissed the application for judicial review on the grounds that the Minister had the widest discretion to carry out such a reallocation and that, in exercising that discretion, he could have regard to social and economic considerations. The Minister may, at any time, favour one group of fishers over another, and he may also make changes to his own policies at any time. The Federal Court of Appeal dismissed the appeal, reiterating that the Minister had wide and unfettered discretion to manage fisheries on behalf of all Canadians, taking into account the public interest. It also reiterated that the Minister was not bound by his past policies and could take another approach if, in his opinion, public interest considerations reasonably justified such a change of policy.

[163] I therefore find that the plaintiffs have failed to establish expropriation; consequently, I would dismiss their first cause of action.

D. *Second cause of action: Unjust enrichment*

(1) Applicable law

[164] The plaintiffs also argue that the facts in evidence show that the defendant unjustly enriched itself at their expense and that they are entitled to be indemnified for their correlative impoverishment. They submit that the defendant unjustly enriched itself by:

> 1. using the snow crab resource to fund DFO activities;
> 2. using snow crab to fund rationalization programs for the lobster and groundfish fisheries; and
> 3. using snow crab to enable DFO to fulfil its obligations involving giving First Nations access to the commercial snow crab fishery.

[165] In *Pacific National Investments Ltd. v. Victoria (City)*, [2004] 3 SCR 575, at paragraph 13, Justice Binnie provided a description of this cause of action and he established, to some extent, the parameters of his analysis:

> [13] The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. This is not to say that it is a form of "'palm tree' justice" (*(Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 802) that varies with the temperament of the sitting judges. On the contrary, as the Court recently reaffirmed in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25, a court is to follow an established approach to unjust enrichment predicated on clearly defined principles. However, their application should not be mechanical. Iacobucci J. observed that "this is an equitable remedy that will necessarily involve discretion and questions of fairness" (para. 44).

[166] In *Garland*, by Binnie J., the Supreme Court of Canada had the opportunity to reiterate and refine the criteria that must be satisfied to establish this cause of action. The applicant must demonstrate:

> 1. an enrichment of the defendant;
> 2. a corresponding deprivation of the plaintiff; and
> 3. an absence of juristic reason for the enrichment.
>
> (*Garland v. Consumers' Gas Co.*, [2004] 1 SCR 629, at paragraph 30)

[167] The analysis of this third criterion is split into two distinct steps:

> (a) The plaintiff must show that there is no juristic reason within the established categories that would deny it recovery. The established categories are the existence of a contract, disposition of law or any other valid common law, equitable or statutory obligation;
>
> (b) On proving that none of these reasons exist to deny recovery, the plaintiff will have made out a prima facie case of unjust enrichment and it will be up to the defendant to provide another reason to deny the recovery. At this stage, the courts will have regard to the reasonable expectations of the parties and public policy considerations.
>
> (Pacific National Investments Ltd. v. Victoria (City), [2004] 3 SCR 575, at paragraphs 23–25)

[168] With regard to the first element, it seems that if the plaintiff's loss is passed on to others, there can be no unjust enrichment (see Justice La Forest's analysis of tax paid under an *ultra vires* statute in *Air Canada v. British Columbia* [1989] 1 SCR 1161). However, as regards the second element, if the defendant's enrichment has benefited third parties, there could exist unjust enrichment and it is in analyzing the third element that the court will decide, by scrutinizing the

whole of the parties conduct (see the analysis of a penalty paid and subsequently claimed, contrary to the provisions of the *Criminal Code* in *Garland*).

[169] That said, the first two elements involve a straightforward economic approach and the analysis of the third element is often the most important; "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'" (*Peter v. Beblow*, [1993] 1 SCR 980, page 990).

(2) Enrichment of DFO

a) *Financing its research and management activities*

[170] The plaintiffs argue that DFO enriched itself by using snow crab to fund its activities. It used 1,880 mt of snow crab to generate revenues of nearly $4.9 million (less the amount outstanding from AGFA in 2005) from 2004 to 2006.

[171] Through a straightforward economic approach, I arrived at the same conclusion as the plaintiffs. As stated by the Federal Court of Appeal in *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, at paragraph 13, regarding a similar agreement entered into in 2003 (which is not the issue before me):

> [13] . . . [Fishery resources] do not belong to the Minister, any more than does their sale price. Also, when the Minister decided to pay a contracting party with the proceeds of sale of the snow crab, he was paying with assets that did not belong to him. Paying with the assets of a third party is, to say the very least, an extraordinary act that the Administration could not perform unless so authorized by an act or by duly enacted regulations. Such an act, on its very

> face, is like an expropriation of fishery resources or a tax on them for the purposes of funding the Crown's undertakings.

[172] Justice Martineau of this Court came to the same conclusion regarding the agreement entered into between DFO and AGFA in 2005 (*Association des crabiers Acadiens v. Canada (Attorney General)*, 2006 FC 1241, as did Justice Harrington regarding the agreement signed in 2006 between AGFA and DFO (*Chiasson v. Canada (Attorney General)*, 2008 FC 616). In *Chiasson*, this Court also found that the Minister illegally held the balance of the amount paid by AGFA to DFO, at the time when the Federal Court of Appeal rendered its decision in *Larocque*. Only the second declaration was at issue in the appeal filed by the Attorney General of Canada in *Canada (Attorney General) v. Chiasson*, 2009 FCA 299 [*Chiasson FCA*]. It will be interesting to apply Justice Nadon's reasons when analyzing the plaintiffs' alleged deprivation.

[173] Based on the Supreme Court of Canada decision in *Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario,* [1992] 3 SCR 762, the defendant argues that DFO was not required to undertake management and research activities covered under the agreements signed with MFU and AGFA from 2004 to 2006. As proof, DFO did not conduct a trawl survey in 1996 and there was no improved soft-shell crab protocol in 2003.

[174] I am not convinced by this argument. In *Peel*, the Municipality tried to recover an amount from the federal and provincial governments, which it paid to place young offenders. However, neither the federal nor provincial government was under a constitutional obligation to assume these costs. Here, DFO voluntarily used the resource to fund its management activities, which it did at every opportunity that arose. These activities were, in effect, assumed year after year by

DFO through AFAP and, aside from the rare exceptions mentioned above, even through other available budgets.

b) *Use of snow crab to fund rationalization programs for other fisheries*

[175] Here the plaintiffs refer to DFO's use of the resource when its permanent snow crab sharing policy was adopted in 2003, in areas 12, 18, 25 and 26. The plaintiffs clearly pointed out the fact that DFO, in a more or less strict fashion, matched the allocations it assigned to different fisher associations on the condition that they provide a rationalization plan for other fisheries.

[176] I see no enrichment of DFO here. Rather, I see a reallocation of the resource for socio-economic purposes, which is not contrary to public policy, and which falls under the vast discretion accorded the Minister under the *Fisheries Act*.

[177] I believe that this conclusion is obvious even though DFO was unable to issue fishing licences and conditions not set out in the regulations–that is, rationalization (*Cheticamp Fisheries Co-Operative Ltd. v. Canada*, [1995] NSJ No. 356 (NSSC), at paragraph 26, and *Aucoin v. Canada (Minister of Fisheries and Oceans)*, [2001] FCJ No. 1157 (FC)), and even if in some respects the use of the amounts collected by associations is not closely linked to fisheries, for example, ecotourism development.

c) *DFO use of snow crab to meet its First Nations obligations*

[178] In my view, the same reasoning as that which applies to permanent sharing applies to the reallocation of a share of the resource to First Nations, in order to comply with the Supreme Court of Canada decision in *Marshall*. DFO had several options: it could have simply issued new licences or transferred a sufficient part of the TAC to meet contractual commitments with the bands involved. It did not have to implement a licence buyback program, just as it did not have to compensate traditional fishers for the portion of the IQs they lost in 2006 (*Arsenault*, above, at paragraph 57). It did so in order to promote the successful integration of First Nations into a certain number of commercial fisheries.

[179] In so doing, the DFO did not enrich itself in any way, it merely managed the resource.

(3) Impoverishment of plaintiffs

[180] I am of the opinion that this element was not satisfied for any of the above-described situations.

[181] For there to be impoverishment giving rise to this cause of action, there has to be more than a straightforward economic approach; there must be a real transfer of wealth from the plaintiffs to the defendant (*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [2012] 3 SCR 660, at paragraphs 148–158). Since the plaintiffs are not entitled to a predetermined share of the TAC (*Comeau's Sea Foods* and *Chiasson FCA*, above, at

paragraphs 26, 28), there can be no unjustified transfer. Therefore, the DFO did not take anything that belonged to the plaintiffs.

[182] I would add, as regards the use of the resource to fund DFO's management and research activities, that the plaintiffs suffered no deprivation as a result, rather, they were enriched.

[183] First, all of the plaintiffs' representatives who spoke on this issue admitted that the trawl survey and the improved soft-shell crab protocol benefited them considerably. This allowed them to maximize the TAC, know the locations of the biomass, anticipate the upcoming fishing seasons and, in the event of a resurgence of soft-shell crabs, to close smaller fishing areas.

[184] Moreover, to this end, DFO used 400 mt in 2004, 480 mt in 2005, and 1,000 mt in 2006. With regard to 2006, let us go back to Justice Nadon's statements in *Chiasson FCA*:

> [27] Based on the evidence, there can be no doubt that the judge erred in this regard. One has only to recall that the TAC had to be set at 20 862 metric tons unless there were management activities, in which case the TAC was to be set at 25 869 tons. Consequently, had it not been for the agreement with the APPFA, the respondents' 65.182% share of the TAC would have resulted in one or more fishing licences for 13 598.3 metric tons. Moreover, because of the agreement with the APPFA, the respondents' 65.182% share of the TAC was calculated on a TAC of 25 869 tons less the 1000 tons allocated to the APPFA. As the Attorney General points out at paragraph 11 of his factum, [TRANSLATION] "Ironically, the respondents thus benefited from the 1000 ton licence being issued to the APPFA, since they were able to catch more crab and, as a result, make more money".

[185] This is precisely what the evidence before me disclosed.

(4) The absence of juristic reason for the enrichment

[186] Since I am of the opinion that the criterion of the plaintiffs' deprivation was not met with regard to any of the situations submitted into evidence by the plaintiffs, there is no need to analyze the third element.

[187] In this respect, I will simply say that I share the defendant's opinion whereby section 7 of the *Fisheries Act* and the *Marshall* decision provide sufficient justification regarding use of the resource to establish a permanent sharing program and to promote integration of First Nations into the snow crab fishery. In other words, had there been enrichment as well as a corresponding deprivation here, in my view, they would not be unjust.

[188] However, these sources of law fail to justify the use of the resource to fund DFO's activities, since that approach was deemed, on numerous occasions, to fall outside the exercise of discretion accorded the Minister under the *Fisheries Act*.

E. *Third cause of action: Misfeasance in public office*

[189] Lastly, the plaintiffs argue that DFO committed the tort of misfeasance in public office:

(i) by using snow crab to fund DFO's management and research activities from 2003 to 2006;

(ii) by using snow crab to fund rationalization programs for other fisheries;

> (iii) by granting, beginning in 2003, a disproportionate share of the TAC to fishers in Area 18;
>
> (iv) by reducing the 2003 TAC by 4,000 mt, in an artificial and arbitrary manner, to force the plaintiffs to pay it an amount of $1.7 million to finance his research activities.

[190] Contrary to the two causes of action analyzed above, misfeasance in public office is a *common law* tort under which the plaintiffs do not have to demonstrate that they own the IQs associated with their licence conditions, nor that they hold any right or interest in a predetermined share of the TAC. As we will see, the plaintiffs must instead show that DFO's wrongful or criminal acts are the cause of their damages.

[191] Moreover, it is worth keeping in mind that "confusing review of the legality of a public body's decisions with the rules that determine that body's civil liability should be avoided" (*Finney v. Barreau du Québec*, [2004] 2 SCR 17, at paragraph 31). In his majority reasons in *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 SCR 304, Justice Deschamps expressed it in no uncertain terms (at paragraph 15):

> [15] It is important not to confuse the rules of administrative law with the rules that govern the extra-contractual liability [or a civil tort under common law] of a public body. The rules of administrative law allow for an application to be made to the Superior Court [or the Federal Court] for judicial review of a public body's decision. The setting aside of such a decision will not necessarily lead to the municipality's being civilly liable.

[192] Similar reasoning was held by Justice Stratas, speaking for the majority of the Federal Court of Appeal in *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, at paragraph 142:

> [142] In public law, monetary relief has never been automatic upon a finding that governmental action is invalid or, using

> modern, post-*Dunsmuir* administrative law language, outside the range of acceptability or defensibility: *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1970 CanLII 1 (SCC)][1971] S.C.R. 957, 22 D.L.R. (3d) 470; *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983 CanLII 21 (SCC)] [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9; *Holland v. Saskatchewan*, 2008 SCC 42 (CanLII), [2008] 2 S.C.R. 551, at paragraph 9. "Invalidity is not the test of fault and it should not be the test of liability": K.C. Davis, Administrative Law Treatise (1958), vol. 3 (St. Paul, MN: West Publishing, 1958) at page 487. There must be additional circumstances to support an exercise of discretion in favour of monetary relief.

[193] Consequently, decisions rendered by this Court and other tribunals regarding DFO's various actions or decisions attacked by the plaintiffs or other groups of fishers are of interest to determine the legality of these actions or decisions, but they are of less interest in determining whether these actions or decisions result in criminal responsibility by DFO.

[194] These rules are specific to the civil tort of misfeasance in public office, as developed by Canadian courts, which we must examine and apply to the facts submitted as evidence by the parties.

(1) Components of the tort

[195] Misfeasance in public office includes four distinguishing elements; the first two are specific to this civil tort and deliberate in nature, whereas the third and fourth are shared by all civil torts (*Odhavji Estate v. Woodhouse,* 2003 SCC 69, at paragraph 32). For a public body's liability to be retained, the plaintiff must demonstrate:

1. deliberate, unlawful conduct in the exercise of public functions;
2. awareness that the conduct is unlawful and likely to injure the plaintiff;

3. that the tortious conduct was the legal cause of the injuries; and

4. that the injuries or damages suffered are compensable in tort law.

[196] In *Odhavji Estate*, above, at paragraph 22, Justice Iacobucci, relying on the House of Lords decision in *Three Rivers District Council v. Bank of England, (No. 3)*, [2000] 2 WLR 1220, explained that there are two ways in which to commit the tort of misfeasance in a public office or to prove the existence of the first two elements of the tort. Category A involves conduct by a public officer that is specifically intended to injure a person or class of persons. If this has been proven, then the first two above-listed criteria have automatically been met. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.

[197] As the Court of Appeal for Ontario explained in *Foschia v. Conseil des Écoles Catholiques de Langue Française du Centre-Est*, 2009 ONCA 499, at paragraph 24, while the constituent elements of the tort do not change depending on the Category of misfeasance alleged, the way those elements are proven does. If the plaintiff proves that the public official acted for the purpose of deliberately causing harm to the plaintiff, this will be sufficient to prove both the first and second elements of the tort. If, on the other hand, the plaintiff is alleging misfeasance in the form of Category B, then it is necessary to individually prove both of these elements.

[198] The plaintiffs also cite the Supreme Court of Canada decisions in *Finney* and *Sibeca*, above, and argue that the bad faith must not only encompass acts committed with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly

inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. I agree, although not only are these decisions less relevant in that they apply Quebec civil law, that in my view it is not necessary to introduce in *common law* (the reverse is true as well), but as Justice Deschamps outlines well in *Sibeca*, above, at paragraph 26, "What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it."

[199] That said, when one applies the criteria specific to the tort of misfeasance in public office to the facts of the case, I am of the opinion that only the decision by Minister Thibault to reduce the TAC by some 4,000 mt, made in 2003 in order to force traditional crabbers to negotiate a joint project agreement, is likely to entail tort liability on the part of the Crown.

(2) Financing of DFO's activities from 2003 to 2006

[200] The question is a moot point; it has been established that through various agreements entered into in 2003, 2004, 2005 and 2006, to obtain financing for his management and research activities, DFO overstepped its management authority by illegally appropriating or selling fishery resources belonging to Canadians (*Larocque*, *Association des crabiers acadiens*, and *Arsenault*, above).

[201] I am also of the opinion that the evidence shows that DFO and its public officers were aware of the unlawful conduct of these agreements. For years they had known that they could not link management of the resource to joint project agreements that they negotiated with various

groups of fishers. They have clearly expressed this to the plaintiffs since 1994, when they negotiated the 1995 Joint Project Agreement. They were formal; providing there were no amendments to the *Fisheries Act*, they could not limit the Minister exercising discretion based on co-management agreements they concluded with industry (Exhibit 162.1). This is also why the Minister refused to approve the 1996 agreement proposal; note that Bill C-62 had not been passed and that it died on the order paper the following year. It was finally for this reason that, in the 1997 Joint Project Agreement (Exhibit 241), concluded with the plaintiffs, the financing agreements for 2004 to 2006 (Exhibits 531.1, 560 and 590), which the plaintiffs challenge herein, contain two parts that DFO public officers want to be seen as very distinct: one part that contains the fisheries management plan or the granting of a quota or fishing licence, and one part that covers the DFO activities that are funded by fishers' associations. With all due respect, I find that this manner of drafting the various agreements instead seems to be a decoy that deludes no one. The fact that various components of the agreements are in separate parts changes nothing about the synallagmatic nature of those agreements. Moreover, an analysis of calls for tenders prepared by DFO in anticipation of the 2004, 2005 and 2006 financing agreements (Exhibits 507, 553 and 586.1), shows that the notion of consideration is fully present. RPPIM and AGFA would have had no interest in financing DFO's activities had they not been granted a certain snow crab quota.

[202] As already indicated, establishing unlawful conduct of an act committed by a public officer in his or her duties, from an administrative point of view, is not equivalent to determining the unlawful and deliberate nature of that same act, for the purposes of analyzing the Crown's tort liability. The impugned actions in this case are not related to the acts alleged against the

public officers in *Roncarelli v. Duplessis*, [1959] SCR 121, *Odhavji* and *Foschia,* above, which contained an element of malice, intent or bad faith. In the context under review, it is difficult to speak of malice or bad faith on the part of DFO officials, much less say that the acts committed were done for improper purposes. The management and research activities covered by the financing agreements fall perfectly under DFO's mission and they are, to some extent, virtuous and praised by all.

[203] Regardless, I also do not believe that DFO and its public officers were aware of the probabilities that the 2004 to 2006 financing agreements with RPPIM and AGFA caused injury to the plaintiffs, just as I do not believe, in effect, that they caused them any harm whatsoever. DFO's management and research activities were undertaken to the benefit of all snow crab fishers in areas 12, 18, 25 and 26, including the plaintiffs. These activities made it possible to maximize the TAC for years during which the agreements were in effect, and to anticipate future biomass, in terms of quantity as well as movement or location. Furthermore, when we consider the TACs and the metric tonnage allotted to the plaintiffs during the years in question, it is difficult to be satisfied that the plaintiffs allegedly suffered injury due to the Minister's use of 1,880 mt of snow crab over three years. As shown in Nadon J.'s analysis in *Chiasson FCA*, above, at paragraph 27, the use of 1,000 mt in 2006 enabled the Minister to increase the TAC by slightly more than 5,000 mt. As we will see in the analysis of the 2003 reduction in TAC of some 4,000 mt, there is no equivalence between the metric tonnage of crabs offered by DFO and the financing amount sought. Nor is there any clear logic that justifies this 5,000-mt difference in 2006, but one thing is certain, this increase benefitted the plaintiffs proportionately to their IQ.

[204] I therefore find that the unlawful nature of the financing agreements concluded between DFO, on the one part, and AGFA and MFU, on the other part, did not cause any harm to the plaintiffs, and that they did not demonstrate misfeasance in public office in this regard.

(3) Financing rationalization programs for other fisheries

[205] Once again, it has been established that the Minister could not link the issuing of fishing licences with preconditions or conditions whose sources are not derived from the *Fisheries Act* and regulations thereunder (*Cheticamp Fisheries* and *Aucoin*, above).

[206] Consequently, if indeed the permanent sharing of the resource for the years 2003 to 2006 was contingent on the recipients of these quotas rationalizing other fisheries, or using the funds generated to buy back licences issued to other fisheries, that condition would be unlawful.

[207] I also believe that the Minister's method of granting a quota to fishers' associations, instead of to fishers, is also problematic.

[208] First, for the Minister, this is sub-delegation of his power to issue fishing licenses; the associations raffled off the snow crab fishing licences, which the witnesses have described as the crab lottery, or the "buffet" where fishers took turns helping themselves.

[209] Second, the associations used the resulting revenues for different purposes; several were unrelated to DFO's mission and objectives, and often to the benefit of the associations as opposed to the fishers.

[210] However, just as for the financing agreements concluded by DFO, I do not believe that the Minister's method has the unlawful and deliberate character likely to engage the Crown's tort liability.

[211] I also do not believe that this method caused any harm whatsoever to the plaintiffs since Minister Robert Thibault had made the decision to implement permanent sharing of the resource for which it would allot approximately 15% of the TAC each year and since it had not issued the licences to fishers' associations, it had apparently issued them directly to fishers (testimony of February 3, 2016, pages 4 and 5). Minister Thibault also informed the plaintiffs, during a meeting held on April 8, 2003, that once the rationalization was completed, the 15% quota would be given directly to the fishers (Exhibit 434). And he had the discretion to do so. Having failed to go ahead as he did, that 15% share of the TAC was allegedly not returned to the plaintiffs.

[212] I therefore conclude that the questionable nature of the mechanism used by DFO to implement permanent sharing of the resource did not cause the plaintiffs any harm and that the plaintiffs did not show misfeasance in a public office in this respect.

(4) Share of the TAC allotted to fishers in Area 18

[213] Although strongly opposed to this, the plaintiffs do not blame the Minister for his decision to integrate Area 18 with areas 12, 25 and 26. They criticize it, but it is not the true source cited for the Minister's liability.

[214] The evidence shows that this decision was based on management and sharing of the resource, which the Minister had full authority to make; especially since it can be explained by the fact that DFO scientists were of the opinion that Area 18 belonged to the same biomass as areas 12, 25 and 26. It is also explained by the fact that this area was too small for the number of fishers authorized to fish there and that it was home to a significant percentage of soft-shell crab that migrate to Area 12 as an adult (testimony of February 24, 2016, page 125).

[215] The plaintiffs mainly criticize the Minister for having granted too high of a share of the TAC to fishers in Area 18, with absolutely no rational basis.

[216] The plaintiffs criticize DFO for allowing fishers in Area 18 to overexploit the stock for several years and, once the stock was depleted, giving them too high of a share of the stock in Area 12.

[217] First, the evidence does not show any alleged overexploitation of stock in Area 18, but rather, that the commercial crab biomass there was low. The evidence effectively shows that, year after year, the exploitation rate in Area 18 was high, that is, the TAC was high compared to biomass. However, the evidence is clear on the fact that although the exploitation rate and, from this the TAC, were high, the catches themselves were not (examinations of January 21, 2016, pages 164, 166 and 167, and February 24, 2016, pages 119 and 120). Since the fishers in Area 18 were never able to catch their quota, the effective exploitation rate was far lower than anticipated. Consequently, we cannot rely on the exploitation rate to establish overexploitation.

[218] Moreover, the percentage of the TAC that the Minister decided to grant to fishers in Area 18, at the time of the integration, falls under his discretion.

[219] Exercising discretion clearly implies good faith and no legislative Act can permit arbitrary discretion, by relying on considerations that are irrelevant, capricious or foreign to the purpose of the statute (*Roncarelli*, above, at page 140).

[220] To determine the share of the TAC that it would allot to 30 fishers in Area 18, the Minister was guided by the share of TAC granted in 1997 to 30 fishers in areas 25 and 26, when those areas were integrated into Area 12 (testimony of Pat Chamut, January 28, 2016, at pages 194–197). Fishers in areas 25 and 26 were granted 5.32% of the TAC, while the Minister set the share allotted to fishers in Area 18 at 4.7081%.

[221] It may be that areas 25 and 26 had contributed more to the total biomass of the combined areas than Area 18. It is also possible that the integration of Area 18 had a negative impact on the plaintiffs, an impact not felt by integration of areas 25 and 26. However, one cannot say that the Minister exercised his discretion in a manner arbitrary, capricious or foreign to the purpose of the statute. From an objective point of view, he made a decision that, under the circumstances, can even be described as fair. He favoured fishers in Area 18 to the detriment of fishers in areas 12, 25 and 26, by distributing the resource more fairly among them, a resource which, let us keep in mind, was part of one and the same biological unit. As Jim Jones explained, tracing an imaginary line between two areas does not ensure that the fishers have access to different crab stocks (transcripts from March 7, 2016, at page 108). That distribution did not entirely satisfy the

fishers in Area 18, who claimed 5.32% of the TAC, like the fishers in areas 25 and 26, with no buffer zone (testimony of Fred Kennedy, February 29, 2016, pages 40 and 41).

[222] The evidence also shows that the buffer zone was created at the boundary of areas 18 and 19 to protect the large quantities of white crab in the area. That decision is therefore based on scientific considerations and conservation concerns, considerations that are far from foreign to the purposes under the *Fisheries Act*.

[223] Lastly, the defendant demonstrated that, in reality, the fishers in Area 18 did not receive 4.7081% of the TAC, but actually 3.37% in 2003 (Exhibit 443), 3.52% in 2004 (Exhibit 498), 3.52% in 2005 (Exhibit 561) and 4.002% in 2006 (Exhibits 581 and 587). These reduced percentages can be explained by the fact that the Minister chose option 2 introduced in the note to the Minister dated April 30, 2003 (Exhibits 440 and 441), that is, to deduct the share attributed to new access and to First Nations, before granting the share that would allegedly be returned to fishers in the new area that combined 12, 18, 25 and 26 ("*from the top*"). The evidence also showed that, in fact, the fishers in Area 18 continued to fish right next to the two sole grids where they had traditionally done their catches (now included in the buffer zone) and that they did not venture very far into Area 12.

[224] I therefore find that the Minister did not commit the tort of misfeasance in public office in his method of integrating Area 18 into areas 12, 25 and 26. The Minister had the authority to decide as he did and to choose among a certain number of proposed formulae in the

2003 decision note. His decision was motivated by social or economic considerations and he acted within the parameters of his mandate.

(5) 4,000 mt reduction in TAC in 2003

[225] It is well established that the Minister holds full discretion to set the annual TAC. However, he cannot do so arbitrarily or reduce the TAC for the sole purpose of forcing a group of fishers to negotiate a joint project agreement or to participate in financing DFO's activities. In my view, the evidence shows that this is what Minister Thibault did in 2003. He was also sufficiently candid so as not to deny this evidence.

[226] The defendant argued that, contrary to the Minister's decisions to use the resource to fund DFO's activities, his decision to reduce the TAC by 20,000 mt or 21,000 mt to 17,148 mt in 2003 was never declared unlawful by the courts. Consequently, it argues, I must declare it unlawful before establishing misfeasance in public office. With respect, I believe that the question is actually whether the Minister, in so doing, used his discretion in an arbitrary and capricious manner, without regard to the purpose of the statute, or whether he acted in bad faith by using a share of the TAC as a bargaining chip to force the plaintiffs to negotiate. In other words, I do not need to rule on the legality of his decision on an administrative level, but I must determine whether it is a source of liability for the Crown.

[227] Although the defendant tried to justify, in many ways, setting the TAC at 17,148 mt, the fact remains that there is no documentary evidence justifying that decision, which apparently predates the release of the 2003 fishing plan.

[228] As in all years, the process of setting the 2003 TAC began by estimating the commercial biomass based on the results of the trawl survey conducted at the end of the 2002 fishing season. Once that exercise was completed by DFO's Science Division, a "Peer Review" meeting was scheduled, attended by scientists and representatives from DFO and industry. The purpose of that meeting was to question and, if applicable, challenge the findings of the Science Division in order to ensure accuracy of those results, and to come to a common consensus.

[229] The meeting was held from February 11 to 13, 2003. Several findings emerged from the Minutes of the Peer Review meetings (Exhibit 410). First, the participants agreed that an exploitation rate of 62% in 2002 was too high. They also noted an increase in pre-recruits, which seemed to indicate an increase in biomass up until 2005. The 2003 biomass was estimated at 41,554 mt +/- 5,942 mt, i.e. an increase compared to the 2002 biomass, which was 36,100 mt. However, although certain factors were very encouraging, other factors argued in favour of a cautionary approach for 2003 and a recommendation was made to set a conservative TAC not exceeding 20,000 mt for Area 12, i.e. an exploitation rate of 48.13%.

[230] As regards area 18 (which was not yet amalgamated with Area 12), a 323% increase in biomass was noted compared to 2002 and there was also a significant presence of pre-recruits, suggesting a high biomass for the next two or three years.

[231] Once their results were tested among scientists and other stakeholders, DFO's Science Division prepared its "Stock Status Report," which it issued in March 2003 (Exhibit 418). That report essentially mirrored the findings made during the peer review and concluded that it would

be [TRANSLATION] "prudent to ensure that the 2003 quota not exceed 20,000 t," for Area 12 alone.

[232] Neither the peer meeting minutes nor the Stock Status Report mentioned the fact that this TAC would only be conservative or prudent if an improved soft-shell crab protocol had been in place for the 2003 fishing season.

[233] The same consensus emerged during the advisory committee meeting held on March 14, 2003. The majority of members were inclined to follow the scientists' recommendation which, in their opinion, is based on an improved soft-shell crab monitoring protocol. DFO asked members whether the same recommendation would be made without this protocol; there was no response based on the summary of that meeting (Exhibit 493.1). It was simply concluded that [TRANSLATION] "without those resources, it would have to be managed differently. . ."

[234] Note that parallel to that exercise, intense negotiations took place between DFO and traditional crabbers regarding a long-term management plan. Although several points were discussed, the Minister was unyielding to the majority of them, particularly regarding permanent access and integration of Area 18. What DFO tried to achieve through those negotiations, with no genuine compromising on his part, was a multiyear joint project agreement for financing DFO's scientific activities, specifically, the improved soft-shell crab protocol and the trawl survey.

[235] Even before those negotiations failed, DFO had already considered certain "creative" options in the event that no joint project agreement were reached with traditional crabbers. According to Pat Chamut, these options included an increase in licence fees, setting aside a certain quota (as was done from 2004 to 2006) and securing additional internal financing (testimony of January 28, 2016, pages 185 to 191, and Exhibit 422). Pat Chamut doubted the legality of the second option, while Réal Vienneau and Monique Baker doubted whether the third option was realistic; officials in the Gulf Region were apparently told in 2001: [TRANSLATION] "Do not come back and see us again." (testimony of February 9, 2016, pages 110 and 111).

[236] One thing is certain, that as of March 25, 2003, the date of the last negotiation meeting, DFO officials were aware that there would be no joint project agreement or financing from industry for the 2003 season. They therefore began to prepare the decision note to send to the Minister to issue the 2003 fishing plan. Discussions took place between the Fisheries Management Division and the Science Division. Since the decision to integrate Area 18 into Area 12 was made after the peer review meeting and after the Stock Status Report was prepared, Monique Baker asked Mikio Moriyasu to estimate the biomass and maximum TAC for the amalgamated areas. In an email dated April 14, 2003 (Exhibit 434), Mikio Moriyasu confirmed a biomass of 44,923 mt +/- 16% and, applying the same conservative exploitation rate of 48.13% recommended by the Science Division and validated by peers, a maximum TAC of 21,621 mt.

[237] For reasons unknown, the decision note dated April 30 to the Minister (Exhibit 440) makes no mention of the maximum conservative TAC of 21,621 mt for combined areas 12 and 18 (21,437 mt if we deduct the buffer zone), but only mentions the TAC of 20,000 mt recommended by scientists for Area 12 alone. Without any other explanation, the decision note recommends applying the average exploitation rate for the years 1991 to 2001, i.e. 38.5% to the combined biomass (44,540 mt if we deduct the buffer zone) and to set the TAC at 17,148 mt.

[238] In so doing, DFO set a TAC of 4,289 mt (21,437 minus 17,148) less than the maximum TAC recommended and validated by scientists, and around which a broad consensus developed as part of the TAC-setting process.

[239] The 38.5% exploitation rate is not explained by any document prior to the decision note, and when questioned previously about this matter, in the presence of Monique Baker, Jim Jones said he had no idea where it came from. Counsel for the defendant first objected to an engagement request based on relevance, but he eventually agreed to have his client verify who suggested that exploitation rate and whether the suggestion was based on a Science Advisory Report (SAR). However, in a letter from counsel for the defendant dated June 28, 2011 (Exhibit 683), he replied that [TRANSLATION] "following our research and in spite of our efforts, we were unable to find that information."

[240] It is important to understand that the 4,289 mt reduction in TAC in 2003 was highly significant in the context of which the Minister had decided, for his first year at the helm of DFO, to settle in one fell swoop a certain number of recurring problems that had persisted in the

crab fishery and to adopt measures he knew were very unpopular among traditional crabbers. The Minister also knew that these measures that he was preparing to adopt were all going to have a negative impact on traditional crabbers. The Minister knew that removing an additional 4,289 mt under the circumstances would have a direct impact on traditional crabbers and he wanted that impact to be sufficient for him to use as a bargaining tool to force traditional crabbers to enter into a joint project agreement and to agree to contribute up to $1.7 million to fund DFO's activities.

[241] The reactions were immediate. The fishing plan was distributed on Friday, May 2, and violent protests erupted during the weekend that followed.

[242] As of Monday, May 5, the Minister made several media releases during which he repeated that the traditional crabbers had known for some time that they would receive an additional 4,000 mt if they agreed to enter into a joint project agreement with DFO (Exhibits 445, 446 and 449).

[243] But the storm did not seem to be letting up. The journalists were unrelenting and wanted an explanation for the reduction in TAC. It was not until May 8, 2003, that Mikio Moriyasu responded to Monique Baker's request to justify the 38.5% exploitation rate as a conservative approach and to justify the 3,000 to 4,000 mt reduction through the proposed mortality rate of soft-shell crab. Mikio Moriyasu offered the following response (Exhibit 460):

> [TRANSLATION]
>
> The quota level of 17,143 t instead of 20,000 t suggested in the stock status document is justifiable, assuming that the ability to protect the soft-shell crab is considerably reduced (without a co-

> management agreement). A conservative approach that we took during the last decade, i.e. 38.5%, corresponds to 17,000 t. In his scientific document, Marcel Hébert wrote that soft-shell crab mortality through handling with 100% death rates, after discards during the 2002 fishing season were allegedly approximately 1,600 t. This was with a full protocol. It is therefore not too unreasonable to conceive that the loss would be twice as high, i.e. about 3,200 t. The two approaches—the first is more scientific than the last—reach the same conclusion. For this reason, I am comfortable supporting both scenarios. Perhaps you should use both explanatory methods at once?

[244] With respect, it seems quite clear that an attempt was made to provide an explanation in hindsight to a decision made without justification. Not only is the tone of that note not very convincing, but the explanations provided are not very scientific. No one explained why it was necessary to change from an exploitation rate of 62% in 2002 (year voluntarily excluded from calculating the mean), to an exploitation rate of 38.5% in 2003, while everyone had actually agreed on an exploitation rate of 48.13%.

[245] Moreover, we understand M. Moriyasu's hesitation around a 100% mortality rate to explain a difference of 3,000 to 4,000 mt. He admitted on cross-examination that the DFO scientists used the results of a study identifying that the mortality rate of white crab discarded at sea was actually 14.3% (Exhibits 647 at point 3.2; 648 at point 3.2; and 649 at point 2.2, and testimony dated February 24, 2016, page 145).

[246] A few days later, at the request of Nathalie Girouard, Associate Advisor, Atlantic Resource Management, Mikio Moriyasu also came back to the position adopted before the fishing plan was issued and confirmed that he felt that a hypothetical TAC of 21,437 mt for combined areas 12 and 18 (with a buffer zone) was reasonable (Exhibit 471).

[247] The defendant argues that the 4,289 mt reduction in TAC was justified by the lack of a joint project agreement for 2003.

[248] It is not disputed that the lack of a trawl survey, which was done after the 2003 fishing season, had no impact on setting the 2003 TAC, but it may have influenced the TAC in subsequent years (see specifically Exhibit 682, page 2654). At any rate, the evidence shows that at the end of the 2003 season, DFO used 50 mt of snow crab as well as the unfished TAC to prepare a call for tenders to issue a scientific licence. Therefore, the lack of a trawl survey cannot justify any TAC reduction in 2003 by the Minister.

[249] As regards the fact that there was allegedly no improved snow crab protocol, the evidence shows that all of DFO's activities were funded by industry during the following years, following DFO's calls for tenders. As already indicated, there seems to be no rational link between the allotted tonnage and the financing amount sought. In 2004, RPPIM obtained a quota of 400 mt in consideration of $1.5 million in financing; in 2005, AGFA obtained a quota of 480 mt in consideration of $1.9 million in financing, whereas in 2006, it obtained a quota of 1000 mt in consideration of $1.5 million in financing. In any case, everyone agreed that the value of the tonnage thus allotted is far higher than the financing amount, hence the incentive to participate in the call for tenders.

[250] That exercise is only necessary to demonstrate that, although the Minister was right to reduce the TAC to take into account the lack of an improved soft-shell crab protocol, which the evidenced failed to show, that reduction should have apparently been much smaller. I have no

evidence of the precise costs associated with the improved soft-shell crab protocol, but they are not that significant and, alone, would certainly not justify reducing a conservative TAC validated by scientists. The Minister could have done what he did for the 2003 trawl survey and for all scientific activities during subsequent years. He chose not to do so in his fishing plan.

[251] Lastly, there is nothing in the evidence regarding steps that DFO could have taken to find an alternate financing method for the improved soft-shell crab protocol for 2003.

[252] The reduction without justification, these attempts to find an explanation *ex post facto*, and the Minister's reaction regarding questions he was asked by journalists after the 2003 fishing plan was released have satisfied me that the only reason the Minister reduced the TAC by 4,289 mt in 2003 was to force traditional crabbers to resume negotiations that could lead to a joint project agreement. I am of the opinion that, in so doing, the Minister acted in bad faith, particularly in the context of all of the changes he chose to make to DFO policies that same year. He exercised his discretion by relying on considerations that are irrelevant, capricious or foreign to the purpose of the statute.

[253] I therefore conclude that the Minister committed a Category A tort, which caused the plaintiffs harm compensable in law, namely the missing 4,289 mt share that the 2003 fishing plan allotted them, based on their respective IQ.

(6) Release signed in 2006

[254] Given that I found that the integration of First Nations into the commercial snow crab fishery did not result in expropriation of the plaintiffs' IQs, and that it did not constitute an unjust enrichment of DFO, I do not need to rule on the releases signed by the plaintiffs in 2006.

[255] I will simply say that I share the plaintiffs' opinion to the effect that these releases apply only to the future. Note that DFO assessed that $37.4 million was needed to acquire the share of TAC from traditional fishers that it was missing to fulfill the agreements to integrate the First Nations into the crab fishery. DFO used the $37.4 million amount, distributed provincially, prorated for each fisher's IQ. The release was integrated into the financial aid agreement signed by the plaintiffs (see, for example, Exhibit 606). This was clearly a buyback of part of each fisher's IQ, and the fishers were giving up this part in future.

[256] Had I concluded that integration of the First Nations into the crab fishery gave rise to an expropriation claim or unjust enrichment, which is not the case, then the release signed by the plaintiffs would not defeat those claims.

F. *Conclusion*

[257] For the reasons set out herein, I am of the opinion to allow the plaintiffs' action in part and to state that DFO committed the tort of misfeasance in public office, for which the defendant is liable, by reducing the TAC from 21,437 mt to 17,148 mt in 2003, thereby causing injury to the plaintiffs for which they are entitled to compensation. The other causes of action, as well as

the action based on misfeasance in public office with respect to the other misfeasance alleged by the plaintiffs, are dismissed.

[258] At the parties' suggestion, they have 30 days from the date hereof to agree on the costs to be awarded regarding the first component of the hearing or, failing consensus, to serve and file to the Registry of the Court their written submissions, not exceeding 10 pages, and addressing the criteria set out in subsection 400(3) of the *Federal Courts Rules*, SOR/98-106.

JUDGMENT

FOR THESE REASONS, the Court:

1. Allows in part the plaintiffs' action;
2. Declares that the Minister of Fisheries and Oceans and the Department of Fisheries and Oceans officials committed the tort of misfeasance in public office, for which the defendant is liable, by reducing the TAC from 21,437 mt to 17,148 mt in 2003, thereby causing injury to the plaintiffs for which they are entitled to compensation;
3. Dismisses the other causes of action, as well as the action based on misfeasance in public office with respect to the other torts alleged by the plaintiffs.
4. If the parties are unable to agree on the costs, they must serve and file, within 30 days from the date hereof, their written submissions in this regard, which are not to exceed 10 pages and must address the criteria set out in subsection 400(3) of the *Federal Courts Rules*, SOR/98-106.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1271-07
STYLE OF CAUSE:	ROLAND ANGLEHART JR ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATES OF HEARINGS:	JANUARY 18, 19, 20, 21, 25, 26, 27, 28; FEBRUARY 1, 2, 3, 8, 9, 10, 15, 16, 17, 22, 23, 24, 29; MARCH 1, 2, 7, 8; MAY 2, 3, 4, 5, 6, 9, 10 AND 11, 2016
JUDGEMENT AND REASONS:	GAGNÉ J.
DATED:	OCTOBER 19, 2016

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