Federal Court of Appeal  Cour d'appel fédérale

Date: 20180613

Docket: A-421-16

Citation: 2018 FCA 115

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

ROLAND ANGLEHART JR. (LES PÊCHERIES JUNIOR INC.), HÉLIODORE AUCOIN (PÊCHERIES H.J.E.S INC. AND 9029-9413 QUÉBEC INC.), ALBERT BENOÎT (LES PÊCHERIES MACK LTÉE), ROBERT BOUCHER (LES ENTREPRISES BOUCHER LTÉE), ÉLIDE BULGER (LES PÊCHERIES TURMEL B. LTÉE), 100186 PEI INC., O.M.D.M. FISHERIES LTD., JEAN-GILLES CHIASSON (P.H. LAMIS LTÉE), LUDGER CHIASSON (PÊCHERIES MARIO C. LTÉE), MARTIN M. CHIASSON (PÊCHERIES JACQUES MARC LTÉE), RÉMI CHIASSON (LE CHALUTIER C.R.R. LTÉE), 2973-0819 QUÉBEC INC., 2973-1288 QUÉBEC INC., 3087-5199 QUÉBEC INC. (PÊCHERIES DOUGLAS MCINNIS INC.), ROBERT COLLIN (3181308 CANADA INC.), ROMÉO G. CORMIER (LES PÊCHERIES RICKY-TIMMY #1 LTÉE), MARC COUTURE (PÊCHERIES MARC COUTURE INC.), LES CRUSTACÉS DE GASPÉ LTÉE, LINO DESBOIS (9137-5998 QUÉBEC INC.), RANDY DEVEAU (R & R DEVEAU FISHERIES LTD.), CAROL DUGUAY (NAVIGATION DUNAMIS INC.), CHARLES-AIMÉ DUGUAY (9005-3711 QUÉBEC INC.), DENIS DUGUAY (PÊCHERIES DENIS DUGUAY INC.), DONALD DUGUAY (GESTION DONALD DUGUAY LTÉE (FORMERLY PÊCHERIES THOMAS DUGUAY LTÉE)), MARIUS DUGUAY (LE JUSMULAC LTÉE), EDGAR FERRON (PÊCHERIES L.E.F. LTÉE), LIVAIN FOULEM (PÊCHERIES LADY CÉLINE INC.), KENNETH GAUDET (CAT IV FISHERIES LTD.), CLAUDE GIONEST (PÊCHERIES CLAUDE GIONEST INC.), JOCELYN GIONET (PÊCHERIES ALLAIN G. LTÉE), SIMON J. GIONET (PÊCHERIES CARLO G. LTÉE), AURÈLE GODIN (PÊCHERIES LADY GODIN LTÉE), VALOIS GOUPIL (LES PÊCHERIES VALOIS LTÉE), AURÉLIEN HACHÉ (PÊCHERIES AURÉLIEN HACHÉ LTÉE), DONALD R. HACHÉ (PÊCHERIES LADY CLAUDINE LTÉE), GAËTAN HACHÉ

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Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Heard at Fredericton, New Brunswick, on February 28, March 1 and 2, 2018.

Judgment delivered at Ottawa, Ontario, on June 13, 2018.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: PELLETIER J.A.
DE MONTIGNY J.A.

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Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

REASONS FOR JUDGMENT

BOIVIN J.A.

[1] This is an appeal by the appellants and a cross-appeal by the respondent (or the Crown) from a decision rendered on October 19, 2016 (2016 FC 1159) in which Justice Gagné of the Federal Court (the Federal Court judge) allowed in part the appellants' action.

[2] For the reasons that follow, I am of the opinion that both the appeal and the cross-appeal should be dismissed.

I. Facts

[3] The facts are not in dispute and they were well summarized by the Federal Court judge. I will reproduce the main facts for the purposes of these reasons.

[4] The appellants represent a community of traditional crab fishers, or their estates or their management companies, in midshore Area 12 (Area 12) in the southern Gulf of St. Lawrence. They are residents of New Brunswick, Quebec, Nova Scotia, and Prince Edward Island. Between 1975 and 1989, the snow crab fishery in that area was a competitive fishery, meaning that as soon as the fishing season began, every fisher could enter this area in the waters of the Gulf of St. Lawrence and catch as many crabs as possible before the end of the fishing season. Beginning in 1984, the Department of Fisheries and Oceans (DFO) established an annual total allowable catch (TAC). Following the depletion of crab stocks and the ensuing crisis in the fishing industry, an individual quota (IQ) regime was established in 1990 based on fishers' historical catches. In other words, each crabber was assigned a predetermined share of the TAC.

A. *The Marshall decision of the Supreme Court of Canada*

[5] There was a considerable increase in the TAC from 1990 to 1995, and the number of metric tonnes (MT) allocated annually for the crab fishery was increased from 7,000 MT to 20,000 MT (Reasons of the Federal Court judge, at paragraph 25). In 1999, the Supreme Court of Canada rendered a decision that had direct consequences on the established fishing regime. In *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall*], it decided that First Nations have a treaty right under the treaties signed with the Crown in 1760 and 1761 and that they have the right to engage in commercial fishing in pursuit of a moderate livelihood at present-day standards. To deal with this new reality, DFO would henceforth be required to integrate First Nations into the commercial fishing of all species. The Marshall Initiative, which involved DFO attempting to buy back licences to integrate Aboriginal peoples into the various commercial fisheries, was introduced in response to the *Marshall* decision. However, the initiative was not as successful as

anticipated, with the result that DFO did not fulfill its commitments to Aboriginal peoples. From 2003 to 2006, DFO used a financial aid agreement to remove IQs from crabbers and give them to Aboriginal people. To remedy this situation, DFO bought back a part of the IQ of each crabber who was giving it up for the future, with a release (Reasons of the Federal Court judge, at paragraph 59).

B. *The 2003 Fishing Plan*

[6] Around 2002–2003, the Maritime Fishermen's Union (MFU) wanted the temporary access to the snow crab fishery that was granted to some lobster and groundfish fishers to become permanent. The MFU planned to use the revenue generated by the snow crab fishery for other activities, such as ecotourism, which in turn would enable workers to get out of the lobster and groundfish fisheries. In fact, if this approach, known as "rationalization", allows for the removal of a certain number of fishers from a given fishery, it ensures in return the profitability of the remaining fishers (Reasons of the Federal Court judge, at paragraph 66). The Minister of Fisheries and Oceans (the Minister) announced a Three-Year Snow Crab Management Plan for the Southern Gulf (Fishing Plan) in 2003. Specifically, the Fishing Plan provides for the area identified as Area 18 (excluding a buffer zone where fishing is prohibited) to be integrated in Area 12, *i.e.*, the area where the appellants fish, and for a percentage of the TAC of the new combined area to be allocated to the Area 18 fishers. To carry out "rationalization", DFO allocated to the associations and to the fishers new access to 15% of the TAC for the three (3) years of the Fishing Plan. The Fishing Plan stipulates that the TAC and management measures would be set every year. For 2003, the TAC was fixed at 17,148 MT; this was a considerable 4,000 MT lower than the crab fishers had anticipated. The Area 12 crab fishers were not satisfied

with the approach set out in the Fishing Plan, and they refused to sign a joint project agreement with DFO for the year 2003.

C. *The use of a portion of the TAC to finance DFO activities*

[7] Since there was no joint project agreement between DFO and crabbers in 2003 to finance DFO's activities, DFO had to find a way to finance the trawl survey that is performed annually after the fishing season to assess the biomass in the concerned areas. To do so, in 2003, it used 50 MT of snow crab that were not fished by First Nations. Between 2004 and 2006, DFO issued a call for proposals to award snow crab allocations to third parties, namely Regroupement des pêcheurs professionnels des Îles-de-la-Madeleine and the Acadian Groundfish Fishermen's Association, to finance its activities, such as the trawl survey, the improved white crab protocol, scientific analysis and increased catch monitoring. In 2004, 400 MT of snow crab were used to finance various DFO operations; in 2005, 480 MT were used, and in 2006, 1,000 MT were used.

[8] On July 11, 2007, a Federal Court action was filed against the Crown in connection with acts or omissions by the Minister and DFO officials that occurred between 2003 and 2006. In the context of that action before the Federal Court, the appellants alleged that some of the decisions made by the Minister and by DFO between 2003 and 2006, more specifically with regard to the Marshall Initiative, the Fishing Plan and the use of a portion of the TAC to finance DFO activities, gave rise to (i) expropriation; (ii) unjust enrichment; and (iii) misfeasance in public office.

II. The Federal Court decision

[9] The appellants' action was only allowed in part, as the Federal Court judge dismissed most of their causes of action. First, she dismissed the appellants' argument that the fishing licences gave them a right of ownership in the fishery resource or a vested right to a portion (IQ) of the TAC. Second, she found that the appellants had no legitimate expectation that their portion of the TAC would remain the same from year to year. As a result, she dismissed the causes of action for expropriation and unjust enrichment. The Federal Court judge also dismissed the appellants' claims regarding their third cause of action, which was for misfeasance in public office, with the exception of one claim: she allowed the appellants' claim that the Minister wrongfully reduced the TAC in 2003 for the sole reason of forcing the appellants to resume negotiations relating to a joint project agreement concerning the Atlantic fishery.

III. The appeal and the cross-appeal

[10] The appellants are appealing the decision of the Federal Court judge and are seeking a favourable appeal judgment from this Court on all of their causes of action, that is, expropriation, unjust enrichment, and misfeasance in public office, which were dismissed at trial.

[11] The Crown, on the other hand, cross-appealed for the sole reason that the Federal Court judge erred in allowing in part the appellants' cause of action for misfeasance in public office on the part of the Minister.

IV. Issues

A. Did the Federal Court judge err in dismissing the cause of action for expropriation?

B. Did the Federal Court judge err in dismissing in part the cause of action for misfeasance in public office?

C. Did the Federal Court judge err in dismissing the cause of action for unjust enrichment?

D. Did the Federal Court judge err in allowing in part the cause of action for misfeasance in public office?

V. Standard of review

[12] The standard of review applicable to the Federal Court judge's findings of law is correctness. The Federal Court judge's findings of fact and of mixed fact and law are subject to the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]).

VI. Analysis

A. *Did the Federal Court judge err in dismissing the cause of action for expropriation?*

(1) Does the notion of "property" in common law apply in this case?

[13] The appellants argue that expropriation law applies to their rights interests in their fishing licences and their IQs. More specifically, the appellants claim that they are entitled to compensation for the loss they incurred as a result of the reduction of their IQs, which the Crown allegedly benefitted from. To succeed, the appellants must demonstrate that the Crown took

"property" in the common law sense away from them or that they were deprived of a right under expropriation law.

[14] The starting point for the appellants' argument in this regard can be summarized as follows: they argue that they have a fishing right that was crystallized in 1990 when DFO changed the competitive fishery policy into an individual fishery policy, that is, when IQs associated with each fishing licence were assigned to the appellants. According to the appellants, the IQ associated with each fishing licence is a permanent commercial asset that is assignable and transferrable. According to the appellants, it is the IQ that gives the appellants the right to fish a predetermined portion of the annual TAC, that is, a proprietary interest in the quotas. The appellants claim that by granting a portion of the TAC to First Nations following the *Marshall* decision and by appropriating a portion of the TAC for rationalization and to finance its operations, DFO removed approximately 35% of the appellants' IQs. For the appellants, that 35% portion of the IQ that was removed constitutes an expropriation.

[15] The appellants agree that the fishing licences accompanied by IQs are not real rights that are normally at issue in a situation of expropriation, and that the *Expropriation Act*, R.S.C. 1985, c. E-21, does not apply in this case. However, they argue that a much broader interpretation must be given to the legal concept of expropriation and expropriation law to extend it to intangible assets. The appellants argue that such an interpretation is possible in the context of the exercise of ministerial discretion, as is the case here (section 7 of the *Fisheries Act*, R.S.C. 1985, c. F-14).

[16] In short, the appellants claim that by removing 35% of their IQs, DFO did in fact expropriate "property". To support this position, the appellants argue that the Federal Court judge erred by disregarding the decisions in *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166 [*Saulnier*]; and *Haché v. Canada*, 2011 FCA 104, [2011] F.C.J. No. 414 (QL) [*Haché*]. According to the appellants, those decisions confirm that the fishing licences in this case must be considered property under the *Fisheries Act*. Therefore, it is appropriate to take a closer look at those two decisions.

(2) The *Saulnier* decision

[17] In *Saulnier*, the Supreme Court of Canada had to decide whether a fishing licence was "property" within the meaning of section 2 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and "personal property" within the meaning of Nova Scotia's *Personal Property Security Act*, S.N.S. 1995-96, c. 13; these are essentially questions of statutory interpretation. The Supreme Court answered in the affirmative. The appellants are relying on this decision to argue that a fishing licence must also be considered "property" within the meaning of the *Fisheries Act*. However, a careful reading of *Saulnier* demonstrates that this case differs from that case in several respects and that the appellants' argument in the context of the *Fisheries Act* cannot be accepted.

[18] The *Bankruptcy and Insolvency Act* and the *Personal Property Security Act* are primarily commercial instruments, and the Supreme Court's statutory interpretation findings in *Saulnier*, namely that regarding the "bundle of rights" conferred on the holder of a fishing licence, are made in the context of legislation that is distinct from that at issue in this case (*Saulnier*, at

paragraph 43). Therefore, the concepts of *profit à prendre* and of the market value of licences addressed by the Supreme Court in *Saulnier* depend on the definition of "property" set out in the legislation at issue. Justice Binnie, writing the reasons for the Court in *Saulnier*, is careful to specify that "[i]t is extremely doubtful that a simple [fishing] licence could itself be considered property at common law" even though "a fishing licence is unquestionably a major commercial asset" (*Saulnier*, at paragraph 23). Justice Binnie states many times in that case that the statutes in question are largely commercial instruments that should be interpreted in a way best suited to enable them to accomplish their respective commercial purposes. Respecting Parliament's intent in that specific context, the Supreme Court concluded that fishing licences meet the definition of "property" for the purposes of the definition of "property" in section 2 of the *Bankruptcy and Insolvency Act* and that of "personal property" within the meaning of section 2 of the *Personal Property Security Act*.

[19] However, the Supreme Court's conclusions in *Saulnier* cannot be taken out of context. Justice Binnie broadly notes in *Saulnier* that his interpretation of the definitions at issue fall within a specific and narrow legislative context. In this case, the Federal Court judge referred to paragraph 48 of *Saulnier*, in which Justice Binnie responds to certain concerns that were raised by counsel for the Crown at the hearing in that case. Counsel for the Crown was concerned that a finding that a fishing licence is "property" in the context of the bankruptcy laws at issue in *Saulnier* would fetter the Minister's discretion granted by the *Fisheries Act*. However, in my view, the Supreme Court removes any ambiguity concerning the extrapolation of its reasoning in *Saulnier* to the application of the *Fisheries Act*. It is useful to reproduce the words of Justice Binnie at paragraph 48 of *Saulnier*:

> 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.
>
> [Emphasis added.]

[20] This Court later reiterated that reasoning in *Kimoto v. Canada (Attorney General)*, 2011 FCA 291, [2011] F.C.J. No. 1471 (QL) [*Kimoto*], where it stated the following at paragraph 12:

> … Justice Bennie, 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* … beyond the particular statutory context before the court…

[21] Therefore, the Federal Court judge in this case was correct to find that *Saulnier* is distinguishable from the case at bar and does not apply.

(3) The *Haché* decision

[22] In *Haché*, this Court had to decide whether the proceeds of the disposition of two commercial fishing licences received through a governmental voluntary licence retirement program were taxable as a capital gain. The issue was as follows: were the fishing licences property within the meaning of subsection 248(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA)? This Court, relying on *Saulnier*, reiterated the commercial reality of the

fishing industry. Per Justice Trudel, this Court found, in light of the evidence before the Tax Court of Canada, that when the fisher involved in that case had negotiated the buyback of his snow crab and groundfish licences, "[he] … was then negotiating on 'property' within the meaning of the ITA and that he was claiming sums as consideration for the disposition of a 'right of any kind whatever.'" (*Haché,* at paragraph 41).

[23] Like the findings made in *Saulnier*, those expressed in *Haché* fall within a very specific legislative context. Like the *Bankruptcy and Insolvency Act*, the ITA contains provisions that define the term "property". This nomenclature is absent from the *Fisheries Act*, and this cannot be ignored. The decisions in both *Saulnier* and *Haché* were rendered to give effect to Parliament's intention in a specific legislative context that cannot be compared to this case, as the Federal Court judge explains at paragraph 112:

> I therefore conclude that the scope of these decisions [*Saulnier* and *Haché*] 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 [*Bankruptcy and Insolvency Act*] 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.
>
> [Emphasis added.]

[24] The decision in *Haché*, like the decision in *Saulnier*, is clearly distinct from this case and does not apply here. The approach to take in addressing the appellants' main argument regarding expropriation is to analyze it from the perspective of the relevant provisions of the *Fisheries Act* and its Regulations, and not otherwise.

(4) The *Fisheries Act* and its Regulations

[25] Section 7 of the *Fisheries Act* grants the Minister discretion to perform his duties, namely for the purposes of issuing fishing licences:

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.

[26] Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop fisheries on behalf of Canadians. The case law has acknowledged on many occasions that Canada's fisheries are a common property resource that belongs to all Canadians and that the Minister's duty is to manage fisheries having regard to the public interest (*Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, [1997] S.C.J. No. 5 (QL) [*Comeau's Sea Foods*] and *Kimoto*).

[27] In *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548, [1997] F.C.J. No. 1811 (F.C.A.) (QL) [*Carpenter Fishing*], Justice Décary noted, at paragraph 37 of his reasons, the broad discretion granted to the Minister in this matter, particularly with regard to policies on fishing quotas:

> It follows that when examining the exercise by the Minister of his powers, duties, functions and discretion in relation to the establishment and implementation of a fishing quota policy, courts should recognize, and give effect to, the avowed intent of Parliament and of the Governor in Council to confer to the Minister the widest possible freedom to manoeuvre. It is only when actions of the Ministry otherwise authorized by the *Fisheries Act* are clearly beyond the broad purposes permitted under the Act that courts should intervene.

[28] The *Fisheries Act* does not define the concept of "fishing licence". However, the *Fishery (General) Regulations*, SOR/93-53 (1993 Regulations) prescribe conditions with regard to fishing licences. In particular, the 1993 Regulations stipulate that a licence expires on December 31 of each year (section 10); that a licence is the property of the Crown and is not transferable; and that 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 (section 16).

[29] The 1993 Regulations also set out conditions of licences at paragraph 22(1)(*a*), namely with regard to the species and quantities of fish:

Conditions of Licences	**Conditions de 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	**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

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:	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;

[30] This, then, is the specific statutory and regulatory context in which this appeal and more specifically the main issue of expropriation as alleged by the appellants in regard to their fishing licences and associated IQs, arises.

(5) Does expropriation law apply to the appellants?

[31] Before this Court, just as before the Federal Court judge, the appellants introduced their arguments centred on expropriation by citing the decision of the House of Lords in *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] AC 508, [1920] UKHL 1 at page 542 [*De Keyser*]. That decision sets out the principle that statutes should not be interpreted so as to enable an individual's property to be confiscated without payment. According to the appellants, Parliament can decide to exclude a claim for compensation following expropriation under a statute, but it must do so explicitly. The appellants claim that the discretion granted to the Minister in section 7 of the *Fisheries Act* is silent on the intention to exclude expropriation law in the context of the *Fisheries Act*. However, the principle set out in *De Keyser* cannot be applied in a vacuum. That means that in this case it must be addressed by taking into consideration the *Fisheries Act* and more specifically the discretion that Act grants to the Minister "wherever the

exclusive right of fishing does not already exist by law" (section 7 of the *Fisheries Act*). Parliament's intention is clear in that if a law does not grant an exclusive right of fishing – and no law of that type has been brought to this Court's attention – the Minister can, in the exercise of his discretion, "… issue … leases and licences for fisheries or fishing" (section 7 of the *Fisheries Act*). It follows that this discretion also enables the Minister to not renew such licences, within the scope of his mandate to manage fisheries.

[32] The statutory and regulatory framework for issuing fishing licences pursuant to the *Fisheries Act* poses an obstacle to the appellants' claims of expropriation. Before this Court and the Federal Court, the appellants nonetheless argued that the following decisions support their claims: *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101 [*Manitoba Fisheries*]; *R. v. Tener*, [1985] 1 S.C.R. 533 [*Tener*]; *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324 [*Rock Resources*]; and *Beaurivage v. Québec (Ville)*, J.E. 2004-820 (C.A.Q.), 2004 CanLII 26320 (QC CA) [*Beaurivage*] (application for leave to appeal to the Supreme Court of Canada dismissed, No. 30351).

[33] Dissatisfied with the Federal Court judge's reasons, the appellants' approach before this Court consisted in trying to convince us that the judge incorrectly interpreted the case law. Our role as an appeal court is not to repeat the trial – which stretched over a period of 33 days – but rather to review the decision of the Federal Court judge and intervene if we are convinced that an error according to the criteria set out in *Housen* was committed. For this purpose, we must look at the decisions on which the appellants rely to invoke expropriation law in the context of the

Fisheries Act in order to determine whether the Federal Court judge committed an error in her analysis that requires this Court's intervention.

[34] The appellants rely, *inter alia*, on *Manitoba Fisheries* to argue that expropriation can occur with regard to intangible property and not just property at common law. In *Manitoba Fisheries*, Manitoba Fisheries Limited, a company that operated a very profitable fish exporting business for 40 years for a loyal clientele, brought a case against the Government of Canada following the enactment of the *Freshwater Fish Marketing Act*, R.S.C. 1985, c. F-13, because, as a result of the Act, the Government of Canada gave its agent exclusive rights to export fish out of Manitoba and participating provinces. The agent in question was authorized to issue licences to allow Manitoba Fisheries Limited to continue exporting fish, but Manitoba Fisheries Limited did not obtain them and was not given any compensation. As a result, Manitoba Fisheries Limited argued before the courts that the *Freshwater Fish Marketing Act* had the effect of depriving the company of its commercial goodwill.

[35] The Supreme Court agreed with Manitoba Fisheries Limited. According to the Supreme Court, Manitoba Fisheries Limited had been deprived of business property and was never compensated for the loss. The appellants in this case rely on *Manitoba Fisheries* to argue that an IQ, even though intangible, is a commercial asset in the same way as a fisher's boats and equipment are. As the Federal Court judge stated at paragraph 153, a parallel cannot be drawn between the rights the appellants claim to have in their IQs and the goodwill of a business as an asset because the appellants do not "own" their IQs:

> … 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.

[36] Therefore, *Manitoba Fisheries* does not support the appellants' argument that the IQs give them a property right and that case cannot serve as an applicable precedent that can justify compensation for expropriation in this case.

[37] The context of IQs also differs from that at issue in *Tener* and *Rock Resources*, both of which involved mineral claims. At paragraph 157, the Federal Court judge made several relevant distinctions between mineral claims and the IQs at issue:

> … 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.
>
> [Emphasis added.]

[38] The Federal Court judge's analysis clearly illustrates that there can be no question of expropriation with regard to IQs because they do not grant any property rights or real interest akin to the rights of mineral claim holders.

[39] The appellants also rely on the decision in *Beaurivage* by the Quebec Court of Appeal. In that case, Quebec City had enacted an order reducing the number of calèche licences from 30 (27 of which were held by Mr. Beaurivage) to 16. In its analysis, the Quebec Court of Appeal noted that Quebec City's powers to regulate calèches were granted under its Charter (*Charter of Ville de Québec, national capital of Québec*, C.Q.L.R., c. C-11.5). This power to regulate calèches and require calèche owners to obtain licences did not allow Quebec City to reduce the number of licences or refuse the renewal of previously issued licences without compensation (*Beaurivage*, at paragraphs 36 and 50).

[40] However, the regulations for the *Fisheries Act* follow an entirely different logic than those at issue in *Beaurivage*. The 1993 Regulations stipulate that a fishing licence is a document that, unless otherwise specified, expires on December 31 of each year and does not provide any guarantee to the holder of receiving a document of the same type each year (1993 Regulations, sections 2, 10 and 16). Indeed, if the stability of the fishing industry depends on DFO's predictable renewal of licences year after year (*Saulnier*, at paragraph 14), this renewal cannot be interpreted as conferring a right similar to a property right that may be expropriated.

[41] The recent decision of this Court in *Canada v. 100193 P.E.I. Inc.*, 2016 FCA 280, [2016] F.C.J. No. 1264 (QL) [*100193 P.E.I.*] (application for leave to appeal to the Supreme Court of Canada dismissed in 2017, No. 37393) is also problematic for the appellants' argument to the effect that they have an interest in the IQs based on the historical conduct of the parties and the implementation of government policies. That decision, rendered approximately one month after the Federal Court judge's decision, concerns the interests of Area 12 snow crab

fishers. In this case, the appellants are members of a community of traditional crab fishers in the same area.

[42] In *100193 P.E.I.*, which involved a motion for summary judgment, this Court dismissed the fishers' expropriation claim. In so doing, it reiterated (i) that Canada's fisheries are a common property resource and that the *Fisheries Act* grants the Minister discretion to manage the resource; and (ii) that IQs are insufficient to maintain a cause of action for expropriation (at paragraphs 14 and 15). In its reasons, this Court, per Justice Stratas, referred to the decision in *Kimoto*, also rendered by this Court. The appellants argue that that case is distinct from the case at bar because *Kimoto* concerned [TRANSLATION] "fish to be fished" and [TRANSLATION] "non-allocated quotas", as opposed to IQs. However, that is not sufficient to disregard the scope of *100193 P.E.I.* and the principles it sets out with regard to IQs, namely that Canada's fisheries resources are common property belonging to all Canadians and that the Minister has a wide discretion to manage them (*100193 P.E.I.*, at paragraph 15).

[43] In fact, as the Federal Court judge noted (at paragraph 160), if a parallel had to be drawn with this case, it would be more appropriate to look to the decision of the Nova Scotia Supreme Court in *Taylor v. Dairy Farmers of Nova Scotia*, 2010 NSSC 436, [2010] N.S.J. No. 624 (QL) (affirmed in 2012 NSCA 1), which involved a regulation of milk quotas. The Nova Scotia Supreme Court dismissed the dairy producers' expropriation claim on the grounds that they do not own their quotas. Thus, since there was no appropriation of the quotas, there could not have been expropriation.

[44] The appellants' claims also indicate that by bringing their expropriation claim, they view in the IQs granted by the Minister, the equivalent of a vested permanent right. In other words, the IQ is in a way frozen in time. The appellants' argument is that, while their snow crab catches may vary according to fluctuations in the TAC, the Minister does not have the authority to reduce their IQs without compensation. This amounts to saying that the Minister must be indefinitely bound by his decision to set the IQ at a given percentage. In other words, according to the appellants, they are the only ones who can benefit at all times from the entirety of the TAC. As a result, the Minister would not be able to grant other fishers, namely First Nations, access to the TAC without compensating the appellants. I cannot accept this argument, particularly considering the discretion granted to the Minister under the *Fisheries Act*. As Justice Pelletier of this Court noted in *Canada (Attorney General) v. Arsenault*, 2009 FCA 300, [2009] F.C.J. No. 1306 (QL) at paragraph 57, the notion of quota in the context of the *Fisheries Act* is inconsistent with the idea of a vested right analogous to that which the appellants are claiming:

> 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: see *Comeau's Sea Foods Ltd v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, [1997] S.C.J. No.5, at paragraph 49. Consequently, if there is no vested right to a given quota, there can be no right to compensation arising purely from the fact of loss of quota. As a result, the decision to offer compensation for lost quota is not one which is based on a statute or a regulation. In fact, the crabbers allege in their action that their right to compensation is a matter of contract. The exercise of the minister's discretion to issue fishing licences with reduced quota under section 7 of the Act [*Fisheries Act*] did not result in a public legal duty to pay compensation for the lost quota. There being no public legal duty, the crabbers are not entitled to an order of *mandamus*.
>
> [Emphasis added.]

[45] The appellants' argument that an IQ is frozen in time cannot be accepted.

[46] The appellants also greatly emphasized at the hearing that their commercial interests could be affected by the exercise of the Minister's discretion and that this can create entitlement to compensation. However, the Minister's discretion is with regard to the allocation of fishery resources and while in the fishing industry there is a commercial reality – in which DFO does not participate – the Minister's duty under the *Fisheries Act* is not to manage commercial interests but rather fishery resources, resources that are not infinite.

[47] Of course, the Minister can consider certain social, economic and commercial factors in managing the fisheries (*Malcolm v. Canada (Fisheries and Oceans*), 2014 FCA 130, [2014] F.C.J. No. 499 (QL) at paragraphs 52–53) but is not obligated to do so. Moreover, there is nothing preventing the Minister from favouring one group of fishers over another in the exercise of his discretion (*Carpenter Fishing*). The Minister's colossal task of managing, developing and conserving the fisheries for all Canadians requires him to make strategic decisions that will inevitably have an impact on competing commercial interests. The Minister must react to varied concerns and occasionally make necessary adjustments to respond to new imposed realities. As previously noted, this was the case following the Supreme Court of Canada's decision in *Marshall*.

[48] This ministerial discretion cannot be interfered with unless it is demonstrated that it was exercised in bad faith, violated the principles of natural justice or was based on considerations that were irrelevant or extraneous to the statutory purpose (*Comeau's Sea Foods*, at paragraph 36; and *Carpenter Fishing* at paragraphs 28 and 37). This aspect will be examined at paragraphs 50 *et seq.* in the context of the misfeasance in public office issue.

[49] In short, I am of the view that the Federal Court judge, in rejecting the appellants' argument with regard to expropriation, conducted a careful legal analysis of each of the decisions raised by the appellants in this respect (Reasons of the Federal Court judge at paragraphs 150-162) and did not commit an error that warrants the intervention of this Court. In light of the foregoing, and since I am of the opinion that the appellants' cause of action for expropriation must be dismissed, it is not necessary to address the argument concerning the benefit obtained by the Crown.

B. *Did the Federal Court judge err in dismissing in part the cause of action for misfeasance in public office?*

[50] The appellants argue that DFO committed misfeasance in public office: (i) by using crab to finance its operations from 2003–2006; (ii) by using crab to finance the operations and programs of coastal fishing associations (*i.e.*, rationalization); and (iii) by granting an unjustified share of the TAC to Area 18 fishers. The Federal Court judge dismissed these claims. However, she sided with the appellants on the reduction of the TAC by 4,000 MT in 2003, which was not raised by the appellants. However, that issue is the subject of the Crown's cross-appeal, which will be addressed at paragraphs 68 *et seq*.

[51] Before this Court, the appellants made many arguments in connection with the cause of action for misfeasance in public office. The appellants are attacking all aspects of the Federal Court judge's analysis and findings regarding this cause of action. In so doing, the appellants invite this Court to reassess and weigh the evidence in the record and substitute their interpretation of the evidence and the conclusions they seek for those of the Federal Court judge.

As previously mentioned, under the *Housen* standard of review, which applies in this case, that is not the role of this Court. The appellants had to show that the Federal Court judge committed an error that warrants our intervention. Such an error was not demonstrated—quite the contrary in fact.

[52] When a cause of action for misfeasance in public office is at issue, the leading case of the Supreme Court of Canada on this matter is *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 [*Odhavji*]. More specifically, misfeasance in public office is an intentional tort that is directed at the conduct of public officers in the exercise of their duties (*Odhavji*, at paragraph 38) and includes the following elements: (i) deliberate, unlawful conduct in the exercise of public functions; (ii) awareness that the conduct is unlawful and likely to injure the plaintiff; (iii) harm; (iv) a legal causal link between the tortious conduct and the harm suffered; and (v) an injury that is compensable in tort law (*Odhavji* at paragraph 32).

[53] There are two ways in which the tort of misfeasance in a public office can arise. In *Odhavji*, the Supreme Court, per Justice Iacobucci, grouped the two ways in which the tort of misfeasance in a public office can arise into two categories of torts: category A and category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to act in the way complained of and that the act is likely to injure the plaintiff.

[54] In this case, at the beginning of her analysis on misfeasance in public office, the Federal Court judge made the distinction between a review of the legality of a public body’s decision and

the rules of civil liability (*Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304; and *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, [2016] 1 F.C.R. 446) (Reasons of the Federal Court judge at paragraphs 191–194). She then described the broad principles that emerged from *Odhavji* (Reasons of the Federal Court judge at paragraphs 195–199) before she began her analysis on the issue of the financing of DFO activities from 2003 to 2006.

(1) The financing of DFO's activities from 2003 to 2006

[55] The Federal Court judge reiterated the 2006 decision of this Court in *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, [2006] F.C.J. No. 985 (QL), that is, that DFO exceeded its management powers by appropriating fishery resources to finance its management and research activities. Although she observed, in light of the evidence, that the public officers were aware of the unlawfulness of the agreements, the alleged misconduct did not contain elements of malice or bad faith that could be likened to misfeasance in public office (*Roncarelli v. Duplessis*, [1959] S.C.R. 121; and *Odhavji*):

> … 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.
>
> (Reasons of the Federal Court judge, at paragraph 202).

[56] In any event, the management and research activities at issue made it possible to increase the TAC and anticipate the biomass, primarily by the trawl survey and the improved white crab protocol. In that sense, the increase in the TAC was advantageous to the appellants because they

also benefitted from increased catches based on their respective IQs, thus making it possible to maximize fishing effort while minimizing its impact on the conservation of the resource. As the Federal Court judge concluded, the appellants did not suffer any harm. There is no need to intervene with regard to the Federal Court judge's findings on this issue.

(2) The use of crab to finance operations and programs of coastal fishing associations (*i.e.*, rationalization)

[57] Confronted with economic difficulties beginning in 1993, groundfish and lobster fishers obtained snow crab allocations in Area 12 prior to 2003. Beginning in 2003, the Minister sought to implement a permanent solution, that is, a "regular" share, by allocating them 15% of the TAC for snow crab in Area 12, with the objective of fleet self-rationalization.

[58] The appellants argue that DFO committed misfeasance in public office by removing 15% of the TAC to fund new access to Area 12 for fishing associations, more specifically, groundfish and lobster fishers. While the appellants do not dispute the Minister's authority to reallocate the resource, they criticize him for having based his decision on illegal grounds and having implemented his decision unlawfully.

[59] Once again, the appellants are asking this Court to intervene on questions of fact when it is well established that appellate courts must show deference to the findings of fact of a trial judge unless there is a palpable and overriding error (*Housen*; and *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, [2012] F.C.J. No. 669 (QL) (application for leave to appeal to the Supreme Court of Canada dismissed in 2012, No. 34946)).

[60] The Federal Court judge made certain findings about the mechanism DFO put in place and, in so doing, noted that the manner in which it issued fishing licences with preconditions or conditions was "problematic" and was an unlawful sub-delegation of the ministerial power. She drew a parallel with DFO's financing agreements, finding that there were no grounds to conclude "… that the Minister's method has the unlawful and deliberate character likely to engage the Crown's tort liability" (Reasons of the Federal Court judge, at paragraph 210). Basing her findings on the evidence in the record, the Federal Court judge then stated the following:

> [211] I also do not believe that this method caused any harm whatsoever to the plaintiffs [appellants] 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 [appellants], 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 [appellants].

[61] On this point, DFO's subsequent behaviour supports the Federal Court judge's conclusion (testimony of R. Vienneau, Appeal Book at page 9027). Consequently, she did not err in deciding that DFO's conduct did not cause any harm to the appellants because the 15% at issue would have been allocated to the groundfish and lobster fishers regardless, with or without rationalization.

(3) The allocation of a portion of the TAC to Area 18 fishers

[62] Lastly, the appellants are challenging the Minister's decision to integrate Area 18 with areas 12, 25 and 26 permanently, though with some qualifications. While the appellants do not

dispute the validity of the decision to integrate Area 18 with Area 12, they argue that there was misfeasance in public office by the Minister and by DFO because the allocation to Area 18 fishers of a share of the combined TAC for areas 12 and 18 was higher than what they consider appropriate. The appellants do not dispute the Minister's decision or his authority to take into account socio-economic considerations, but argue that the evidence does not show the relevant considerations the Minister apparently took into account. According to the appellants, the evidence shows that [TRANSLATION] "the public officers had received the instruction to disregard truly relevant factors to inflate the calculation of the share for Area 18" (Appellants' Memorandum at paragraph 100). They also criticize the process DFO followed and argue that the criteria for misfeasance in public office have been met.

[63] Once again, it appears that the appellants are dissatisfied with the Federal Court judge's interpretation of the evidence. In the Federal Court judge's detailed reasons that are well rooted in the evidence in the record, she concluded that the Minister's decision was motivated by social or economic considerations and that he acted within the parameters of his mandate pursuant to the *Fisheries Act*.

[64] In reaching this conclusion, the Federal Court judge relied heavily on the evidence and testimony to rebut the appellants' claims and thereby conclude that:

- Since the commercial crab biomass in Area 18 was low, there was no overexploitation of stock in Area 18 because while the exploitation rate in Area 18 was high, the catches themselves were not;
- The distribution of the resource among Area 12 and Area 18 fishers was fair;
- The Minister, in exercising his discretion, acted in good faith and was entitled to select the sharing formula he chose in the exercise of his discretion;

- The buffer zone in Area 18 helped to protect white crab, a measure that was of benefit to the Area 12 fishers;
- The Area 18 fishers received an allocation of approximately 3.4% and not 4.7081%.

(Reasons of the Federal Court judge, at paragraphs 217–224).

[65] On the basis of the abundant evidence in the record that largely supports the findings of the Federal Court judge, nothing warrants our intervention.

C. *Did the Federal Court judge err in dismissing the cause of action for unjust enrichment?*

[66] The appellants argue that the Federal Court judge erred in dismissing their cause of action for unjust enrichment. According to the appellants, DFO enriched itself by using a portion of the TAC in three ways: (a) to finance its coastal fisheries rationalization program; (b) to fulfill its commitments to First Nations from 2003 to 2006; and (c) to finance its own operations.

[67] The criteria developed by the Supreme Court giving rise to the cause of action for unjust enrichment are as follows: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) an absence of juristic reason for the enrichment (*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; and *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575).

[68] Upon initial analysis, the appellants' arguments raise the issue of the application of the concept of unjust enrichment in this case. Even considering, without deciding the point, that the concept of unjust enrichment may apply in this case and that there was a corresponding

deprivation of the appellants, the broad discretion enjoyed by the Minister under the *Fisheries Act* to manage and reallocate fishery resources is sufficient in itself to justify the impugned acts.

D. *Did the Federal Court judge err in allowing in part the cause of action for misfeasance in public office?*

[69] This issue arises from the Crown's cross-appeal targeting the Minister's decision to reduce the TAC in 2003 by approximately 4,000 MT, that is, from 21,437 MT to 17,148 MT, a reduction of 20%. The Crown argues that [TRANSLATION] "the trial judge erred in finding that the Minister had used the [TAC] as a bargaining chip to force the [appellants] to enter into a joint project agreement" (Respondent's/Cross-appellant's Memorandum at paragraph 103). In so doing, the Federal Court judge apparently failed to consider the objectives of protecting and conserving the resource, which justified reducing the TAC.

[70] The Crown's main argument on this issue is that the Federal Court judge erred in finding that there was a specific intent on the part of the Minister to harm the appellants. According to the Crown, the Federal Court judge should have first found that the decision was unjustified in order to conclude that it was made with intent to harm (Respondent's/Cross-appellant's Memorandum at paragraphs 129–131). The Crown also argues that there is overwhelming evidence to justify an exploitation rate of 38.5% (rather than 48%) in 2003, and that by reaching the opposite conclusion, the Federal Court judge committed a palpable and overriding error. That error led her to erroneously conclude that the Minister had acted in bad faith by reducing the TAC for 2003.

[71] The Crown also states that the Category A tort set out in *Odhavji* requires not only evidence of bad faith and intent to harm, but also an identification of who exactly committed the tort. In this case, the Federal Court judge named only the Minister himself. According to the Crown, the fact that the Minister made a decision even though he knew it would have a negative impact on the appellants is not proof of an intent to harm. The fact that the decision has no legal justification does not prove that intent either. In this case, according to the Crown, the Federal Court judge erred in finding that the decision to reduce the TAC was unjustified because the evidence demonstrates several adequate justifications. Nevertheless, the lack of justification reveals nothing about the Minister's intent or belief and, in the absence of evidence on this point, the Crown argues that the Federal Court judge erred in finding that there was misfeasance.

[72] The Crown's claims cannot be accepted. What are involved here are findings of the Federal Court judge that are largely findings of fact and not of law. The Federal Court judge correctly instructed herself on this point by applying the correct legal test set out in *Odhavji* for misfeasance in public office. She also relied on the documentary evidence and had the opportunity to hear and assess the testimony of many people, including the Minister at the time (Robert Thibault) and many public officers, including the assistant deputy minister of fisheries management (Patrick Chamut), the director general for the Gulf region (Jim Jones), the director of resource management for the Gulf region (Rhéal Vienneau), the officer responsible for shellfish for the Gulf region (Monique Baker), and the head of the snow crab section for DFO's science branch, Gulf region (Dr. Mikio Moriyasu).

[73] The Federal Court judge acknowledged that even though the Minister has full discretion to set the annual TAC, the TAC cannot be set arbitrarily (*Comeau's Sea Foods;* and *Carpenter Fishing*). The evidence, including discussions between DFO officials, supports the Federal Court judge's central findings that the reduction of the TAC was intended to serve "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." (Reasons of the Federal Court judge at paragraph 240). Moreover, the Federal Court judge specified in her reasons that on this issue, the Minister "was also sufficiently candid so as not to deny this evidence." (Reasons of the Federal Court judge at paragraph 225). With regard to the considerations of resource protection that apparently guided the Minister's decision, the evidence indicates that they were limited to "attempts to find an explanation ex post facto" and the Crown presented no evidence that could contradict the finding that the Minister "exercised his discretion by relying on considerations that are irrelevant, capricious or foreign to the purpose of the statute." (Reasons of the Federal Court judge at paragraph 252; see also paragraphs 243–250).

[74] Therefore, the Crown failed to demonstrate any error warranting the intervention of this Court.

[75] Lastly, the argument of immunity briefly raised by the Crown in its memorandum does not apply in the circumstances of this case.

VII. Conclusion

[76] For all of these reasons, I would dismiss the appeal and the cross-appeal. Given the result, the appellants and the Crown should bear their own costs.

"Richard Boivin"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
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REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	PELLETIER J.A. DE MONTIGNY J.A.
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