Date: 20070306

Docket: T-742-06

Citation: 2007 FC 251

Ottawa, Ontario, the 6th day of March 2007

Present: the Honourable Mr. Justice Blanchard

BETWEEN:

AURÉLIEN MAINVILLE and CLAUDE PAULIN

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] This is an application for judicial review of a decision by the Minister of Fisheries and Oceans (the Minister) on March 30, 2006, regarding distribution of the total allowable catch (TAC) of snow crab in the southern Gulf of St. Lawrence, that is, in fishing areas 12, 18, 25 and 26 ("the fishing plan").

2. Factual background

[2] The applicants are two fishers from the Caraquet region in New Brunswick. They are holders of mobile gear groundfish licences and competitive quotas, and the Minister recognized their status as groundfish specialists for eastern New Brunswick. Since 1993 they have been the victims of a moratorium on such fishing and were also identified by the Minister as fishers who had a heavy dependence on groundfishing.

[3] The Minister announced the snow crab fishing plan for the areas in question on March 30, 2006. This plan is the decision by the Minister which is the subject of the judicial review at bar.

[4] The fishing plan awards 7.129% of the TAC, or 1,772.91 t., to the New Brunswick non-traditional fleet: 10% of this quota was awarded to the Acadian Groundfish Fishermen's Association (APPFA), and 90% to the Maritime Fishermen's Union (MFU), which has some 1,200 members.

[5] The effect of this decision was to exclude the applicants from the distribution set out in the snow crab management plan, since they do not belong either to the APPFA or the MFU. The applicants apparently sent a letter to the Minister giving him the necessary information so that he could take their particular situation into account in 2006 in the fishing plan.

[6] The applicants maintained that they were unable to determine why they were excluded from the distribution. However, they pointed out that they are the only ones, with two of their fellow fishers from New Brunswick among the hundred or so active fishers, who receive no

benefit from this fishing. They added that their situation differs from that of their New Brunswick colleagues in that the latter are members of the MFU, which received a large quota. The applicants compared themselves to fishers who were members of the APPFA.

3. Issues

[7] This application for judicial review raises the following questions:

A. Did the Minister act in accordance with his obligations in assigning snow crab quotas in 2006?

B. Did the Minister have a fiduciary obligation to the applicants, and if so did he fail to carry out that obligation to the applicants?

4. Standard of review

[8] First, it must be determined what the applicable standards of review are in the case at bar. The standard of review applicable to a decision by the Minister made pursuant to section 7 of the Act is that of the patently unreasonable decision, as the Federal Court of Appeal ruled in *Tucker v. Canada (Minister of Fisheries and Oceans)*, 2001 FCA 384. This conclusion was recently restated by the Court of Appeal in *Recherches Marines Inc. /Marine Research Inc. v. Attorney General of Canada,* 2006 FCA 425.

[9] So far as questions regarding procedural fairness or the principles of natural justice are concerned, it is not necessary to discuss the applicable standard of review: if those principles have been violated, the decision will be set aside and returned to the Minister for reconsideration.

5. Historical background

[10] In light of the issues raised in the case at bar, I feel it is necessary to review the historical background to the Minister's decision.

[11] In 1990, there were more than 100 licences for groundfishing with mobile gear, including the licences held by the applicants. At the time, the holders of this kind of licence were eligible to become holders of individual transferable quotas (ITQs). The ITQs were determined on the basis of historical catches (1986–1989).

[12] The fishers who opted for the ITQ plan lost their status as inshore fishers and were subject to different rules. For example, they could only obtain licences by an application to reassign a licence; access to coastal licences (smelt, oysters and so on) was no longer possible; and they lost access to cod fishing in the Northumberland Strait. Each ITQ fisher had a fixed share, expressed as a percentage of the groundfish quotas. The fisher decided on the rate of his or her activities during the fishing season.

[13] In New Brunswick, there are still 87 holders of competitive mobile gear groundfish licences. The applicants chose to remain in this group of fishers. In making this choice, they agreed to continue fishing competitively for the groundfish quotas ("race for the fish"). They also retained the option of fishing in the Northumberland Strait. Apart from the applicants, all the fishers are represented by the MFU. There were also thirteen ITQ licence holders, most of whom are represented by the APPFA.

[14] Following the announcement of the cod fishing moratorium (1993–1997, inclusive) and the initiation of various financial assistance programs, the Minister identified fishers with a heavy dependence on groundfishing. Over the years, this list of fishers has been amended to take into account changes in the fishers' situation and the eligibility criteria. In New Brunswick, there are nineteen fishers on this list: the applicants; four fishers holding competitive mobile gear groundfish licences who are part of the MFU core group; and thirteen fishers represented by the APPFA who are generally holders of ITQ licences.

[15] In 2003, the Minister decided to stabilize long-term snow crab allocations in area 12. *Inter alia*, he granted 90% of the share of new access reserved for New Brunswick to core inshore fishers through MFU, which includes fishers dependent on competitive groundfishing, and 10% was for fishers dependent on groundfishing who operated vessels less than 65 feet long and who were subject to the ITQs represented by APPFA.

[16] In 2005, the Minister approved the "Inshore Transition and Development Plan" submitted by the MFU. The purpose of this transition plan was primarily to rationalize the inshore lobster fishing fleet (licence retirement), but also included the fishers dependent on groundfishing.

[17] Under the transition plan, the applicants and four other New Brunswick fishers dependent on competitive fishing no longer automatically had access to a snow crab allocation, but in return they received a substantial increase in their cod allocations over 2004. This approach appeared to satisfy the group of six fishers when their cod allocations were confirmed in 2005. However, after the

fishing season, certain fishers maintained that the cod was more difficult to catch and that there was little or no market for the cod.

[18] In 2006, the Minister repeated his approval of the "Inshore Transition and Development Plan" submitted by the MFU.

[19] The Minister took part in meetings with the fishers dependent on groundfishing with competitive quotas several times in 2005 and the winter of 2006 to discuss their situation. At those meetings the fishers told the Minister that they wanted a [TRANSLATION] "permanent" snow crab allocation in areas 12 and 12E and larger cod allocations. The Minister's representatives confirmed that they were prepared to work with them to give them greater stability and greater predictability of access.

[20] In February 2006, these competitive fishers submitted their own rationalization plan to the Minister. The Minister did not approve this plan, because the quantities sought were substantial and because there was no guarantee that there would in fact be a rationalization. Further, the proposal was contrary to the transition plan announced by the Minister in 2005 and restated on March 23, 2006.

[21] The snow crab fishing plan announced on March 30, 2006, continues to give a snow crab allocation in area 12 to the MFU in accordance with its [TRANSLATION] "transition and rationalization plan". The 90/10 distribution of the quota between the MFU and the APPFA was also maintained.

[22] This plan also includes the creation of a trust fund to rationalize the groundfishing competitive fishers fleet (four fishers with mobile gear, including the two applicants, and two fishers with fixed gear). This group of six groundfishers, including the two applicants, received a total allocation of 46.25 metric tons (metr. t.) of snow crabs in area 12E for 2006, pursuant to the fishery plan announced for that area on April 11, 2006. Additionally, the four fishers dependent on competitive mobile gear groundfishing, including the two applicants, had access in 2006 to over 128 metr. t. of cod, the same amount as 2005.

[23] Of the group of fishers on the list of fishers with a heavy dependence on groundfishing, seven were holders of ITQ licences, represented by the APPFA; and four fishers who were part of the MFU core group and who held competitive mobile gear groundfish licences received snow crab allocations in area 12.

6. Analysis

A. *Did the Minister act in accordance with his obligations in assigning snow crab quotas in 2006?*

[24] The Minister's discretion to grant fishing licences is set out in subsection 7(1) of the *Fisheries Act*, R.S. 1985, c. F-14:

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.

[25] This discretion is restricted only by the principles of natural justice, as the Supreme Court stated in paragraph 36 of *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12:

> It is my opinion that the Minister's discretion under s. 7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, no regulations currently being applicable. <u>The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith</u>. The result is an administrative scheme based primarily on the discretion of the Minister: see *Thomson v. Minister of Fisheries and Oceans*, F.C.T.D., No. T-113-84, February 29, 1984. [Emphasis added.]

[26] Accordingly, the discretion to authorize the issuance of licences conferred on the Minister by s. 7 of the Act is restricted only by the requirement of natural justice, which means that the Minister must base his decision on relevant considerations, avoid arbitrariness and act in good faith.

[27] In their argument, the applicants referred to *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool),* [1996] 3 S.C.R. 919, to establish the Minister's duty to act fairly in exercising his power to authorize the issuance of fishing licences. In that judgment, the Supreme Court held that the Quebec Régie des permis d'alcool was not observing the guarantees of impartiality at the institutional level. In the course of its analysis, it noted that the *nemo debet esse judex in propria sua causa* rule (the *nemo judex* rule), which has to do with the right to a public and impartial hearing, applied to the Régie as part of the duty to act fairly.

[28] In my view, that case has little application in the case at bar, since the applicants did not raise any questions about the Minister's independence and impartiality. Despite this conclusion, I agree with the applicants that the Minister was required to act fairly or in keeping with the principles of natural justice, as set out in *Comeau*. For the sake of consistency, I will use, as the Supreme Court did in *Comeau*, the phrase [TRANSLATION] "principles of natural justice" rather than [TRANSLATION] "duty to act fairly" in these reasons. This choice of terminology does not have any negative impact on the applicants, since in *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602, at paragraph 47, the Supreme Court held that "It is wrong . . . to regard natural justice and fairness as distinct and separate standards" and noted that "Fairness involves compliance with only some of the principles of natural justice".

[29] Accordingly, in this Court, the applicants essentially maintained that, in exercising his discretion in a non-arbitrary way and in good faith, the Minister should treat them in the same way as other fishers dependent on groundfish, since there is no reason for their being given different treatment. Additionally, it appeared from the record as a whole and from various issues raised by the applicants that they also objected to the Minister's not giving them specific allocations of snow crab in the areas in question. This claim, which I would describe as implicit, was based on the Minister's knowledge of the problems between the applicants and the MFU; on the fact that the Minister was apparently informed on February 3, 2006, that the applicants were no longer represented by the MFU; and on the fact that the MFU was supposed to give the applicants an area 12 crab allowance.

[30] For his part, the respondent maintained that nothing in the evidence shows that the Minister acted arbitrarily. He further noted that although the applicants claimed that they should

have been given the same treatment as the APPFA fishers, the evidence shows that their situation was not identical, since they had chosen to remain in the group of competitive fishers. The respondent claimed that there was no evidence that the Minister acted in bad faith. On the contrary, he maintained that the Minister substantially increased the applicants' cod allocation and gave them a crab quota in area 12E.

[31] The issue that arises in the case at bar is whether the Minister complied with the principles of natural justice in exercising his discretion to authorize the issuance of licences.

[32] The Minister's duty to act in accordance with the principles of natural justice implies no duty to treat all fishers in the same way. Earlier decisions by the Federal Court of Appeal have recognized the inequitable aspect of decisions by the Minister of Fisheries on this type of question. In particular, in *Carpenter Fishing Corp. v. Canada (C.A.)*, [1998] 2 F.C. 548, at paragraph 39 of his reasons, Robert Décary J.A. wrote:

> Quotas invariably and inescapably carry with them some element of arbitrariness and unfairness. Some fishermen may win, others may lose, some may win or lose more than others, most if not all will find themselves with less catches than before. It is at best in that sense, and not in the legal sense, that one can speak, in cases such as the present one, in terms of discrimination. If this were found to be discrimination, then it would be discrimination authorized by statute.

Accordingly, the fact that two groundfishers received a different allocation is acceptable provided that the difference in treatment is based on relevant considerations, is not arbitrary and was made in good faith.

[33] In my view, the evidence before the Court does not show that the Minister's decision was based on irrelevant considerations, was arbitrary or was made in bad faith. Instead, the evidence shows that the applicants' situation differs from that of the other ITQ holding fishers to which they compared themselves. In fact, they chose to remain in the group of competitive fishers and, consequently, enjoyed certain benefits applicable to that group, including access to a significant cod allocation and a snow crab quota in area 12E.

[34] In view of their decision to remain in the competitive fisher group, the applicants cannot complain that they were the subject of unfair treatment. The ITQ fishers with whom the applicants compared themselves are necessarily treated differently under the plan which they chose, a plan that is quite different from that chosen by the applicants. Accordingly, this difference in treatment is not arbitrary.

[35] Even considering that the Minister was aware of the problems between the applicants and the MFU before the fishing plan was announced, the applicants did not persuade the Court that he had a duty to make a specific snow crab allocation for them. To the extent that the preparation of a fishing plan extends over a long period; that the principle on which the allocations are made depends on the fisher associations; and that, when the fishing plan was announced the applicants were still officially part of the MFU, this Court cannot conclude that the Minister failed to fulfill his duties. Although the Minister was aware of the dispute between the MFU and the applicants when the fishing plan was announced, he had no duty to ensure that part of the quota allocated to the MFU would in fact be assigned to the applicants.

[36] For these reasons, I therefore conclude that the Minister acted in accordance with his obligations in assigning the snow crab quotas in 2006 pursuant to the fishing plan.

B. *Did the Minister have a fiduciary obligation to the applicant, and, if so, did he fail to fulfill that obligation to the applicants?*

[37] The applicants argued that there was a fiduciary relationship between themselves and the Minister. They relied on *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. At paragraph 32 of that judgment, the Supreme Court identified the three features of a fiduciary obligation as follows:

1. the fiduciary has scope for the exercise of some discretion or power;
2. the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[38] To begin with, the applicants maintained that it was well settled that the Minister exercises some discretion in granting fishing licences. They claimed that he could therefore, as in the case at bar, decide not to grant licences to the applicants and other fishers. Then, they argued that the exercise of the discretion has a direct legal effect on them and also an effect on their practical interests, in that they do not have the right to fish for crabs. Finally, the applicants claimed that it is clear that they are at the Minister's mercy regarding the right to fish for crabs or any other species. In support of this idea, they claimed that they were identified by the Minister as belonging to the group of fishers most dependent on groundfishing.

[39] The respondent cited the following statements by the Supreme Court:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. *Guérin v. Canada*, [1984] 2 S.C.R. 335, at paragraph 105.

[40] In that judgment Dickson J. held that the Crown's fiduciary duty to the Musqueam Indian Band was in the nature of private law, not a public law obligation. The respondent claimed that the management of fisheries on behalf of all Canadians is not in any way comparable to the situation described in *Guérin* and cannot give rise to a similar fiduciary duty.

[41] Eleanor Dawson J. summarized the principles emerging from decisions on fiduciary obligations in *Harris v. Canada*, [2002] 2 F.C. 484, at paragraph 178, which reads as follows:

> 1. The Crown may in some circumstances owe a fiduciary duty, or a duty akin to a fiduciary duty.
>
> 2. In any particular case, the surrounding circumstances must be closely examined in order to determine whether the duty imposed on, or undertaken by, the Crown is in the nature of a private law duty. For example, is the Crown exercising a discretion on behalf of the beneficiary of the alleged fiduciary duty? Thus in *Guérin*, the mere fact that Indian Bands had an interest in lands did not by itself give rise to a fiduciary relationship with the Crown. The existence of that relationship depended upon the further fact that the Indian interest in land was inalienable expect upon surrender to the Crown, with the Crown there acting on the Band's behalf. The source of that obligation was not a creation of either the legislative or executive branches of government and so was not a public law duty. The equitable obligation entailed in the surrender requirement was the source of the fiduciary

> obligation owed to Indians. It was therefore in the nature of a private law duty.
>
> 3. Where the Crown owes duties to a number of interests it is more likely that the Crown is not in a fiduciary relationship, but rather is exercising a public authority governed by the proper construction of the relevant statute.
>
> 4. A fiduciary relationship is unlikely to exist where that would place the Crown in a conflict between its responsibility to act in the public interest and the fiduciary duty of loyalty to its beneficiary.

[42] When he is managing fisheries, the Minister has duties to a number of interests, since he does so on behalf of all Canadians and in the public interest. Moreover, this principle was in fact stated by the Supreme Court in *Comeau*. The Court stated the following in that case:

> Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43).

[43] In light of this principle and those mentioned by Dawson J., I am of the opinion that it is extremely unlikely that a fiduciary relationship exists between the Minister and the applicants. Additionally, if I were to accept the applicants' argument that the Minister owes them a fiduciary duty, the Crown would be placed in a situation of conflict between its responsibility to act in the public interest and the duty of loyalty which a fiduciary has to a beneficiary.

[44] All things considered, I am of the opinion that, in the case at bar, no fiduciary relationship exists between the Minister and the applicants.

6. Conclusion

[45] The Minister must base his decisions on relevant considerations, avoid arbitrariness and act in good faith. I am satisfied that there is no evidence the Minister based his decision on irrelevant considerations or acted arbitrarily or in bad faith.

[46] The Minister has no duty to treat all fishers dependent on groundfish in the same way. Accordingly, in my view, the Minister observed the principles of natural justice.

[47] Moreover, the Minister has no fiduciary duty to the applicants. The Crown is instead exercising a public authority, which is governed by the interpretation that should be given to the applicable legislation.

[48] In view of my findings on the issues, I am of the opinion that there is no basis for reviewing the Minister's decision.

ORDER

THE COURT ORDERS that:

1. The application for judicial review of a decision by the Minister of Fisheries and Oceans on March 30, 2006, is dismissed;

2. Costs are awarded to the respondents.

"Edmond P. Blanchard"
Judge

Certified true translation

Mavis Cavanaugh

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-742-06
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