Date: 20090427

Docket: T-725-08

Citation: 2009 FC 417

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 27, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ASSOCIATION DES CREVETTIERS ACADIENS DU GOLFE INC., A COMPANY DULY INCORPORATED UNDER THE LAWS OF NEW BRUNSWICK, MICHEL LÉGÈRE IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS REPRESENTATIVE OF ASSOCIATION DES CREVETTIERS ACADIENS DU GOLF INC., ASSOCIATION DES PÊCHEURS DE CREVETTE DE MATANE INC., A COMPANY DULY INCORPORATED UNDER THE LAWS OF QUEBEC, PIERRE CANTIN IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS REPRESENTATIVE OF ASSOCIATION DES PÊCHEURS DE CREVETTE DE MATANE INC. AND ONEIL BOND

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The Minister of Fisheries and Oceans Canada has what is possibly one of the most thankless jobs in the government. He manages a resource that may be gradually shrinking and will inevitably do so if it is not carefully monitored and controlled. There may not be enough fish, and there may be too many fishers. Every spring, he authorizes harvest plans for the various types of fish and seafood in various designated locations. These plans are based on the issue of licences and the establishment of quotas.

[2] Despite the Minister's efforts, the plans may not please all interested parties. It is almost inevitable that some parties unsatisfied with a plan will consequently file an application for judicial review of the Minister's decision. This was the path taken by the applicants with respect to the 2008 Gulf of St. Lawrence Shrimp Harvest Plan. This plan was made available to the applicants in a notice to fish harvesters published on April 4, 2008. In an amended notice to fish harvesters titled 2008 Gulf of St. Lawrence Shrimp – Temporary Group B Shrimp Allocation, published on April 25, 2008, the allocation was subsequently increased.

[3] The applicants are essentially seeking a declaration that:

> [TRANSLATION] [….] the Minister did not have jurisdiction and/or exceeded his jurisdiction when he adopted the […] aspects of the Plan and/or made decisions based on parameters determined by said aspects of the Plan, in particular:
>
> a) that this honourable Court declare that the Minister did not have jurisdiction and/or exceeded his jurisdiction by distributing total allowable catch (TAC) values based on

reasons unrelated to the purpose of the Act, the Regulations and the *Atlantic Fishery Regulations*;

b) that the Minister did not have jurisdiction, exceeded his jurisdiction and/or unlawfully delegated his jurisdiction by assigning a portion of the TAC to certain fishers' groups and leaving them responsible for distributing TAC shares among their members and/or third parties and by issuing fishing licences to third parties and/or persons affiliated with these groups;

c) that the Minister did not have jurisdiction and/or exceeded his jurisdiction by announcing the adoption of a fixed sharing formula for the resource beginning in 2009.

[4] The applicants also filed an application concerning the disclosure of a broad range of documents, in particular:

1. All documents, memoranda, electronic messages, briefings, studies (scientific or other), advisories, news releases and backgrounders relating to the design, development and/or adoption of the Plan and amended plan as well as all correspondence from and/or to the Minister, Deputy Minister and Assistant Deputy Minister, Fisheries Management, directors general and officers in the Gulf and Quebec regions and/or National Headquarters concerning these aspects.

2. All decisions, orders, leases, permits and/or licences issued, renewed and/or amended, partially or entirely, following adoption of the Plan and/or based on the parameters established in the Plan.

[5] The applicants are in possession of the seven-page memorandum addressed to the Minister on March 25, 2008, covering the preliminary plan approved by him, as well as a subsequent one-page document, plus cover page, dated April 25, 2008, and addressing the second decision also approved by him. In a cover letter, counsel for the respondent objected to the disclosure of all other documents sought.

[6] The applicants filed a notice of motion calling for production of the missing documents. Prothonotary Tabib dismissed this notion on August 18, 2008. The applicant is now appealing this decision.

BACKGROUND

[7] Subsection 18(1) of the *Federal Courts Act* authorizes the submission of an application for judicial review in respect of a decision or order rendered by a federal board, which includes decisions rendered by a minister. Although the Minister may delegate certain powers, this does not appear to have been the case in the present matter.

[8] An application for judicial review is normally effected by application, as opposed to an action, while the applicable procedure is a summary procedure. Rules 317(1) and 318(2), (3) and (4) stipulate that:

317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	317. (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.
318. …	318. […]
(2) Where a tribunal or party objects to a request under rule	(2) Si l'office fédéral ou une partie s'opposent à la demande

317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.	de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.
(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).	(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.
(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.	(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[9] In the present case, Barry Rachat, acting director general of resource management, Fisheries and Oceans Canada, stated [TRANSLATION] "that the Minister of Fisheries and Oceans Canada was in possession of the attached documents when he made the decision in question . . ." The relevant section of the cover letter from the attorney general expressing his opposition to the disclosure of all other documents sought reads as follows:

> . . . [TRANSLATION] Pursuant to Rule 318(2) of the *Federal Courts Rules*, the respondent objects to disclosure of the documents requested and described in the notice of application on one or more of the following grounds:
>
> (a) the documents sought, other than those provided, are not pertinent to the decisions subject to the application for judicial review;

(b) The Minister of Fisheries and Oceans was not in possession of the documents sought, other than those provided, when he made the decisions subject to the present application for judicial review;

(c) A requisition in this manner constitutes a general claim similar to discovery in an action.

APPEAL OF PROTHONOTARY'S ORDER

[10] Rule 51(1) provides:

51. (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	51. (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

[11] The first matter in dispute to be decided in this case is to determine whether the order of Prothonotary Tabib is discretionary in nature. In *Merck & Co. v. Apotex*, 2003 FCA 488, [2004] 2 F.C.R. 459 at para. 19, Décary J. set out the test for the standard of review under an appeal from a prothonotary's discretionary decision:

> . . . Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
>
> (a) the questions raised in the motion are vital to the final issue of the case, or
>
> (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[12] The applicants maintain that the prothonotary's order is non-discretionary. They rely on my decision in *Kamel v. Canada (Attorney General)*, 2006 FC 676, [2006] F.C.J. No. 876, an appeal from a prothonotary's decision under Rules 317 and 318, in which I stated:

> A priori, I find that the Prothonotary's order is not discretionary. Therefore *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 (QL) – which stipulates that the discretionary order of a prothonotary is reviewable de novo only when the prothonotary has erred in law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where the issues raised are vital to the final issue of the case – does not apply. I perceive the order in this case as purely a question of legal interpretation. However, if I am wrong on this point, the refusal to grant Mr. Kamel's request underscored fundamental issues and was based on an improper principle of law.

[13] I committed an inaccuracy in stating the legal principle applicable in that decision. What I should have said is that if a document under review by the decision maker was clearly pertinent to the decision, then there is no reason for a court to exercise its discretion to refuse disclosure of the document. The disclosure of documents included in the record and in the possession of a federal board at the time of a decision-making process is not the same thing as the exchange of documents between parties. For example, in *AstraZeneca Canada Inc. et al. v. Apotex Inc. et al.*, 2009 FC 269, the Court ruled, under the *Patented Medicines (Notice of Compliance) Regulations*, that it was not obligated, in exercising its discretion, to order the disclosure of a document deemed pertinent if it found that a proper record exists.

[14] Section 11 of the *Interpretation Act* specifies that:

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive.	11. L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à

> l'occasion, par des expressions
> comportant ces notions.

Rule 318(4) of the *Federal Courts Rules*, *supra*, grants the Court authority to order the disclosure of documents to a judge or prothonotary, as is evident in the use of the word "may." According to section 11 of the *Interpretation Act*, this means that the statute anticipated that a motion in response to an objection to an application to disclose documents, pursuant to Rules 317 and 318, would be left to the discretion of the decision maker. As set out in *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities – Gomery Commission)*, 2006 FC 720, 293 F.T.R. 108, at paragraph 51, "The wording is permissive, but leaves the Court with full discretion over whether or not to order the transmission of requested materials."

[15] The order from Prothonotary Tabib is consequently discretionary, and the principles of law, as set out in *Merck, supra*, in *R. v. Aqua-Gem Investments Ltd.*, [1993] 2 FC 425 and in *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 SCR 450 apply.

[16] More recently, in *Lundbeck Canada Inc. v. Canada (Minister of Health)*, 2008 FCA 265, [2008] F.C.J. No. 1275 (QL), Evans J., on behalf of the Federal Court of Appeal, stated:

> [My translation]
>
> [5] I wish to emphasize at the outset a point reflected in the jurisprudence and often reiterated by this Court in interlocutory disputes, particularly, but not exclusively, in connection with those arising from NOC proceedings. Appellate courts (including courts of first instance when exercising an appellate function) are well advised not to interfere with discretionary rulings in interlocutory matters, especially of the kind in this case, unless satisfied that the issues in

> dispute are clearly material to the just disposition of the litigation and the ruling in question is fundamentally flawed.
>
> [6] The fact that the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides for appeals as of right in interlocutory matters from a Prothonotary to a Judge of the Federal Court, and then to the Federal Court of Appeal, is not an open invitation to subject discretionary decisions at first instance to close scrutiny. The interests of justice are normally best served in summary and, indeed, in other proceedings, by minimizing delays in the determination of the substantive matter. Whenever possible, the resolution of ongoing evidential wrangles (and some procedural issues) should be left to be decided by the judge hearing the application, or conducting the trial.

THE PROTHONOTARY'S DECISION

[17] The order issued by Prothonotary Tabib contains 24 paragraphs. She notes that the application is similar to those filed in relation to plans for previous fishing seasons. She conducted a detailed analysis of the case law and noted [TRANSLATION] "that the only pertinent documents under Rule 317 are those that were before the Minister at the time of adoption of the plan."

[18] The decision does not cover questions vital to the final issue of the case. Consequently, the Court can intervene only if the decision is clearly wrong.

ANALYSIS

[19] The applicants raised two main arguments which essentially subsume all other arguments. Hypothetically, these two arguments may be correct. According to the first, the Minister may have taken part in the meetings before making his decision and may have taken into consideration the documents mentioned in the memorandum and had them in mind when he approved the Plan. The

second proposes that the summary addressed to the Minister may not have been complete or entirely accurate.

[20] First, there is nothing to suggest any sleight of hand on the part of the Minister or his department with the objective of removing any documents that might be considered pertinent from his office before he signed his decision. The words used by Prothonotary Tabib do not suggest this: [TRANSLATION] “effectively in the Minister’s hands at the time of making the decision.” She made reference to *Assoc. des crabiers acadiens Inc. v. Canada (Minister of Fisheries and Oceans)*, 2004 FC 23, in which she stated the following in paragraph 23:

> [23] I adopt the reasons stated by Associate Prothonotary Giles in *Ecology Action Centre Society v. Canada (Attorney General)*, [2001] F.C.J. No. 1588, adopting the rules set out by the Court of Appeal in *Canada v. Pathak*, [1995] 2 FC 455:
>
>> “[6] (...) What is relevant is what was before the decision maker when he was reaching his decision... it does not include everything dealing with the subject which may have crossed his desk at a prior time. It certainly does not include everything in his department or area of responsibility.”

[21] In *Pathak* to which she referred, the Canadian Human Rights Commission had in its possession its investigator’s report but not the materials used by the investigator in preparing the report.

[22] Pratt J. set out as follows in paragraph 11:

> In this case, the decision of the Commission which the respondent seeks to have reviewed was rendered under subsection 44(3) of the

> Act on the basis of the report prepared by Mr. Fagan and the written submissions sent by the respondent in answer to that report. Section 44 of the Act clearly contemplates that the decision of the Commission be made on the basis of the investigator's report. This is so because the law presumes that the report of the investigator correctly summarizes all the evidence before him. That presumption must be taken into account in assessing the relevance of the materials requested by the respondent.

[23] In the present case, it may not be as marked a question of presumption of law, but there is nothing in the record to suggest that the summary was incomplete or inaccurate.

[24] Counsel for the applicants cited the decisions *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1997] F.C.J. No. 556, 130 F.T.R. 223 and [1997] F.C.J. No. 557, 130 F.T.R. 206. These decisions may be excluded since they were strongly guided by the facts in the record.

[25] In my opinion, the gist of the judgment in [1997] F.C.J. No. 556 is found in paragraphs 16 and 17. The allegation was that notice letters did not qualify as a decision. After Muldoon J. determined to the contrary, there was no doubt as to whether these letters were in the possession of the decision maker. In [1997] F.C.J. No. 557, I believe that it may be said, possibly with reference to paragraph 20, that the Minister, or another responsible authority, was obliged to play a supervisory role rather than one of passive document recipient and decision maker.

[26] This decision is also consistent with other decisions in which the question of documents that should have been in the possession of a decision maker was the central issue. It is to be added that

on appeal, the application was dismissed due to lack of interest since the documents in question had been disclosed.

[27] The prothonotary noted further that the applicants may be contravening Rule 302 in that their application appears to concern more than one order. However, she opted to focus her attention on the decision as to adoption of the fishing plan and did not go any further with the argument concerning Rule 302.

<u>THE SUMMARY IN THE MINISTER'S POSSESSION</u>

[28] There are certainly judgments in which a decision is contested because the decision maker did not have pertinent documents in his or her possession that should have been (*Tremblay v. Canada [Attorney General]*, 2005 FC 339, [2005] F.C.J. No. 241), but in the present matter, there is no indication that the prothonotary erred. The applicants also rely on *Assoc. des crabiers acadiens v. Canada (Attorney General*) 2006 FC 222, [2006] F.C.J. No. 294, in which the Court ordered the disclosure of documents that did not exist at the time of making the challenged decision. However, that point had only very limited scope, since the decision in question indicated that a bid had been accepted. The Court stated in paragraph 12:

> It does not much matter that the documents did not exist when the decision was made. The applicants were informed that the decision received from the APPFA had been approved by the Minister. As it is not only necessary to have a contract but a fishing licence for the contract to be enforceable, and in the case at bar the contract had been awarded, the Minister could not then argue that he could not provide the documents since the contract was not finalized. "Equity looks on as done that which ought to be done."

[29] It is important to note that the present case does not involve a *de novo* appeal and that a certain amount of deference is appropriate with regard to the prothonotary's decision. The issue to be resolved is not determining what decision I would have rendered at trial but rather whether the prothonotary overstepped the limits established in *Merck*, *supra*.

[30] Although stated in a different context, the words of Iacobbucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, at paragraph 80, are pertinent:

> I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness *simpliciter*, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

[31] The applicants may possibly, via cross-examination, test their theories that certain documents that should have been in the Minister's possession were not or that, through some sleight of hand, the documents that were in his possession and were pertinent were taken from him just before he signed off on his decision. Other decisions may also exist the details of which have yet to be disclosed to the interested parties.

[32] It is to be noted that the motion before the prothonotary included a much longer list of documents than the list submitted with the application for judicial review. All punning aside, I would say that the entire matter could be described as a fishing expedition and, quite naturally, the

question of the breach of Rule 302 was raised. That being said, counsel for the respondent does not appear to be suggesting that the situation requires the filing of additional applications for judicial review. It seems to me instead that he notes the intermingling of facts and decisions.

[33] The situation in this case is very different from a request made to a formal tribunal concerning materials to be transmitted that are more easily identified. When the federal board in question is a department, it cannot be considered that every document in that department is pertinent or was in the decision maker's possession. The expression "in the Minister's hands" must be interpreted with some scepticism.

[34] As set out in *AstraZeneca*, *supra*, there are cases in which the Court may order the filing of additional documents or materials under Rule 313.

CONCLUSION

[35] Having completed my analysis, I am satisfied that Prothonotary Tabib's order was not clearly wrong. She did not exercise her discretion based upon a wrong principle or a misapprehension of the facts.

ORDER

FOR THE AFOREMENTIONED REASONS;

THE COURT ORDERS that:

1. The appeal be dismissed with costs.

"Sean J. Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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