Federal Court  Cour fédérale

Date: 20090713

Docket: T-1289-07

Citation: 2009 FC 720

Ottawa, Ontario, July 13, 2009

PRESENT: The Honourable Madam Justice Johanne Gauthier

BETWEEN:

AURÉLIEN MAINVILLE, CLAUDE PAULIN, JEAN-PIERRE PLOURDE

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Mainville, Mr. Paulin and Mr. Plourde are asking the Court to set aside the decision by the Minister of Fisheries and Oceans (Minister) dated June 5, 2007, allocating each Eastern New Brunswick groundfish-dependent competitive fisher a share of 0.050925% of the total allowable catch (TAC) (or 0.7143% of the New Brunswick non-traditional allocation (or new access)) of snow crabs in crab fishing areas (CFA) 12, 18, 25 and 26.

[2] Furthermore, they are asking the Court to declare that they are entitled to receive double this allocation as well as damages equivalent to the losses suffered because of the respondent's conduct in the 2007 season, with costs.

Facts

[3] It is appropriate to relate, even briefly, the issues to the more general framework of the system in which the applicants operate.

[4] Groundfish fishers in New Brunswick traditionally fish cod and also flounder. Between 1989 and 1993, they were allowed to choose between the individual transferable quota (ITQ) system and the competitive system. The ITQ system offers fishers an individual quota that allows them to fish at their own pace until their maximum catch quota is filled or until the season closes. Fishers under the competitive fishing system do not have an individual quota, but rather a global quota allocated to a designated group of fishers; these fishers then engage in a catching race until the group quota is filled or until the season closes.

[5] Competitive fishers enjoy greater flexibility than ITQ fishers do with respect to transferring their licence. They have access to certain fishing areas, such as the Northumberland Strait, from which ITQ fishers are excluded. There are other differences between the two systems, although the applicants have indicated that these have become increasingly blurred over time.

[6] As well, there are distinctions within the same group of groundfish fishers, for instance, as to the type of fishing gear used – either mobile or fixed. Fishers with fixed gear just "pull" or place lines in the water and come back the next day to fish them. By contrast, mobile-gear fishing or trawling involves a net (the seine) being pulled by the boat, which requires a more powerful motor and results in greater fuel consumption. As a practical matter, this distinction applies only to groundfish-dependent competitive fishers because all of the groundfish-dependent ITQ fishers operate mobile gear.

[7] The applicants are groundfish-dependent fishers who use mobile gear and operate under the competitive system.

[8] Although Eastern New Brunswick groundfish fishers are not required by statute or regulations to be members of a fishing association as are, for example, lobster or herring fishers, almost all of them are, as a practical matter, members (the only exception being two of the applicants) of either the Acadian Groundfish Fisherman's Association (AGFA) or the Maritime Fishermen's Union (MFU). It seems that AGFA represents, among others, the fleet of ITQ groundfish fishers whereas the MFU, which represents several types of fishers (more than 1,200 members), particularly lobster fishers, unites competitive groundfish fishers. Before May 10, 2005, only six (two using fixed gear and four others using mobile gear) fishers who were MFU members were designated as groundfish-dependent[1] whereas, among the AGFA members, fourteen fishers were designated as such.

[1] The MFU has 87 licensees for competitive groundfish fishing.

[9] Following the imposition of a moratorium on cod fishing in the Gulf of St. Lawrence in 1993, groundfish-dependent fishers had access to fishing licences for other species, namely, snow crab. Access to snow crab was first granted in 2003 to groundfish and lobster fishers in the southern region of the Gulf of St. Lawrence, and they were allocated 15% of the TAC, minus the share allocated to Aboriginals. The share of this allocation for fishers from Eastern New Brunswick was to be managed by the AGFA and the MFU, to which 10% and 90% respectively of this share had been allocated. These organizations were responsible for achieving consensus among their members and proposing to the Minister the list of licences to be issued in a given year.

[10] As indicated in the memorandum that was prepared the Minister and on which he was to base his decision that is being challenged herein, the applicants and the other three groundfish-dependent fishers who were members of the MFU had to continually renegotiate their shares of the association's total allocation, in the context of competition with the core group of lobster fishers for whom the MFU reserved the major part of its crab allocation. This situation was unsatisfactory, since it was a constant irritant for the association and the groundfish-dependent fishers. On May 10, 2005, the MFU asked two of the applicants, Mr. Mainville and Mr. Paulin, to leave the association and notified the Minister of Agriculture, Fisheries and Aquaculture of New Brunswick and the Minister of Fisheries and Oceans Canada of this. Mr. Plourde, who had a herring fishing licence at that time, was to remain a member of the association.

[11] In 2006, the Minister allocated directly to the fleet of groundfish-dependent competitive fishers an additional quota of 46.24 tonnes in CFA 12E, a zone farther away from the coasts and less accessible than CFA 12, 18, 25 and 26. This was a temporary allocation. As for the group of ITQ groundfish-dependent fishers, they received until 2005 a temporary snow crab allocation for CFA 12, 18, 25 and 26 which, in 2005, was 0.636% of the TAC. That year, the AGFA proposed to the Minister that the allocation be shared equally among seven fishers designated by mutual agreement by the fleet of ITQ groundfish-dependent fishers (14 fishers) and that this become a regular allocation. This proposal was adopted by the Minister.

[12] It is not challenged that groundfish-dependent fishers who are part of the ITQ fleet had a history of significantly larger catches than those in the competitive fleet. The average value of these catches, from 1989 to 1992, was $204,155 for the ITQ fleet but only $28,752 for the applicants. The ITQ fleet was therefore, according to the Minister, hit harder by the moratorium.

[13] Although the fishing plan for 2007 was not put in evidence by the applicants, the parties agreed at the hearing that, when it was made public, it did not include the snow crab allocation in CFA 12, 18, 25 and 26 for groundfish-dependent competitive fishers who were not members of an association.

Impugned decision and issues

[14] In a memorandum entitled “Snow Crab and Cod Allocations to Groundfish-Dependent Competitive Fleet Fishers from Eastern New Brunswick”, the Deputy Minister of Fisheries and

Oceans recommended that the Minister allocate an individual snow crab quota to members of this fleet (with the exception of a fisher who already benefited from an additional licence for lobster). On June 5, 2007, the Minister decided to adopt this recommendation and allocate a snow crab quota to this fleet (with the exception of the fisher mentioned above) for CFA 12 (but also 18, 25 and 26) of 0.050925% of the TAC (which, that year, represented around 11,818 tonnes) per fisher to be deducted from the MFU's global allocation for the 2007 fishing season, which had been previously announced.

[15] The applicants obviously are not challenging the decision to allocate the above-mentioned quota directly to them. However, they submit that the decision must be reviewed because it contains the following errors:

i. the Minister compared the size of the applicants' vessels and their operating expenses without making a distinction within the competitive fleet, which includes two fishers using fixed gear. Furthermore, he compares them to the ITQ fleet, which includes vessels of disparate sizes such as a small 11-tonne vessel and a very large 31-tonne vessel, which has a major impact on the fleet's average vessel size;

ii. Since the vessels in the applicants' fleet are not, in fact, "*much smaller*", their operating costs cannot be said to be lower. Erroneous information cannot be characterized as relevant in accordance with the Act;

iii. an error can also be found in the table attached to the memorandum submitted to the Minister which describes the cod, crab and lobster quotas allocated to the applicants and other members of the competitive fleet from 2002 to 2006, particularly the footnote indicating that the quota they were allocated in 2006 for CFA 12E was not fished because Mr. Plourde, who had been designated by the other members of the group to fish this quota, experienced mechanical problems. In fact, although Mr. Plourde did indeed

> experience mechanical problems, he was able to fish half of the tonnage allocated. This information was in the possession of the Department as was noted by Mr. Vienneau during his examination on the affidavit filed in support of the respondent's submissions. This error is in addition to those mentioned above and together they reveal, according to the applicants, that the Minister did not act in good faith;
>
> iv. the scale adopted to arrive at an allocation of 50% of the quota allocated to the ITQ fleet is arbitrary since it does not directly express the difference in the size or the operating costs of the two fleets expressed as a percentage.

[16] Finally, the applicants submit that the Minister breached his duty to act fairly by not allowing them to make comments on the memorandum or at least on the recommendation therein. In this regard, the applicants acknowledge that the Department generally consulted them on the fishing plan and that they were given the opportunity to make submissions on their desire to not be compared to groundfish-dependent competitive fishers using fixed gear. However, they submit that they were not informed of the fact that the Minister was considering allocating them a percentage lower than that allocated to the ITQ fleet because of a difference in vessel size, loading capacity and restrictions with respect to distances travelled and operating costs.

[17] For the applicants, this is not a policy decision such as fixing global allocations or a resource management plan, but rather a series of individual decisions that are subject to a duty of procedural fairness that is higher than that defined by the case law on policy decisions on fishing allocations.

Preliminary remarks

[18] The applicants acknowledged at the hearing that the Court actually has no jurisdiction to grant damages in judicial review proceedings (*Manuge v. Canada*, 2009 FCA 29, 384 N.R. 313). Therefore, this prayer for relief need not be addressed any further.

[19] Also, the applicants did not make submissions in reply to the respondent's application to strike certain paragraphs in Mr. Plourde's affidavit that the respondent characterizes as hearsay and that contain opinions based on information or documents that have not been offered in evidence, such as the table comparing the dimensions of the vessels of the two relevant fleets, as well as other elements that are more akin to arguments than facts.

[20] The Court does not intend to give weight to these elements of the affidavit since, as mentioned at the hearing, only an expert is able to give opinions on matters that he or she does not have personal knowledge of, especially on its face, Mr. Plourde's table contains at least one obvious error and the documentation on which it is based is not before the Court. In this regard, the Court also notes that nothing indicates that Mr. Plourde considered the modifications made to certain vessels in the ITQ fleet after their original registration (such as the 45-foot supers).

Analysis

[21] The applicable standard of review in relation to issues other than a breach of duty to act fairly will not be addressed in a detailed analysis since it is clear that deference is called for since, in this case, the Minister has exercised his discretion to manage the fishery and establish allocations in

accordance with the licences and leases that could subsequently be issued (*Fisheries Act*, R.C.S. 1985, c. F-14 (the Act), section 7. The parties are also in agreement as to this (Applicants' Memorandum of Facts and Law, paragraph 8; Respondent's Memorandum of Facts and Law, paragraph 32).

[22] Before *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), a Supreme Court of Canada decision, the standard of review that was applicable to a decision by the Minister on this matter was that of patent unreasonableness (*Tucker v. Canada (Minister of Fisheries and Oceans)*, 2001 FCA 384, 288 N.R. 10, at paragraph 2; *Area Twenty Three Snow Crab Fisher's Association v. Canada (A.G.)* 2005 FC 1190, 279 F.T.R. 137, at paragraphs 19 and 25 (*Area Twenty Three Snow Crab Fisher's Association*); and *Association des crabiers acadiens v. Canada (A.G.)*, 2006 FC 1242, 305 F.T.R. 318, at paragraph 2 (*Assoc. des crabiers acadiens*)). Now, the appropriate standard of review is that of reasonableness.

[23] With regard to the submission that the Minister breached his duty to act fairly, the Court must normally intervene as soon as it is found that this duty was breached (*Sketchley v. Canada (A.G.)*, 2005 FCA 404, [2006] 3 F.C.R. 392, at paragraphs 52-55 and *Dunsmuir*, at paragraph 60).

[24] Some general principles recognized by the case law relating to the Minister's authority to manage the fishery and allocate quotas in accordance with the Act should be reiterated at this point. As indicated by Justice Richard Mosley in *Area Twenty Three Snow Crab Fisher's Association*, the Minister's discretionary power in this regard is virtually absolute.

[25] In *Canadian Assn. of Regulated Importers v. Canada (A.G.)*, [1994] 2 F.C. 247, (C.A.) (*Canadian Assn. of Regulated Importers*), Justice Allen Linden explained at paragraph 22 that "[i]t is not fatal to a policy decision that some irrelevant factors be taken into account; it is only when such a decision is based entirely or predominantly on irrelevant factors that it is impeachable." This remark was cited with approval by the Federal Court of Appeal in *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548, 155 D.L.R. (4th) 572 (*Carpenter Fishing Corp.*), where the Minister's authority to allocate fishing quotas was under scrutiny. Thus, as indicated by Justice Danièle Tremblay-Lamer in *Campbell*, at paragraph 40, "[a] Minister's decision is not reviewable when it takes into account a minor irrelevant factor. Instead, what is necessary is to show that the Minister predominantly took into account irrelevant factors in arriving at the decision . . . " (emphasis in original).

[26] In *Carpenter Fishing Corp.*, Justice Robert Décary also remarked at paragraph 39:

> Quotas invariably and inescapably carry with them some element of arbitrariness and unfairness. . . . The need for objective standards in regulating an industry that was until then self-governed requires tough decisions to be made that will hurt some less than others. Seldom, if ever, is the imposition of quotas a win-win situation.

[27] Furthermore, Justice Marc Nadon made the following remarks in *Assoc. des Senneurs du Golf Inc. v. Canada (Minister of Fisheries and Oceans)* (1999), 175 F.T.R. 25, 94 A.C.W.S. (3d) 774, at paragraph 25:

> Since there is no limitation in the Fisheries Act or Regulations regarding matters over which the Minister should exercise his powers, there is in my opinion no question that the Minister has the

> power to manage fishing in accordance with social, economic or other factors. In my view, there is nothing to prevent the Minister favouring one group of fishers at the expense of another.

[28] Finally, as the Court has indicated on a number of occasions, including in *Assoc. des crabiers acadiens* at paragraph 9, in the context of a judicial review "it is not the province of this Court to dictate to the Minister what is more appropriate, nor to substitute [its] personal view for that of the Minister in the assessment and the selection of measures by him in relation to the achievement of the objectives sought and the objects of the Act and of the Regulations."

[29] In applying the above-stated principles to the facts in this case, it is evident that the nature of fishing carried on by the ITQ fleet versus that carried on by the competitive fleet, the size of the vessels as well as the operating costs are clearly relevant considerations. The Court cannot question the reference groups used by the Minister to make a comparison on the ground that, according to the applicants, the use of sub-groups (for example, excluding the biggest vessel of the ITQ fleet or excluding fixed-gear users in the competitive fleet) would be fairer or more appropriate.

[30] That being said, aside from the above-mentioned comparative table to which the Court cannot assign probative value, the applicants have not showed that the vessels in their fleet (or even the applicants' vessels only) are not "*much smaller"* than those in the ITQ fleet. With respect to the evidence as a whole, including the examinations of the affiants, the Court is also not satisfied that the operating costs of the applicants' vessels or the competitive fleet's other vessels discussed in the memorandum are not lower than those for the ITQ fleet.

[31] Regarding the submission that these elements do not exactly warrant the percentage of 50% (versus 48% or 52%) used by the Minister, the comments by Justice Décary cited above at paragraph 25 are particularly apposite here and it is not necessary to discuss this further.

[32] With respect to the note in the appendix to the memorandum concerning snow crab catches made by Mr. Plourde in 2006, there is no doubt that this is not the main element on which the Minister relied to arrive at his decision. In fact, the Court is not even persuaded that there is any connection at all between the half-wrong information and the decision. There is no evidence of bad faith by the Minister in this case.

[33] After a probing examination of the record, the Court cannot find that the decision is unreasonable.

[34] The applicants' asubmission that the Minister allegedly breached his duty to act fairly will now be examined. In this regard, it is appropriate to note that in *Carpenter Fishing Corp.*, Justice Décary indicated the following, at paragraph 32:

> Generally, the principles of natural justice do not apply to legislative or policy decisions. There may be cases--this is not one of them--where consultation with the public is required by statute to be held prior to the adoption of a policy, but even then, consultation with the public does not import the normal rules of natural justice into the process. In the case at bar, the Minister was under no legal duty to hold consultation but he nevertheless chose to do so. It is not the function of courts to pass judgment on the propriety of the method of consultation followed by a minister as long as the requirements of the legislation, if any, have been complied with. The finding by the Trial

> Judge that the process was undemocratic was at best irrelevant, at worst totally unsupported by the evidence.
>
> [References omitted.]

[35] Because the Court is bound by this decision, the applicants attempted to distinguish it on two groundss. First, as previously mentioned, this is not a policy decision aimed at defining allocations, but rather an individual decision, which is akin to the distinction raised in more recent Supreme Court of Canada decisions, such as *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281 (*Mount Sinai Hospital Center*).

[36] The facts in *Mount Sinai Hospital Center* are distinguishable from the facts before us since, in the first case, the Minister in question was acting in response to a request for a licence amendment, whereas in this case, the applicants not only did not make a licence application, they did not even have the right to make one since they did not benefit from any regular snow crab allocation in CFA 12, 18, 25 and 26.

[37] Furthermore, even though the decision had a direct impact on a limited number of people, there is no doubt in my mind that this decision constituted a fisheries management policy. This regular snow crab allocation is an integral part of a global fishing plan for the southern region of the Gulf of St. Lawrence. It is likely that several other elements of the fishing plan target a limited number of people (such as the allocation to the ITQ fleet). It would be dangerous to make a distinction between what constitutes establishing allocations and fisheries management policy and what is not based solely on the number of people affected. The Court is satisfied that the nature of

the decision under review is not different from those that were before the Court in the case law stated above.

[38] Second, the applicants claim that *Dunsmuir*, particularly at paragraphs 86 to 90, changed the law regarding the scope of the duty of procedural fairness and that, in this case, the criteria in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (*Baker*) should now be applied instead of the principles that applied at the time the Federal Court of Appeal delivered its judgment in *Carpenter Fishing Corp.*

[39] It should first be noted that in *Baker*, the Supreme Court of Canada reiterated principles it had already stated in, among others, *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489 (*Knight*) and *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44 (*Cardinal*), decisions delivered well before *Carpenter Fishing Corp.* and *Canadian Assn. of Regulated Importers*.

[40] However, the more structured approach or analysis established in *Baker* does not seem to have been formally applied until now. The Court will therefore proceed to determine the scope of the Minister's duty to act fairly in the light of the factors set out in *Baker*, that is:

> i) the nature of the decision being made and the process followed in making it;
> ii) the nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates;
> iii) the importance of the decision to the rights or privileges enjoyed by the applicants;

iv) the legitimate expectations of the applicants;

v) the choices of procedure made by the decision-maker when the statute gives the decision-maker the possibility of choosing his or her own procedures.

[41] With respect to the first factor, as I have said, this is purely a discretionary decision. The Minister must weigh a set of competing interests (for example, that of resource conservation, that of various representative organizations, that of Aboriginal groups, that of various types of fishers, etc.) in exercising his discretion. Therefore, this is a polycentric decision (*Area Twenty Three Snow Crab Fisher's Assn.*, paragraph 21) that is not subject to any mechanism under the Act. The Act also does not provide for a right of appeal. In general, this factor indicates that the degree of procedural protection should be low.

[42] Second, the Court accepts that the Minister's decision is important for the applicants. However, as mentioned, they had no right to a snow crab quota for CFA 12, 18, 25 and 26 (or even a privilege). The decision therefore concerns the granting of a new privilege and, under the circumstances, this indicates again that a degree of procedural protection that is lower than that suggested by the applicants is appropriate.

[43] The applicants did not offer evidence supporting the existence of legitimate expectations in this case. They are very familiar with Fisheries and Oceans Canada's consultation process and were given the opportunity to indicate their point of view. Indeed, Mr. Plourde indicated during his examination that the applicants had already reported their objection to being compared to

groundfish-dependent competitive fishers using fixed gear to Fisheries and Oceans Canada (page 109, lines 11 to 17).

[44] Regarding the last factor, the Act gives the Minister an almost absolute discretion, which extends not only to the decision as such but also to the procedure in making it. The Minister chose a procedure of general consultation before developing a fishing plan, from which he did not depart in this case. Given the latitude given to the Minister by the Act, the Court must accord deference with regard to this choice, unless the other above-mentioned factors require a higher degree of procedural protection, which is not the case here.

[45] In short, the Minister did not breach his duty to act fairly.

[46] The application for judicial review is dismissed, with costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed, with costs.

"Johanne Gauthier"

Judge

Certified true translation
François Brunet, Revisor

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET :	T-1289-07
STYLE OF CAUSE :	AURÉLIEN MAINVILLE, CLAUDE PAULIN, JEAN-PIERRE PLOURDE v. THE ATTORNEY GENERAL OF CANADA
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