Federal Court  Cour fédérale

Date: 20080422

Docket: T-895-07

Citation: 2008 FC 519

BETWEEN:

**ASSOCIATION DES CRABIERS ACADIENS INC.,
a company duly incorporated under the laws
of New Brunswick, JEAN-GILLES CHIASSON,
on his own behalf and in his capacity as President of
the Association des crabiers acadiens inc.,
ASSOCIATION DES CRABIERS GASPÉSIENS INC.,
an incorporated association registered under the laws
of Quebec, MARC COUTURE, on his own behalf
and in his capacity as Administrator of the Association des crabiers
gaspésiens inc., ASSOCIATION DES CRABIERS DE LA BAIE,
an unincorporated association registered under the laws
of Quebec, DANIEL DESBOIS, on his own behalf
and in his capacity as Administrator of the Association des crabiers de la Baie,
and ROBERT F. HACHÉ**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

PROTHONOTARY MORNEAU

[1] This is a motion by the applicants under, firstly, subsection 18.4(2) of the *Federal Courts Act*, R.S.C. (1985), c. F-7, as amended, (the Act) seeking an order that the application for judicial review in this case (the Application) be treated and proceeded with as an action.

[2] If this Court agrees to the first remedy, the applicants also seek under paragraph 105(*a*) of the *Federal Courts Rules* (the rules) to have the Application consolidated with Court file T-1271-07, in which an action for damages was brought against the Federal Crown on July 11, 2007.

[3] Finally, an extension of the time limit under rule 309 for the filing of the applicants' record is sought if the applicants' motion is dismissed.

[4] I will examine each of these remedies in order after reviewing the facts underlying this motion.

Background

[5] The applicants essentially consist of three associations of traditional snow crab fishers.

[6] In the Application commenced on May 24, 2007, the impugned decision is identified as follows:

> [TRANSLATION]
>
> This application for judicial review concerns the adoption, by the Minister of Fisheries and Oceans (the **Minister**), of a Snow Crab Fishery Management Plan for the southern Gulf (the **Plan**), which was publicly announced on or about April 25, 2007. . . .

[7] For ease of comprehension, the aspects of the Plan that the applicants are referring to deal primarily with the closure of fishing zones and the allocation of fishing licences that reflect a maximum quota allocated between the traditional fishers and the First Nations fishers and the so-called non-traditional fleets.

[8] The applicants are essentially seeking in their Application to have these aspects of the Plan cancelled on the basis that the Minister based his decision on reasons unrelated to the *Fisheries Act*, R.S.C. (1985), c. F-14, as amended, thereby exceeding his jurisdiction.

[9] After filing the Application in May 2007, the applicants brought a motion under rule 318 to obtain from the respondent an extensive series of documents. In a decision dated July 27, 2007, this Court denied the motion because the documents sought were not before the Minister when the Plan was adopted and because this request for documents was similar to the discovery of information and documents that occurs at the interlocutory stage of an action, not on an application for judicial review.

[10] Following that decision, which was not appealed, the applicants filed on August 27, 2007, under rule 306, a single affidavit, namely the detailed affidavit of Robert Haché, one of the applicants in this case. On October 12, 2007, the respondent filed in response

the detailed affidavit of Rhéal Vienneau under rule 307. Mr. Vienneau is Regional Director of the Resource Management Division of Fisheries and Oceans Canada (Gulf Region).

[11] On November 23, 2007, Mr. Vienneau underwent a lengthy examination on affidavit. During that examination, counsel for the defence objected, *inter alia*, to the production of additional documents.

[12] On January 17, 2008, the applicants filed the motion under review, raising in paragraph 3 of their notice of motion that the conversion of their Application to an action was justified on the following basis:

> [TRANSLATION]
>
> (…) the proof that the applicants intend to make in support of their claims cannot be made by affidavit and requires that the applicants follow the procedures applicable to the discovery of documents and examinations for discovery;

[13] It should be noted, however, that on July 11, 2007, almost all of the individual applicants in this case joined with other applicants who were also members of associations of crab fishers in filing an action for damages against the respondent (file T-1271-07, or, sometimes, the action for damages).

[14] In file T-1271-07, which deals with the history of the snow crab fishery, including the Plan, the applicants in this case sought damages for breach of contract, fault in the exercise of a public office, expropriation without compensation, negligence in the exercise of discretionary power, misrepresentations, unjustified enrichment and breach of a fiduciary obligation.

[15] As to the respective progress of this file T-895-07 and the action for damages, it should be noted that this case T-895-07 is in a relatively advanced stage, the affidavits having been filed and the examinations on affidavit having been conducted. File T-1271-07, on the other hand, is still in the initial stages. File T-1271-07 is currently subject to a motion to strike brought by the respondent on the principal allegation that the applicants failed to have the ministerial decisions invalidated before bringing an action for damages. A hearing by a judge of this Court on the motion to strike is pending by virtue of the order made by this Court on April 14, 2008.

Analysis

[16] I intend to dismiss the applicants' motion with regard to the principal remedies for the following reasons.

[17] The text itself of section 18.4 provides that the possibility of conversion set out in subsection 18.4(2) is an exception to the general rule in subsection 18.4(1) that applications shall be heard without delay and in a summary way.

[18] Section 18.4 reads as follows:

18.4 (1) Hearings in a summary way - Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.	**18.4 (1) Procédure sommaire d'audition** - Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.
(2) Exception - The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.	**(2) Exception** - Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

[19] Although *Drapeau v. Canada (Minister of National Defence)*, [1995] F.C.J. No. 536 establishes that, in certain circumstances, there are no limits placed on the considerations which may be taken into account when the Court is seized of an application for conversion under subsection 18.4(2) of the Act, it seems to me that paragraph [1] of the reasons of the majority of the Federal Court of Appeal in *Drapeau* lead us to conclude nevertheless that when a party raises evidentiary constraints, as in this case, Federal Court of Appeal decision *Macinnis v. Canada*, [1994] 2 F.C. 464 (*Macinnis*) remains the leading applicable case.

[20] At pages 470 to 472 of *Macinnis*, the Court cites the following central principles:

It is, in general, only where facts of whatever nature cannot be satisfactorily established or weighed through affidavit evidence that consideration should be given to using subsection 18.4(2) of the Act. One should not lose sight of the clear intention of Parliament to have applications for judicial review determined whenever possible with as much speed and as little encumbrances and delays of the kind associated with	En général, c'est seulement lorsque les faits, de quelque nature qu'ils soient, ne peuvent pas être évalués ou établis avec satisfaction au moyen d'un affidavit que l'on devrait envisager d'utiliser le paragraphe 18.4(2) de la Loi. Il ne faudrait pas perdre de vue l'intention clairement exprimée par le Parlement, qu'il soit statué le plus tôt possible sur les demandes de contrôle judiciaire, avec toute la célérité possible, et le

trials as are possible. The “clearest of circumstances”, to use the words of Muldoon J., where that subsection may be used, is where there is a need for *viva voce* evidence, either to assess demeanour and credibility of witnesses or to allow the Court to have a full grasp of the whole of the evidence whenever it feels the case cries out for the full panoply of a trial.[7] The decision of this Court in *Bayer AG and Miles Canada Inc. v. Minister of National Health and Welfare and Apotex Inc.*[8] where Mahoney J.A. to some extent commented adversely on a decision made by Rouleau J. in the same file,[9] is a recent illustration of the reluctance of the Court to proceed by way of an action rather than by way of an application.

moins possible d'obstacles et de retards du type de ceux qu'il est fréquent de rencontrer dans les procès. On a des « motifs très clairs » d'avoir recours à ce paragraphe, pour utiliser les mots du juge Muldoon, lorsqu'il faut obtenir une preuve de vive voix soit pour évaluer l'attitude et la crédibilité des témoins ou pour permettre à la Cour de saisir l'ensemble de la preuve lorsqu'elle considère que l'affaire requiert tout l'appareillage d'un procès tenu en bonne et due forme[7]. L'arrêt rendu par la présente Cour dans l'affaire *Bayer AG et Miles Canada Inc. c. Ministre de la Santé nationale et du Bien-être social et Apotex Inc.*[8], où le juge Mahoney, J.C.A. s'est montré jusqu'à un certain point en désaccord avec la décision rendue par le juge Rouleau dans la même affaire[9], est un exemple récent de l'hésitation de la Cour à instruire une affaire par voie d'action plutôt qu'au moyen d'une demande.

Strayer J. in *Vancouver Island Peace Society*, and Reed J. in *Derrickson* have indicated that it is important to remember the true nature of the questions to be answered by the Court in judicial review proceedings and to consider the adequacy of affidavit evidence for answering those questions. Thus, a judge would err in accepting that a party could only introduce the evidence it wants by way of a trial if that evidence was not related to the narrow issues to be answered by the Court. The complexity of the factual issues would be, taken by itself, an irrelevant consideration if the conflicting expert affidavits on which they are based are related to the issues before the tribunal rather than issues before the Court. In the same vein, speculation that hidden evidence will come to light is not a basis for ordering a trial.[10] A judge might be justified in holding otherwise if there were good grounds for believing

Le juge Strayer, dans l'arrêt *Vancouver Island Peace Society*, et le juge Reed dans l'arrêt *Derrickson*, ont mentionné qu'il est important de se rappeler la vraie nature des questions auxquelles la Cour doit répondre dans une procédure de contrôle judiciaire, et de considérer la pertinence d'utiliser la preuve déposée par affidavit pour répondre à ces questions. Par conséquent, un juge commettrait une erreur en acceptant qu'une partie puisse seulement présenter la preuve qu'elle veut au moyen d'un procès si cette preuve n'était pas liée aux questions très précises auxquelles la Cour doit répondre. La complexité, comme telle, des questions de faits ne saurait être prise en considération si les affidavits contradictoires des experts qui s'appuient sur ces faits se rapportent aux questions soumises au tribunal plutôt qu'aux questions soumises à la

that such evidence would only come to light in a trial, but the key test is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior.

[Emphasis added.]

Cour. Par conséquent, supposer qu'on pourra mettre au jour une preuve cachée n'est pas une raison suffisante pour ordonner la tenue d'un procès[10]. Un juge peut être justifié de statuer autrement s'il a de bonnes raisons de croire qu'une telle preuve ne pourrait être mise au jour qu'au moyen d'un procès. Mais le vrai critère que le juge doit appliquer est de se demander si la preuve présentée au moyen d'affidavits sera suffisante, et non de se demander si la preuve qui pourrait être présentée au cours d'un procès pourrait être supérieure.

[Je souligne.]

[7] *See Canadian Pacific Ltd. v. Matsqui Indian Band*, [1993] 2 F.C. 641 (C.A.), at pp. 649-650; *Edwards v. Canada (Minister of Agriculture)* (1992), 53 F.T.R. 265 (F.C.T.D.), at p. 267, Pinard J.

[7] Voir *Canadien Pacifique Ltée. c. Bande indienne de Matsqui*, [1993] 2 C.F. 641 (C.A.), aux p. 649 et 650; *Edwards c. Canada (Ministre de l'Agriculture)* (1992), 53 F.T.R. 265 (1re inst.), à la p. 267, le juge Pinard.

[8] (25 October 1993), A-389-93, not yet reported.

[8] (25 octobre 1993), A-389-93, encore inédit.

[9] [Bayer AG et al. v. Canada (Minister of National Health and Welfare) et al.] (1993), 66 F.T.R. 137 (F.C.T.D.).

[9] [*Bayer AG et autre c. Canada (Ministre de la Santé nationale et du Bien-être social) et autre*] (1993), 66 F.T.R. 137 (C.F. 1re inst.).

[10] *Oduro v. Canada (Minister of Employment and Immigration)*, 9 December 1993, IMM-903-93 (F.C.T.D.), McKeown J. (not yet reported).

[10] *Oduro c. Canada (Ministre de l'Emploi et de l'Immigration)*, 9 décembre 1993, IMM-903-93 (C.F. 1re inst.), le juge McKeown, (encore inédit).

[21] Based on the above, and without disregarding other relevant factors, I believe that the joint assessment of the following three criteria or factors will be sufficient to deal with the application for conversion in this case:

1 - The true nature of the questions the Court must answer in the Application;

2 - The adequacy of affidavit evidence;

3 - The need to assess demeanour and credibility of witnesses.

[22] I agree with the respondent that in hearing the Application, the Court must decide whether the Minister, in developing and implementing the Plan, acted in accordance with the powers and obligations conferred on him by the *Fisheries Act* and whether the exercise of his discretionary powers was based on appropriate considerations rather than considerations unrelated to the Act.

[23] Therefore, I agree that the history of the relationship between the parties, the history of the development of the snow crab fishery and the validity of the existence of possible agreements between the parties in 1990, 1997 and 2002 are not relevant issues in the context of this Application. At the very least, these issues are not central to the Application. The difficulties encountered by the applicants during the examination of Mr. Vienneau on these points, including the argument that he had no personal knowledge of certain facts, therefore cannot militate in favour of the full panoply of a trial.

[24] As for the issues related more directly to the Plan that should be considered once again here, I do not find that the dynamic surrounding the parties' affidavits and Mr. Vienneau's examination calls for the conversion sought on the basis of the inadequacy of proof by affidavit or the need to assess *viva voce* the demeanour and credibility of the witnesses.

[25] In the same vein, with respect to the delayed opening of the fishery in zone 12, Mr. Vienneau adequately stated what he knew. The fact that during this examination the applicants were refused the production of an exchange of correspondence potentially relevant to a decision note produced by the respondent is a situation that could have been settled in a timely fashion by a motion to decide an objection, and not by an application for conversion.

[26] The applicants could also have sought affidavits to that effect from fishers in zone 19.

[27] Affidavits could also have been sought from, *inter alia*, the Maritime Fishermen's Union (MFU) about thei own lobster fishing rationalization plan or about their obligation to return their lobster trap tags directly to the Minister.

[28] I think it is safe to assume that any steps taken to obtain affidavits would have been met with failure. At least such a result would have been clear.

[29] As for the allegations that the Minister was acting in bad faith, raised by the applicants in their written representations in support of the motion under review, I must take note of the respondent's comment that neither the Application nor Mr. Haché's affidavit under rule 306 raises this issue in a clear and precise manner. It would therefore not be appropriate here to rely

on bad faith to apply the decision of this Court in *Jazz Air LP v. Toronto Port Authority*, [2006] F.C.J. No. 1053 (F.C. – prot), aff'd [2006] F.C.J. No. 1155 (F.C.)).

[30] As for mesh size restrictions, the particulars supplied by Mr. Vienneau during his examination on discovery were adequate, and the applicants are now able to maintain the line of argument they set forth at paragraph 50 of their written representations.

[31] Therefore, the Court dismisses the applicants' motion under subsection 18.4(2) of the Act.

[32] Moreover, as regards the applicants' application to have this file consolidated with file T-1271-07 under paragraph 105 (*a*) of the Rules, the Court is not required to answer that question because it is dismissing the application for conversion.

[33] However, if it were to consider the issue formally, the Court would dismiss the application for the reasons raised by the respondent in Part B of his written representations, and more particularly on the basis of paragraphs 79 and 82 of those representations.

[34] Finally, with respect to the extension of the time limit under rule 309, the motion is granted, the whole without costs. The applicants shall serve and file their record under rule 309 within thirty days of the final judgment with regard to the motion under review. This extension overrides and replaces the similar extension contained in the order of this Court dated January 7, 2008.

"Richard Morneau"
Prothonotary

Certified true translation

Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-895-07
STYLE OF CAUSE:	ASSOCIATION DES CRABIERS ACADIENS INC., a company duly incorporated under the laws of New Brunswick, JEAN-GILLES CHIASSON, on his own behalf and in his capacity as President of the Association des crabiers acadiens inc., ASSOCIATION DES CRABIERS GASPÉSIENS INC., an incorporated association registered under the laws of Quebec, MARC COUTURE, on his own behalf and in his capacity as Administrator of the Association des crabiers gaspésiens inc., ASSOCIATION DES CRABIERS DE LA BAIE, an unincorporated association registered under the laws of Quebec, DANIEL DESBOIS, on his own behalf and in his capacity as Administrator of the Association des crabiers de la Baie, and ROBERT F. HACHÉ
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 15, 2008
REASONS FOR ORDER BY:	PROTHONOTARY MORNEAU
DATED:	April 22, 2008

APPEARANCES:

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Ginette Mazerolle	FOR THE RESPONDENT

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