Federal Court  Cour fédérale

Date: 20121018

Docket: T-1271-07

Citation: 2012 FC 1205

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, October 18, 2012

PRESENT: The Honourable Mr. Justice Michel Beaudry

BETWEEN:

ROLAND ANGLEHART SR. ET AL.

Plaintiffs/
Respondents

AND

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Defendant/
Moving Party

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a motion brought by Her Majesty the Queen in right of Canada [the moving party or defendant] pursuant to sections 213 to 219 of the *Federal Courts Rules*, SOR/98-106 [the Rules], to obtain a summary judgment regarding the plaintiffs' statement of claim.

[2] In this case, Michel Turbide is representing himself. He made written submissions, but counsel for the plaintiffs informed the Court that he endorses their arguments. After a conference call with the parties, including Mr. Turbide, on September 17, 2012, an amended statement of claim (fifth) dated September 18, 2012, and amended defence (sixth) dated September 20, 2012, were filed in the Court record.

[3] For the reasons that follow, the defendant's motion will be dismissed.

Factual background

[4] The plaintiffs are (or were during the relevant period) individuals that hold, or companies that directly or indirectly operate under, snow crab fishery licences in the area known as Area 12 in the southern Gulf of St. Lawrence. They are all members of the so-called "traditional" mid-shore fleet of snow crab fishers in Area 12.

[5] The snow crab fishery began in the 1960s. Until 1975, this fishery was open to all and subject to very few constraints. In 1975, the Minister of Fisheries and Oceans [MFO] announced that access to the snow crab fishery would from then on be limited, with the number of "permanent" fishing licences being limited to 130.

[6] For a period of 28 years, from 1975 to 2003, the plaintiffs were, along with the other fishers in the traditional fleet and subject to 30 licences granted to fishers from Prince Edward Island upon the integration of areas 25 and 26 in 1997, the sole licence holders with permanent access to the snow crab fishery in Area 12. This brought the total number of licence holders to 160.

[7] These licences were renewed from year to year under the same issuing numbers. To renew the licence, each holder had to fill out a form entitled [TRANSLATION] "Fisheries and Oceans Registration and Commercial Fishing Licence Application". The licence holder had to submit the application before a specific date and pay the associated fees; otherwise, the licence could be cancelled. Each licence was subject to certain conditions, such as the effective date, the opening and closing dates of the season, specific prohibited locations and the number of authorized traps.

[8] In 1989, the crabbing industry was hit by an unprecedented crisis that threatened its future. The MFO turned to the 130 traditional fishery licence holders for solutions. Specific measures were put in place in 1990:

(a) Funding from the MFO for a biomass assessment program, and a management measure prescribing the closure of the fishery when the proportion of white crabs detected in catches rises above 20%;

(b) dockside weighing of crab catches by independent weighmasters and deployment of independent at-sea observers, at the fishers' expense;

(c) implementation of a fishery regime based on individual quotas, rather than a competitive regime; and

(d) distribution of the total allowable catch [TAC] in accordance with a sharing formula where 80% of the TAC is divided equally among the 130 fishers and 20% is divided in accordance with the historical catches of each fisher.

[9] Under the new individual quota regime, the same portion of the TAC is attached to each holder's licence year after year, as opposed to an overall TAC under the terms of which fishers competed against each other to make the greatest number of catches possible. The value of the fishing rights associated with the licence is therefore now determined on the basis of the percentage of the TAC attached to each licence.

[10] Given that the number of licences has remained the same since 1975, third persons who want to fish crab have no choice but to acquire a licence from a traditional fisher, hence the creation of a market where licences are bought and sold for substantial amounts of money.

[11] The MFO is aware of these commercial transactions, since he is responsible for the administrative procedures related to any licence transfer. The MFO himself buys back some

licences at their fair market value, according to the percentage of the TAC associated with each one.

[12] In 1997, the MFO adopted a "co-management" approach with the plaintiffs. A joint agreement was set up for a five-year term. This agreement provided that the number of permanent fishing licences in Area 12 would remain at 160, that the resource would be shared in times of abundance and that the plaintiffs would make annual financial contributions of $1.7 million for the MFO's management, protection and research activities.

[13] In 1999, the Supreme Court of Canada rendered its judgment in *R v Marshall*, [1993] 3 SCR 456 [*Marshall*]. It confirmed the hunting and fishing rights of certain Aboriginal bands (the Mi'kmaq) under treaties entered into with the British Crown in 1760 and 1761. In terms of fishing, it is important to note that what is contemplated is "a right to trade for necessaries" to ensure a "moderate livelihood" (*Marshall*, at para 58), and not a right to trade for financial gain. The term "moderate livelihood" was defined later on in *R v Gladstone*, [1996] 2 SCR 723 at para 165, as being "such basics as food, clothing and housing, supplemented by a few amenities".

[14] In response to *Marshall*, the MFO developed a program called the "Marshall Initiative" to integrate Aboriginal bands into the fishing industry. He then announced to the plaintiffs that Aboriginal fishers would be integrated into the snow crab fishery in Area 12 through voluntary

licence buybacks. The Treasury Board made a special multi-million dollar fund available to the MFO for this purpose.

[15] The plaintiffs did not challenge the MFO's decision to integrate Aboriginal people into the snow crab fishery in Area 12, as they believed that under the co-management agreement, the number of licences would not increase, and that everything would be resolved through the voluntary buyback program. The plaintiffs therefore did not expect the percentage of the TAC associated with their respective licences to be reduced.

[16] However, in the years 2000, 2001 and 2002, the MFO did not buy back enough licences to achieve its objectives with regard to Aboriginal fishers. Following negotiations, the plaintiffs agreed that a portion of the TAC allocated to them would be made available to the MFO so that it could be allocated to Aboriginal fishers, provided that the plaintiffs' TAC would not be reduced below a certain level, and only until the MFO succeeded in buying back enough licences to fulfil the MFO's commitments under the Marshall Initiative.

[17] The 1997 co-management agreement was extended for another year and finally ended on March 31, 2003.

[18] In late December 2002, negotiations for a new agreement began. During these negotiations, the plaintiffs were notified that the MFO wanted to add new so-called "permanent" fishers to the Area 12 snow crab fishery and divide the TAC among the various groups. The plaintiffs' opposed this and advocated their point of view at the meetings.

[19] On May 2, 2003, and despite the plaintiffs' objections, the MFO announced a new three-year management plan. The MFO reduced the TAC to 17,148 metric tonnes, thus ignoring the recommendations of the MFO's own scientists, who set the TAC at 21,500 metric tonnes. This plan also changed the formula for sharing the TAC among the various groups of fishers and integrated Area 18 fishers into Area 12.

[20] Unhappy and unwilling to accept these conditions, the plaintiffs brought an application for judicial review before the Federal Court. That application never made it to the judgment stage, owing to a discontinuance (see docket T-891-03).

[21] Therefore, pursuant to the announced plan, the MFO increased the number of licences in Area 12 from 160 to almost 400.

[22] In June 2003, the MFO issued a licence to a fisher for certain scientific activities. This licence placed a limit of 50 metric tonnes on the amount of snow crab that the licence holder could catch and sell. From 2004 to 2006, the MFO set aside allocations of 400 to 1,000 metric tonnes for

third parties who signed joint project agreements with the MFO. The Federal Court declared these financing practices *ultra vires* in *Larocque v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237 [*Larocque*], and *Association des crabiers acadiens v Canada (AG)*, 2006 FC 1241 [*Assoc des crabiers acadiens*]. In response to these decisions, the MFO immediately ended these practices, and the money collected was allocated to the programs for which they were originally intended, except the money collected in 2006, which is still being held by the MFO.

[23] On March 30, 2006, the MFO decided to provide $37.4 million in financial assistance to eligible members of the Area 12 traditional fleet. The purpose of this contribution was to mitigate the negative impact of integrating Aboriginal fishers into the crab fishery since 2003. The amount given to each member varied from approximately $200,000 to $350,000.

[24] On July 11, 2007, the plaintiffs filed an action in damages alleging that several acts committed by the MFO in managing the fishery in Area 12 since 2003 had harmed them. In their amended statement of claim (fifth) dated September 18, 2012, at paragraph 77, they state as follows:

> [TRANSLATION]
> (a) By unilaterally reducing, without compensation, the portion of the TAC allocated to the plaintiffs to reallocate it to Aboriginal fishers, fishers of other species and Area 18 fishers, effective 2003, the MFO breached the legitimate expectations of the plaintiffs . . . and the 1999 agreement;
>
> (b) In unilaterally reducing the TAC and allocating part of it to other groups, the MFO exercised his management powers in bad faith, and in an abusive and capricious

manner, and the MFO knew that this would cause the plaintiffs a considerable loss of income;

(c) In thus reducing the portion of the TAC allocated to the plaintiffs, the MFO in fact used the fish resource to pay for obligations that the Crown believed to owe to other groups of fishers;

(d) This unilateral reduction of the portion of the TAC allocated to the plaintiffs constituted an expropriation without compensation for the share of the TAC to which each of them was entitled;

(e) This unilateral reduction of the portion of the TAC allocated to the plaintiffs constituted a taking without compensation by the MFO from the share of the TAC to which each of the plaintiffs was entitled;

(f) In arbitrarily deciding, in 2003, to reduce the TAC to 17,144 metric tonnes, the MFO exercised his management powers in bad faith, and in an abusive and capricious manner, and the MFO knew that this would cause the plaintiffs a considerable loss of income;

(g) In thus reducing the TAC in 2003 . . . [,] the MFO breached his obligations . . . towards the plaintiffs, thereby causing injury;

(h) . . . ;

(i) In arbitrarily depriving the plaintiffs of their share of the TAC and in using a portion of the TAC to fund his activities and the obligations he believed to owe to other groups of fishers, the MFO acted unlawfully and in bad faith when he knew that his conduct was unlawful and would cause injury to plaintiffs, thereby committing misfeasance in public office;

(j) In taking the portion of the TAC that should have been allocated to the plaintiffs and allocating it to other groups of fishers or using it to fund his activities or the obligations he believed to owe to other groups of fishers, the MFO in fact unjustly enriched himself, and the plaintiffs, who suffered a corresponding deprivation, are entitled to restitution of the value of this enrichment;

[25] On September 23, 2007, the defendant filed a motion to strike on the grounds that the Federal Court does not have jurisdiction to hear the plaintiffs' action under section 17 of the *Federal Courts Act*, RSC, 1985, c F-7, and that their statement of claim discloses no reasonable cause of action. That motion was dismissed on November 28, 2008, by Justice Frenette (*Anglehardt Sr et al v Canada*, 2008 FC 1323). The Federal Court of Appeal upheld that judgment (*Anglehardt Sr et al v Canada (AG)*, 2009 FCA 241). On January 13, 2011, the Supreme Court refused leave to appeal (*Canada (AG) v Anglehardt Sr et al* [2009] SCCA 414).

[26] In her motion for summary judgment, the defendant is asking the Court to dismiss the plaintiffs' action on the ground that there are no genuine issues to be tried.

Issues

[27] The Court finds that the issues are the following:

(a) Is the motion for summary judgment an abuse of process on the part of the defendant?

(b) Should the Court strike certain paragraphs of the affidavit of Robert Haché?

(c) Is there a genuine issue requiring a trial?

a. Is the motion for summary judgment an abuse of process on the part of the defendant?

Arguments of the plaintiffs (respondents)

[28] The plaintiffs are of the opinion that this motion is an abuse of process, for several reasons: the defendant is trying to reopen the same debate that was pleaded in the motion to strike; the position pleaded by the defendant in this case is inconsistent with the position adopted in other, previous cases; the defendant is trying to skew the debate by invoking immunity; and the defendant's motion does not cover all the claims of the plaintiffs.

Reopening the debate

[29] First, the plaintiffs allege that the defendant is essentially trying to repeat in this Court the same debate from the motion to strike in November 2008. Although these are two different motions, the same arguments regarding the MFO's immunity are repeated, namely, that the plaintiffs have no property rights in the sea resource and that the MFO cannot be held liable for the impugned actions because they involve the development of a basic general policy. The defendant is trying to disturb the findings of the judgment in the motion to strike, particularly since there was no appeal in respect of the issues decided by Justice Frenette.

[30] Such an attempt is an abuse of process because this motion "is . . . in essence an attempt to relitigate a claim which the court has already determined" (*Toronto (City) v. C.U.P.E.*, 2003 SCC 63 at para 37 [*Toronto (City)*]. This also "violate[s] such principles as judicial economy, consistency, finality and the integrity of the administration of justice" (*Toronto (City)* at para 37).

[31] Although the causes of action were amended over time, with some of them being abandoned, the defendant is challenging the remaining causes of action in this case in the same way as in the motion to strike.

[32] The prohibition against reopening the debate in such a case is based on solid policy grounds. As the Supreme Court wrote in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 18:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. . . . Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[33] The plaintiffs cite *Workers' Compensation Board v Figliola*, 2011 SCC 52 at para 34, where the Supreme Court refers to paragraphs 38 and 51 of *Toronto (City)*:

> Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings.

> The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

MFO's position inconsistent with other cases

[34] The plaintiffs submit that the abusive nature of the motion for summary judgment is especially flagrant because it is based on an argument that is diametrically opposed to the position that the defendant adopted—successfully—in other disputes. The plaintiffs refer to *Haché v Canada*, 2010 TCC 10, in the Tax Court of Canada, and later, in the Federal Court of Appeal, *Haché v Canada*, 2011 FCA 104 [*Haché*], where the MFO had pleaded that fishing licences were "property", whereas in this motion he argues that licences only give fishers the right to fish, subject to the conditions set out in these licences.

[35] They add that the MFO should not be allowed to change its position to suit the circumstances and his interests in the dispute (*Angelini v Angelini*, [2008] OJ 30; *New Hampshire v Maine* (2001), 5312 US 742 at p 749).

Immunity of the MFO and the "policy/operational" dichotomy

[36] The plaintiffs acknowledge that the courts are extremely reluctant to find a public authority liable in negligence or to engage its tort liability where it makes a policy decision. However, not all causes of action against the Crown (and certainly not all the causes of action alleged by the plaintiffs here) are affected by the dichotomy between a general policy decision and an operational decision.

[37] Neither the cause of action based on the expropriation of the plaintiffs' rights, not the one based on the MFO's unjust enrichment is affected by this dichotomy. These causes of action are based on equity and by no means require the Court to rule on the wisdom of the MFO's decisions, thus avoiding the MFO's so-called immunity. These causes of action simply require that the Court determine whether the nature of the fishing rights of which the plaintiffs were deprived is such that it warrants compensation.

[38] For the other causes of action, the plaintiffs note that the "policy or operational" dichotomy cannot immunize the Crown against actions in tort unless those actions are "neither irrational nor taken in bad faith" (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 72).

[39] Moreover, the plaintiffs submit that the MFO's acts constitute misfeasance in public office.

Defendant's arguments do not cover all the causes of action

[40] Finally, the plaintiffs argue that the motion in no way challenges the legal basis of part of their action, that is, the reduction of the TAC by 4,000 metric tonnes in 2003, an arbitrary decision made in bad faith. This means that there are genuine issues for trial in future.

Arguments of the defendant

Different principles and new circumstances

[41] The defendant is of the view that this motion is not an abuse of process because under the Rules, she is entitled to bring a motion in summary judgment despite the motion to strike, as the two proceedings do not involve the same legal tests or serve the same purposes.

[42] First, in the case of a motion to strike, no evidence is admissible, the facts are deemed to be proven, and the issue is whether there is a reasonable cause of action. By contrast, in a motion for summary judgment, each party must present their best evidence and arguments, as well as proof of the facts they are pleading, especially since the standard to be met is whether there is an issue to be tried. The motion to strike is not final in respect of the merits, whereas a motion for summary judgment is. For this reason, issue estoppel does not come into play (*Pleau v Canada*, 2008 NSSC 118 at paras 39-40).

[43] Second, the defendant submits that the circumstances have changed since the motion to strike. The plaintiffs admitted that no contract between them and the MFO was signed in 1990, so their action for breach of contract was withdrawn. According to the defendant, they added a new cause of action regarding legitimate expectations, and on November 25, 2011, they filed a lengthy statement of particulars regarding the bad faith argument pleaded in their statement of claim.

Inconsistency of MFO's position with other cases

[44] Regarding the so-called inconsistency of the MFO's position with other cases, the defendant notes that the plaintiffs are misinterpreting the Attorney General's position in *Haché*. In

that case, the issue was whether the proceeds from the disposition of two commercial fishing licences (one of which was for groundfish, while the other was for snow crabs) were "property" within the meaning of subsection 248(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), and was therefore taxable as a capital gain. That case did not determine any rights, but simply defined "property" for the purpose of applying the *Income Tax Act*.

[45] In *Saulnier v Royal Bank of Canada*, 2008 SCC 58 at para 16 [*Saulnier*], the Supreme Court recognized that "[f]or particular purposes Parliament can and does create its own lexicon". Indeed,, the Court stated that the interpretation and meaning that it gave to property under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, and the *Personal Property Security Act*, SNS 1995-96, c 13 (NS), did not expand the scope of licence holders' interests. The Federal Court of Appeal, too, reiterated this principle in *Kimoto et al v Canada (AG)*, 2011 FCA 291 at paras 12 and 13 [*Kimoto*], rendered six months after *Haché*.

Entire action

[46] Finally, the defendant alleges that the purpose of this motion is to obtain a summary judgment regarding the plaintiffs' entire action. As regards the plaintiffs' argument that the decision to reduce the TAC by 4,000 metric tonnes in 2003 was arbitrary and made in bad faith, the defendant pleads that private law does not permit an independent action in bad faith. The defendant even adduced factual evidence refuting the plaintiffs' allegations. The defendant also states that the testimony of Mr. Vienneau in an application for judicial review in another case (T-895-07) does not represent an admission of the facts in the case at bar, and that his testimony is not binding on the Crown (*Merck Frosst Inc v Canada (Minister of Health)* [1997] FCJ 1847,

aff'd on appeal, [1999] FCJ 1536). All this counters the plaintiffs' allegations of misfeasance in public office.

Analysis

[47] The Court cannot agree with the plaintiffs' arguments, for the following reasons.

[48] The defendant is correct with regard to the fundamental differences between a motion for summary judgment and a motion to strike.

[49] As regards a motion to strike, according to subsection 221(1) of the Rules, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on various grounds. The Court may also order the action completely dismissed. I would add that according to subsection 221(2) of the Rules, no evidence shall be heard on a motion for an order under paragraph (1)(*a*).

[50] The motion to strike filed on September 28, 2007, dealt with the grounds set out in paragraphs 221(1)(*a*) and (*f*) of the Rules. The issues in that motion were whether the Federal Court had jurisdiction to hear the case, given that the plaintiffs had not brought an application for judicial review of the MFO's decisions, and that the plaintiffs' statement of claim disclosed no reasonable cause of action.

[51] Conversely, the conditions governing a motion for summary judgment are provided in sections 213 to 219 of the Rules. The purpose of these rules is to bar actions or defences that have

no chance of making it to the trial stage (*TPG Technology Consulting Ltd v Canada*, 2011 FC 1054 [*Technology*] citing *Canada (AG) v Lameman*, 2008 SCC 14 at para 11 [*Lameman*]):

> The summary judgment rule serves an important purpose in the civil litigation system . . . . Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage.

[52] The Supreme Court warned that "[c]onversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial" (*Lameman* at para 11). It went on to write that "[f]or this reason, the bar on a motion for summary judgment is high" (*Lameman* at para 12).

[53] Furthermore, subsection 213(1) of the Rules provides that a defendant may bring a motion for summary judgment on all or some of the issues raised in the pleadings at any time before the time and place for trial have been fixed. There is no particular restriction to this effect. The fact that a motion to strike has been filed does not prevent the defendant from filing a motion for summary judgment, so long as it meets the conditions of subsection 213(1) of the Rules. Ultimately, one does not bar the other.

[54] The Court also finds it helpful to reproduce the fundamental principles governing summary judgments, as stated by Justice Tremblay-Lamer in *Granville Shipping Co v Pegasus Lines Ltd SA*, [1996] 2 FC 853 at para 8 [*Granville*], and subsequently repeated countless times thereafter:

> 1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there

is no genuine issue to be tried (*Old Fish market Restaurants v 1000357 Ontario Inc et al*, (1994) 58 CPR (3d) 221);

2. there is no determinative test (*Feoso Oil Ltd. v. Sarla (The)*, [1995] 3 F.C. 68 [*Feoso*]) but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie*, (1990) 75 OR (2d) 225. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trials;

3. each case should be interpreted in reference to its own contextual framework (*Marine Atlantic Inc v Blyth*, (1994) 77 FTR 97; *Feoso*);

4. provincial practice rules (especially Rule 20 of the Ontario *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194]) can aid in interpretation (*Feoso*; *Collie Woollen Mills Ltd v Canada*, [1996] FCJ 193).

5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario *Rules of Civil Procedure*; *Patrick v Canada*, [1994] FCJ 1216);

6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (*Pallmann Maschinenfabrik GmbH Co KG v CAE Machinery Ltd*, (1995) 62 CPR (3d) 26 [*Pallmann Maschinenfabrik*]; *Homelife Realty Services Inc v Sears Canada Inc*, [1996] FCJ 51 [*Sears*]);

7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (*Forde v Canada (Minister of National Revenue, Customs and Excise*), [1995] FCJ 48; *Sears*). The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (*Shelburne Marine Ltd v Stokes*, [1995] FCJ 1547).

[55] Regarding the burden of proof that the parties must meet, the Court adopts the view expressed by Justice Crampton (now Chief Justice) in *Trevor Nicholas Construction Co v Canada (Minister of Public Works)*, 2011 FC 70 at para 44 [*Trevor Nicholas*]:

> . . . (i) to succeed in its motion for summary judgment dismissing the plaintiff's statement of claim, the defendant has the burden of establishing that all the relevant issues can properly be decided on the evidence before the Court; and (ii) the plaintiff must show that there is a genuine issue for trial. In this regard, the plaintiff is not required to prove all the facts in its case, but also cannot simply rely on bare "allegations or denials of the pleadings." Each party is required to "put its best foot forward," to enable the Court to determine whether there is an issue that should go to trial (*Lameman*, at para 11; *F Von Langsdorff Licensing Ltd v SF Concrete Technology Inc* (1999), 165 F.T.R. 74, at paras 9-12; *AMR Technology, Inc v Novopharm Ltd*, 2008 FC 970, at paras 6-8; *Succession MacNeil v Canada (Department of Indian and Northern Affairs)*, 2004 FCA 50 at para 25). However, "the test is not whether the plaintiff cannot succeed at trial; rather, it is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial (emphasis added).

[56] The judge must "subject the evidence to a 'hard look' in order to determine whether there are factual issues that really do require the kind of assessment and weighing of evidence that should properly be done by the trier of fact" (*F Von Langsdorff Licensing Ltd v SF Concrete Technology Inc*, (1999) 165 FTR 74 at para 13. See also *Lameman* at paras 11-12). The motions judge may also "make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts" (*Lameman* at para 11; *Trevor Nicholas*, at para 44).

[57] It should be noted that "[i]t remains important for the motions judge to consider a motion for summary judgement with great care", as "the effect of the granting of summary judgment will be to preclude a party from presenting any evidence at trial . . . [and from having] its 'day in court'" (*Canada (Minister of Citizenship and Immigration) v Laroche*, 2008 FC 528 at para 18 citing *Apotex Inc v Merck & Co*, 248 FTR 82 at para 12, aff'd by 2004 FCA 298; *Technology* at para 22).

[58] In the case at bar, given that the motion to strike was dismissed by interlocutory judgment, the plaintiffs' causes of action continue on in the amended statement of claim (*Kealey v Canada*, [1991] FCJ 909). There is no issue estoppel.

[59] It is true that certain arguments pleaded before Justice Frenette are similar to those raised in the motion for summary judgment. However, these same arguments are much more detailed here, and the record shows that examinations have since taken place.

b. Should the Court strike certain paragraphs of the affidavit of Robert Haché?

Arguments of the defendant (respondent)

[60] The defendant submits that certain paragraphs of the affidavit of Robert Haché should be struck. The defendant argues that allegations based on beliefs or information not within the deponent's personal knowledge are inadmissible under subsection 81(1) of the Rules and cites *Canadian Tire Corp Ltd v PS Partsource Inc* 2001 FCA 8 at para 6 [*Canadian Tire*]. If the

deponent has obtained information from others, that information is hearsay (*Canadian Tire* at para 6).

[61] There are several exceptions to the hearsay rule, for example, if it is demonstrated that the evidence is reliable and that its admission is necessary (*Canadian Tire* at para 11). In such a case, it is up to the party to submit facts or arguments showing that an exception to the hearsay rule applies (*Canadian Tire* at para 14). Any affidavit filed in support of a motion or an application for judicial review should be limited to adducing the facts without gloss or explanation (*Gravel v Telus Communications Inc*, 2010 FC 151 at para 6; *Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at paras 2-3; *Canada (AG) v Quadrini*, 2010 FCA 47 at paras 18-19 [*Quadrini*]). Allegations containing opinion, argument or legal conclusions should be struck (*Quadrini* at paras 18-19).

[62] The defendant is of the opinion that paragraphs 6, 10, 11, 13, 14 and 36 of Robert Haché's affidavit are hearsay, given that Mr. Haché has only been a fishery management adviser since 1990. He therefore cannot testify to having personal knowledge of facts and events that occurred before 1990, particularly those he presents at paragraphs 6, 10, 11, 13 and 14.

[63] In addition, the defendant submits that paragraphs 15, 17, 19, 20, 21, 23, 24, 25, 29, 30, 31, 32, 33, 34, 35 and 37 should be struck because they contain opinion, argument or legal conclusions, in both the allegations themselves and Mr. Haché's comments on the attached exhibits.

[64] The defendant goes on to argue that the documents presented in evidence by the plaintiffs do not have the significance that they ascribe to them. The defendant is of the opinion that the documents attached to Robert Haché's affidavit must be proven (*Inhesion Industrial Co v Anglo Canadian Mercantile Co*, [2000] FCJ 491 at para 22 [*Inhension Industrial Co*]). Simply alleging that the documents come from the MFO and were exchanged in the service of affidavits of documents is insufficient to justify the interpretation that the plaintiffs give to their contents. The defendant relies on section 231 of the Rules, according to which the disclosure of a document or its production does not constitute an admission of its authenticity or admissibility.

[65] Although the defendant does not deny that the documents in question come from the MFO and that she produced her documents in the course of the regular process for disclosing and producing documents in this case, she argues that the exhibits attached to Robert Haché's affidavit do not have the significance that the plaintiffs ascribe to them.

Analysis

[66] For the reasons that follow, the Court dismisses the defendant's motion.

[67] Sections 80 to 86 of the Rules deal with the conditions regarding affidavit evidence. More specifically, section 80 deals with the form of affidavits, specifying that they shall be drawn up in the first person (subsection 80(1)) and that when an affidavit refers to an exhibit, the exhibit shall be accurately identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn. In the instant case, there is no problem with the form of the affidavits.

[68] In terms of the contents, in the case of a motion for summary judgment, subsection 81(1) provides that affidavits shall be confined to facts within the deponent's personal knowledge. This is because the evidence contained in an affidavit must be able to be tested during a cross-examination of the affiant (*Bressette v Kettle & Stony Point First Nations Band Council* (1997), 137 FTR 18). To determine whether the deponent has personal knowledge of the facts, the Court may analyze the deponent's function and office to determine whether it is likely that the deponent has personal knowledge of the alleged facts (*Smith, Line & French Laboratories Ltd v Novopharm Ltd*, (1984) 2 CIPR 205).

[69] Affidavits are therefore meant to adduce facts relevant to the dispute "without gloss or explanation" (*Technology* at para 26 citing *Quadrini* at para 18). Accordingly, the Court will strike out the parts that are abusive, argumentative or opinionated and contain legal conclusions (*McNabb v Canada Post Corp*, 2006 FC 1130; *Technology* at para 26).

[70] Regarding hearsay, the Supreme Court has recognized that it is now admissible if the criteria of reliability and necessity can be met, in addition to the recognized common law exceptions (*Ethier v Canada*, [1993] 2 FC 659; *Inhesion Industrial*).

[71] The plaintiffs correctly point out that the defendant should have filed a motion to strike instead of bringing this motion as part of a response. The normal procedure is to bring a motion to strike such that "the party who produced the affidavit can adequately respond by serving and filing a respondent record" (*Burns Lake Native Development Corp v Canada (Commissioner of Competition)*, 2005 FCA 256 at para 13).

[72] The Court acknowledges that in some cases, not bringing a motion to strike was not found to be fatal, as the Court instead stressed the importance of there being significant harm. In *Sawridge Band v Canada*, [2000] FCJ 192 (reproduced in *Armstrong v Canada (AG)*, 2005 FC 1013 [*Armstrong*]), Justice Hugessen explained as follows at paragraphs 5 and 6:

> . . . I may say that upon examination of that affidavit, I have no doubt whatever that it is improper. It is replete with conclusory and argumentative allegations, almost all of them being on matters of law as to which the deponent is not apparently qualified . . . .
>
> That said, I have not been persuaded that the affidavit should be struck. In my view, in a sane modern procedure, irregularities in proceedings should not be made the subject of motions and should not require the Court to give orders striking out or correcting such irregularities unless the party attacking the irregularity can show that it suffer some sort of prejudice as a result thereof. . . . Accordingly, absent any showing of prejudice and notwithstanding that almost all of the affidavit is irregular and should not be before the Court, I have no grounds that would justify me in striking it out . . . (emphasis added).

[73] In a similar vein, Justice Near, in *Technology* at para 29, relied on *Armstrong* at para 40 to explain as follows:

> The caselaw of this Court emphasizes that the discretion to strike out affidavits ought to be exercised sparingly and only where it is in the interests to do so, for example where a party would be materially prejudiced or where not striking would impair the orderly hearing of the application.

[74] Here, the defendant has in no way shown how filing this affidavit would cause her prejudice, or how failing to strike out the impugned paragraphs would impair the orderly hearing of the case. Moreover, Mr. Haché's affidavit is dated May 23, 2012, while the defendant's response contesting virtually everything in this affidavit was filed on August 17, 2012. The motion for summary judgment was heard in Fredericton on September 24, 25 and 26, 2012. The defendant could have filed a motion to strike, thereby giving the plaintiffs an opportunity to respond.

[75] The Court adopts the conclusions of Justice Near in *Technology* at para 30 "that at this late stage, and on a motion for summary judgement it would be inappropriate to strike [certain parts of the plaintiffs' affidavits]".

[76] Finally, it is helpful to cite Justice Hugessen in *Sawridge*: "[T]he Crown need not worry that the Court is so gullible as to uncritically accept the evidence contained in the affidavits". It will therefore be up to the judge who hears the case on the merits to assess the probative value of the evidence presented.

c. Is there a genuine issue requiring a trial?

Preliminary remarks

[77] The plaintiffs are seeking compensation for various acts committed by the MFO since 2003. More specifically, they focus on three actions: the approximately 35% reduction in their right to fish (May 2, 2003); the reduction of the TAC (May 2, 2003) to a TAC that was 4,000 metric tonnes less than what was proposed by scientists to integrate Aboriginal fishers and help fishers from Zone 18; and the unlawful use of a portion of the resource granted to other fishers to fund the MFO's research.

[78] In terms of relief, they are claiming the following: compensation for profits lost during the fishing seasons from 2003 to 2008, compensation for the diminished value of their fishing businesses, damages for loss of future income, restitution of the value of the benefits that the MFO appropriated at their expense, compensation for their rights or interests that were expropriated, general and punitive damages, and interest. The total claimed is nearly $250 million (see paragraph 73 of the fifth amended statement of claim).

Arguments of the plaintiffs

[79] The plaintiffs accuse the MFO of having acted irrationally and in bad faith, of having violated their legitimate expectations, of having enriched himself to their detriment, of having expropriated their rights without compensation, and of having caused the losses they suffered through misfeasance in public office.

Bad faith of the MFO

[80] First, the plaintiffs submit that the MFO acted in bad faith in 2003 by choosing to completely disregard his scientists' recommendations and set the TAC 4,000 metric tonnes lower without valid reason. When he made the decision, the MFO knew that it would cause the plaintiffs a considerable loss of income. The MFO allegedly even tried to cover up the recommendations of his own experts. It is further alleged that he did this to obtain a $1.7 million financial contribution from the plaintiffs' in exchange for reversing this decision.

[81] Second, the plaintiffs allege bad faith because in using the resource, the MFO funded his activities when he knew full well that this practice was illegal: *Larocque*; *Assoc des crabiers acadiens*; and *Chiasson v Canada*, 2008 FC 616 [*Chiasson*].

[82] Third, they submit that the sharing of the TAC among the various groups of fishers, the introduction of new groups of fishers (i.e., from areas 18, 25 and 26 to Area 12) and the integration of Aboriginal fishers are the result of irrational decisions made in bad faith, without any prior analysis and without any consultations with existing scientific committees. Furthermore, the decision to grant part of the TAC (4.78% instead of the 2.6% initially planned) in Area 12 to Area 18 fishers was based on calculations favouring Area 18 fishers over the usual formula, thereby causing significant harm to fishers in Area 12. The same reasoning is alleged with regard to the integration of fishers from areas 25 and 26 into Area 12. These arbitrary decisions run counter to the legitimate expectations of traditional fishers and threaten the resource and the economic viability of their businesses.

[83] Regarding the integration of Aboriginal fishers, the plaintiffs submit that the decision was made unilaterally and contradicted previous statements that it would be done through voluntary licence buybacks.

[84] Therefore, they argue that the unilateral reduction of the TAC by 35% constituted an expropriation without compensation of their fishing rights.

Plaintiffs' legitimate expectations regarding maintenance of their share of the TAC

[85] The plaintiffs are of the opinion that they had a legitimate expectation that the Minister would continue to respect their fishing rights, that is, that their share of the TAC would remain unchanged (paragraphs 70 to 74, Plaintiff's Memorandum).

Expropriation of the plaintiffs' fishing rights

[86] The plaintiffs' argument is found at paragraphs 76 to 91 of their memorandum. They submit that there is a right to compensation not only where the thing expropriated is "property" within the meaning of the common law, but also where it is an intangible asset or a right whose enjoyment is subject to the discretion of a public authority. According to them, it is undeniable that their fishing rights have a considerable commercial value that is directly related to the share of the TAC written on their licences each year. There is no need to prove that they have a legal property right in the licence (*Manitoba Fisheries Ltd v The Queen*, [1979] 1 SCR 10) or that their fishing rights are conditional on the issuance of a licence (*The Queen v Tener*, [1985] 1 SCR 533 and *Rock Resources Inc v British Colombia*, [2003] BCJ 1283).

[87] The plaintiffs note that the defendant does not dispute that she benefited from unlawfully appropriating a part of the fishery resource (*Larocque*; *Assoc des crabiers acadiens* and *Chiasson*).

[88] When a trial is eventually held, the Court will therefore have to determine what the plaintiffs' fishing rights are and what portion of their rights was expropriated by the MFO.

Unjust enrichment

[89] In using the portion of the TAC that should have been allocated to them and giving it to other groups, the MFO enriched himself to the detriment of the plaintiffs, who suffered a corresponding deprivation. They are therefore entitled to restitution of the value of this enrichment: *Pacific National Investments Ltd v Victoria (City)*, [2004] 3 SCR 575 at para 13). The defendant has not shown any juristic reason for the enrichment: *Pacific National*, at para 14, *Garland v Consumer's Gas Co,* [2004] 1 SCR 629 at para 30 [*Garland*].

[90] The plaintiffs are of the view that the defendant's argument to the effect that she should be exempted from compensating them because she did not keep the benefits of her enrichment is entirely without merit. The MFO did indeed keep the proceeds of his enrichment because he was never obliged to assume the costs of the services that he benefited from or of the programs that he

implemented. Similarly, the defendant cannot rely on a defence of change of position because this defence is available only to those who are not wrongdoers (*Garland* at para 65). Here, the defendant cannot protest her innocence because her practice of financing activities through the sale of crab has already been declared illegal (*Larocque*; *Assoc des crabiers acadiens* and *Aucoin v Canada (MFO)*, [2001] FCJ 1157).

Misfeasance in public office

[91] The plaintiffs are of the opinion that the MFO's actions constitute misfeasance according to *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263 [*Odhavji*]. Knowledge of the illegitimate or illegal nature of an act may be inferred from the serious carelessness or recklessness of the official with regard to his or her actions or decisions (*O'Dwyer v Ontario (Racing Commission)*, [2008] OJ 2219 at para 48, *Finney v Barreau du Québec*, [2004] 2 SCR 17 at para 3).

[92] The plaintiffs refer the Court to details given (letter dated November 25, 2011) to the defendant regarding the identities of the officials involved and their knowledge of the illegitimacy of their actions, as well as the alleged misfeasance.

Section 9 of the Crown Liability and Proceedings Act, RSC 1985 c C-50

[93] The plaintiffs refute the defendant's argument that section 9 of the *Crown Liability and Proceedings Act* prevents them from suing the MFO because they have already been compensated for the negative impact of the integration of Aboriginal fishers into the crab fishery. They submit that this section's sole purpose is to prevent double indemnity. To rely on this immunity, the

defendant must show that the compensation was based on the same factual foundation as the plaintiffs' action.

[94] The money given to the plaintiffs ($200,000 to $350,000) was paid out under the [TRANSLATION] "Financial Aid Agreement to Give Aboriginal Fishers Access to the Snow Crab Fishery – Areas 12, 18, 25/26" However, that document in no way supports the defendant's position. The payments were made to get the signatories to waive their rights for the future, not to compensate for the past harm claimed in the amended statement of claim (fifth).

[95] In addition, the plaintiffs submit that the section in question applies only to actions in civil liability and not to the plaintiffs' other causes of action, namely, unjust enrichment and expropriation.

[96] According to the plaintiffs, the issue in this case is not whether the provisions of the *Fisheries Act*, RSC 1985 c F-14 [the Act], or the *Fisheries (General) Regulations*, SOR/95-53, entitle licence holders to compensation when a licence is cancelled or not renewed, nor is it whether fishing licences are "property" *per se* within the meaning of the common law, given that in their view, entitlement to compensation does not depend on their fishing rights eventually being characterized as true "property" within the generally understood meaning of the common law.

[97] The real question is whether, in the circumstances or the particular context of the history of the snow crab fishery, the plaintiffs are entitled to be compensated for the 35% reduction in the TAC, taking into account the limited number of licences with an individual TAC, the automatic

renewal of the licences, the economic realities of the snow crab fishery and the recognized market for buying and selling licences. This all relates back to the legitimate expectations of the plaintiffs.

[98] The plaintiffs point out that Canada's courts have yet to rule on a request for compensation for the withdrawal of the abovementioned rights.

Arguments of the defendant (respondent)

[99] On the other hand, the defendant maintains that her motion for summary judgment should be allowed, given that the plaintiffs' evidence does not disclose a genuine issue to be tried with respect to the allegations, namely, bad faith, legitimate expectations, expropriation, unjust enrichment, misfeasance in public office and any property rights in the fishing licences or the TAC.

Bad faith

[100] The defendant submits that in a private law action, the law does not recognize a stand-alone action for bad faith. The alleged bad faith exercise of discretion should instead be analyzed as a tort of misfeasance in public office: *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 78 [*Elder Advocates of Alberta*].

Legitimate expectations

[101] Regarding the legitimate expectations of the plaintiffs, the defendant argues that legitimate expectations, even if encouraged by officials, cannot create any property rights that would entitle the holder to compensation: *Her Majesty the Queen v South Yukon Forest Corp et al*, 2012 FCA

165 at paras 78-79 [*South Yukon Forest*]. The doctrine of legitimate expectations cannot be used to determine legal rights on the merits (*Mount Sinai Hospital Center v Quebec*, 2001 SCC 41 at paras 38 and 90; *Durant v Canada (MFO)*, 2002 FC 327 at para 35).

[102] Even if the plaintiffs succeeded in establishing at trial that their fishing licences have some sort of value (regardless of whether MFO recognizes that value), and even if their expectations had been encouraged by the MFO's officials, this would be of no help to them. They had an opportunity to express their disagreement at a number of meetings, either directly with the Minister or with his officials.

[103] Regarding the statements that the MFO allegedly made to the plaintiffs concerning the integration of Aboriginal fishers into the commercial fishery in Area 12 through a voluntary licence buyback program, they do not entitle the plaintiffs to any legal remedies because they were merely expressions of the government's intentions with regard to the development of future programs. The MFO is not bound by the alleged representations of Jim B. Jones or Minister Dhaliwal. Broken promises or false or misleading statements therefore cannot engage the defendant's liability.

Expropriation

[104] The defendant pleads that there was no expropriation of the plaintiffs' rights, given that (i) the MFO's policy decisions on fisheries management are immune from the law, and (ii) the plaintiffs do not have a property right in the fishing licences or a right to a quota or a predetermined share of the TAC *(Chiasson*).

(i) Immunity

[105] First, the decisions challenged by the plaintiffs are basic policy decisions designed to give various groups of fishers regular access to the commercial snow crab fishery and are precisely the kind of decision protected from judicial scrutiny, provided that they are made in good faith. Beginning in 2003, the MFO's policy on fisheries management sought to weigh political, social and economic factors, the interests of various groups and the public interest. Although the plaintiffs do not agree with this policy, there is nothing in the evidence to support the conclusion that it was made in bad faith.

[106] The defendant submits that the MFO's duty under the Act is to manage, conserve and develop the fishery on behalf of Canadians in the public interest (*Comeau's Sea Food Ltd v Canada (MFO),* [1971] 1 SCR 12 at para 37 [*Comeau's Sea Food*]). To discharge its duties, the MFO develops general policies on allocations and on the division of the resource among fishers. These strategic policies do not have force of law and cannot be challenged (*Carpenter Fishing Corp v Canada*, [1998] 2 FC 548 at paras 28-29 [*Carpenter*]). Licensing is a tool available to the MFO to discharge his duties under the Act (*Comeau's Sea Food* at para 37). The MFO has broad, almost absolute discretion to issue licences (*Comeau's Sea* Food at paras 31, 35-37), and a quota policy cannot fetter the MFO in the exercise of his discretion to issue licences in accordance with the Act (*Carpenter* at paras 28-29). Holding the MFO liable for the actions alleged by the plaintiffs would fetter the discretion delegated to the MFO under the Act and would prevent him from duly discharging his duties.

[107] In addition, the Crown cannot be held legally liable for the exercise of a minister's discretion because that exercise contradicts an earlier policy (*Carpente*r at paras 28-29), an alleged agreement (*Pacific National Investments Ltd v Vancouver (City)*, 2000 SCC 64), a promise, a statement or an undertaking of any kind, or because there are harmful effects on certain groups. Accordingly, in 2003, the MFO was not bound by any previous conduct, agreement or policy, and it was entirely open to the MFO to issue new licences and divide up the resource as he saw fit.

[108] The defendant also notes that the Minister is not limited to taking scientific or conservation considerations into account in managing the fishery, nor is he required to comply with a scientific opinion or standard of any kind or to give precedence to scientific or conservation-related considerations (*Ward v Canada (AG)*, 2002 SCC 17 at paras 38-39). He may also consider social, political and economic factors, and this is precisely what he did (*Association des Senneurs du Golf Inc v Canada (MFO)*, [1999] FCJ 1449 [*Assoc Senneurs du Golf*]).

(ii) No property rights

[109] The defendant argues that a fishing licence and the privileges that come with it owe their existence to fisheries legislation. They do not grant property rights in the "fish" in the sea, and the plaintiffs are not entitled to a predetermined share of the TAC (*Chiasson* at para 28). The "fish" are a public resource that belongs to all Canadians. It is only once the fish are caught that they become the property of the licence holder (*Saulnier* at para 22).

[110] Although a fishing licence may be considered to be an "interest" or a "*profit à prendre*", the Supreme Court clearly stated in *Saulnier* that the finding of rights and privileges in respect of fishing licences should not be interpreted as limiting the Minister's discretion or as expanding the scope of the privileges granted to licence holders under the Act and the Regulations.

[111] This is especially true because fishing licences and the conditions on them expire each year. The Act and the Regulations do not entitle licence holders to a permit each year, or to a permit with the same conditions, particularly conditions regarding the quantity of "fish" that may be caught. Even though licences were reissued every year, and even though they had acquired a commercial value and the MFO permitted certain transfers or reassignments of licences between fishers, the holders still had to apply to renew them each year.

[112] It is trite law that fishers do not have legal rights to receive the same allocation of the TAC from year to year (*Chiasson* at para 28; *Carpenter* at paras 37-39; *Area Twenty Three Snow Crab Fisher's Assn v Canada*, 2005 FC 1190 at para 44; *Radil Bros Fishing Co Ltd v Canada (MFO)*, 2001 FCA 317 at para 36; *Joys v Minister of National Revenue* (1995), 128 DLR (4th) 385 at pp 394 and 399; *Molaison v Canada* [1993] FCJ 1409 at para 57, *Comeau's Sea Food* at paras 32-33, 36-37, 40 and 49; *Joliffe v The Queen*, [1986] 1 FC 511 at p 520; *Bennett (Re)*, [1998] 24 BCLR (2d) 246 at p 3). Any cause of action relied on by the plaintiffs that requires recognition of legal interests in respect of licences, quotas or a predetermined share of the TAC must fail. Therefore, there cannot be any expropriation without compensation or any conversion in this case.

[113] Furthermore, where it is a right, not property, that is expropriated, the plaintiffs have to have been completely deprived of the exercise of the alleged right to succeed (*Manitoba Fisheries Ltd v The Queen*, [1979] 1 SCR 101). Here, only a part of the plaintiffs' rights was taken away.

Unjust enrichment

[114] In her response, the defendant acknowledges that unjust enrichment can have a negative impact. However, contrary to what the plaintiffs claim, the enrichment must be related to a cost that the defendant would otherwise have been legally obliged to incur (*Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762 at paras 46, 55, 57 and 59). However, the MFO has no legal duty to develop scientific research programs or activities. As regards lobster and groundfish fishers in Area 18 and Aboriginal groups, the MFO had no legal duty to allocate them a share of the TAC.

[115] The defendant submits that if there was a deprivation, it was not a corresponding one. Just because the plaintiffs claim to have been affected by the alleged enrichment, it does not necessarily follow that they suffered a deprivation. The question is not whether the use of the resource or the allocation of a part of the TAC to others caused the plaintiffs deprivation, but whether the plaintiffs made a contribution to the MFO by which the MFO enriched himself, or whether the MFO had a legal duty to give the plaintiffs a greater share of the TAC than they received.

[116] The defendant notes that the plaintiffs have no recognized legal interest with regard to the licences, the quotas or a predetermined share of the TAC. Therefore, the plaintiffs would not be

able to prove that the alleged enrichment of the defendant occurred at their expense, nor could they prove the corresponding deprivation, given that it was neither the plaintiffs nor their associations that paid the MFO or provided the services in question, but third parties.

[117] Even if unjust enrichment could be proven at trial, there would be reasons to deny compensation, owing to a change of position. The MFO did not retain the benefits; they passed directly to other groups of fishers. All the funds collected to support the scientific research activities in question in *Larocque* and *Assoc des Crabiers* were allocated to research programs and management activities as intended. There are therefore grounds to exempt the defendant from the duty to compensate (*Garland* at para 37).

Misfeasance in public office

[118] The defendant counters that the plaintiffs had to establish that there was a breach of an obligation owed to them by the defendant, absent which there can be no liability in tort (*Odhavji* au para 29).

[119] The relevant question is whether the MFO had an obligation to give the plaintiffs a fixed portion of the TAC year after year. The answer to this question can only be no.

[120] Regarding the tort raised by the plaintiffs on the basis of *Odhavij*, Category "B" of this tort requires, more specifically, that the official must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer and that he or she must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiffs. The plaintiffs must

therefore show a direct link between the harm and the tortious conduct. The defendant adds that the official's knowledge that his or her actions were unlawful is an insufficient basis for a finding of malfeasance in public office. The plaintiffs must prove an element of bad faith or dishonesty (*Odhavij* au para 28).

[121] The defendant submits that a public officer may in good faith make a decision that she or he knows to be adverse to certain members of the public (*Odhavij* at para 28) and has the freedom to act against the personal interests of certain citizens in favour of other groups. This is particularly the case of fisheries when dividing quotas or a portion of the TAC among the various groups of fishers. For example, the MFO may favour one group over another (*Assoc Senneurs du Golf* at para 25), and it is understandable that certain fishers will lose more than others (*Carpenter* at para 39).

[122] In the case at bar, the impugned acts involve officials of the MFO from three different departments at various times between 2003 and 2008. These actions are institutional, collective and not personal in nature, unlike what occurred in *Roncarelli v Duplessis*, [1959] SCR 122. The plaintiffs have not proven any bad faith or malice towards them.

[123] The officials did not act unlawfully and deliberately. There was nothing unlawful or illegal in the MFO's integration of Aboriginal crab fishers, groundfish and lobster fishers or their associations and Area 18 fishers in the sharing of the resource. The MFO did not receive any money or services from these groups. Even when unlawful conduct was recognized in *Larocque* and *Assoc des crabiers acadiens*, this was insufficient to show an element of bad faith.

[124] Given that the plaintiffs have no recognized legal interest in fishing licences, a quota or a predetermined share of the TAC, the likelihood of harm to the plaintiffs is in itself insufficient to meet the test for finding a tort.

[125] The conservation measures, like the rationalization, were not imposed on the plaintiffs, but on third parties. Similarly, the money and services in question in *Larocque* and *Association des crabiers* were paid for by fishers from other groups, not the plaintiffs. The plaintiffs have no standing to act on behalf of these third parties.

Conclusion of the defendant

[126] The defendant notes that in *Kimoto* at paras 12-13, it was recognized that the MFO is charged with the formidable task of managing, developing and conserving the fisheries, which belong to the Canadian people as a whole. Decisions with respect to conservation and management issues must necessarily balance the interests of competing stakeholders. Issues concerning the definition of the rights or interests related to fishing licences have already been considered by the courts and need not be revisited (*Comeau's Sea Food*, *Carpenter* and *Kimoto*).

[127] Finally, the defendant is of the opinion that the Treasury Board has already compensated the plaintiffs for the integration of Aboriginal fishers, such that subsequent claims based on the same facts are barred, in accordance with section 9 of the *Crown Liability and Proceedings Act*,

RSC 1985, c C-50. On March 29, 2006, the MFO set up a financial assistance program for fishers who held Area 12 licences at the time, to reduce the impact that the integration of Aboriginal fishers in 2003 may have had. This applied whether or not the plaintiffs participated in the voluntary licence buyback program. All the plaintiffs who held licences at the relevant time took part in the program, and each of them received between $200,000 and $350,000.

Analysis and determination

[128] Referring to the Rules, the criteria established by case law for motions for summary judgment (see paras 51 to 58) and the evidence submitted by the parties, the Court dismisses the defendant's motion for the following reasons.

[129] The Court is not satisfied that the defendant has clearly and specifically established that the issues raised in this case can properly be decided on the evidence that she filed with her motion (*Trevor Nicholas* at para 44). Major ambiguities and gaps remain with regard to the factual background and the history of relations between the MFO and the plaintiffs.

[130] The evidence on certain points is contradictory, and it is impossible for the Court to decide the issues (subsection 216(6) of the Rules; *Granville* at para 8 citing *Pallman Maschinenfabrik* and *Sears*). The Court finds that it would be unjust to deprive the plaintiffs of the opportunity to be heard at a trial, as the arguments they raised are far from dubious and deserve closer

examination (*Trevor Nicholas* at para 44). The Court is not satisfied that the plaintiffs' claims have no chance of succeeding (*Lameman* at para 11).

[131] For example, the defendant pleads that the plaintiffs were compensated in full for the negative impact of integrating Aboriginal snow crab fishers. The answer to Question 7 in the plaintiffs' written examination is not conclusive enough to provide a basis for the defendant's statement on this question. First of all, the Court does not know which plaintiffs were compensated or exactly how much was paid out. No list was provided. Second, the document on which the defendant relies, namely, the [TRANSLATION] "Financial Aid Agreement to Give Aboriginal Fishers Access to the Snow Crab Fishery – Areas 12, 18, 25/26", is not so clear on this point that it can be determined whether the compensation was for the past or the future. Third, the Court cannot determine for what portion of the 35% reduction the plaintiffs were allegedly compensated. The defendant has therefore not discharged her burden of proof in accordance with *Lameman*, at para 12.

[132] The defendant also cautioned the Court regarding the plaintiffs' interpretation of certain documents attached to the affidavit of Robert Haché. However, several of these documents come from the MFO. How can the Court decide how to interpret them without hearing the documents' authors? There is therefore a controversy that could be resolved at trial.

[133] The Court is of the opinion that the courts have yet to decide some of the contentious issues raised here. This motion will not allow such issues to be adequately resolved.

[134] In *Society of Composers, Authors and Music Publishers of Canada v Maple Leaf Sports & Entertainment*, 2010 FC 731 at para 15, the Court found that trials are the usual ways by which true disputes are resolved. Any person who makes an application that is not frivolous, vexatious or manifestly unfounded has a right to their "day in court". A summary judgment may completely deprive a party of this right, and "it is essential to justice that claims disclosing real issues that may be successful proceed to trial" (*Lameman* at para 11).

[135] The Court has no intention of ruling on all the elements raised by the parties, so as not to influence the judge who will hear the case on the merits; instead, the Court will limit its comments to the following ones in support of the conclusion that there are genuine issues to be tried.

Bad faith

[136] The defendant is correct to raise the obiter of Chief Justice McLachlin in *Elder Advocates of Alberta* at para 78 (see paragraph 100 of this decision):

> The law does not recognize a stand-alone action for bad faith. . . . [T]he bad faith exercise of discretion by a government authority is properly a ground for judicial review of administrative action. In tort, it is an element of misfeasance in public office . . . . The simple fact of bad faith is not independently actionable.

[137] The burden will therefore be on the plaintiffs to satisfy the judge who hears this case that their allegations of bad faith are well-founded and that they are directly connected to a tort of misfeasance in public office committed by representatives of the defendant.

Legitimate expectations of the plaintiffs

[138] The plaintiffs acknowledge that section 7 of the Act gives the MFO discretion in managing fisheries.

[139] The Federal Court of Appeal ruled on this issue in *South Yukon Forest* at paras 78-79:

> The Federal Court's decision essentially enforces South Yukon and Liard Plywood's substantive expectations, said to be encouraged by the Department's officials, that they would receive a long term Timber Harvesting Agreement allowing for the harvesting of timber in the quantities necessary to keep the Watson Lake Mill alive.
>
> It is well-established that an action does not lie to enforce substantive expectations encouraged by officials: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 SCR 1170 at page 1204; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at page 557; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 26.

[140] The judge who is appointed to hear the parties will have to determine whether this Supreme Court judgment applies in the special circumstances of the present case, after examining the history between the MFO and the plaintiffs. In other words, before the decision of May 2, 2003, could the plaintiffs, who had substantially contributed to the MFO's activities, have reasonably expected the MFO to recognize some of their expectations?

Expropriation of the plaintiffs' fishing rights

[141] Several issues require a trial with regard to the plaintiffs' claim that the MFO expropriated their fishing rights. The case law has not yet clearly determined what rights fishers who have their licences renewed year after year have. On the one hand, it is recognized that the MFO has broad discretion to issue licences and must manage the resource on behalf of all Canadians (*Comeau's Sea food* at paras 31, 35-37). Moreover, in *Chiasson* at para 28, the Court relied on *Comeau's Sea food* to state that "the respondents were not entitled to a specific percentage of the TAC".

[142] On the other hand, although "[t]he imposition of a quota policy . . . is a discretionary decision in the nature of policy or legislative action" and "the Minister . . . may validly and properly indicate the kind of considerations by which he will be guided as a general rule when allocating quotas", all this nonetheless remains subject to the condition that the MFO not fetter his discretion through elements such as "bad faith, non-conformity with the principles of natural justice where their application is required by statute and reliance placed upon considerations that are irrelevant or extraneous to the statutory purpose" (*Carpenter* para 28 citing *Maple Lodge Farms v Canada*, [1982] 2 SCR 2) [*Maple Lodge Farms*], or if the Minister "acted improperly, in a wholly unreasonable manner, or . . . committed an error of law": *Kozarov v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 866; *Getkate v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 965; *Grant v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 958; *Holmes v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112; *Duarte v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 602.

[143] Therefore, while it is true that "[s]eldom, if ever, is the imposition of quotas a win-win situation" (*Carpenter* at para 39), and that the MFO is not bound to pick the best, the wisest or the most logical formula for distributing quotas (*Carpenter* at para 41), the fact remains that there are many bases on which the plaintiffs can rely to rebut the MFO's immunity. It should also be noted that the plaintiffs are not seeking the reinstatement of the quotas or the introduction of a new formula for sharing the TAC, but compensation for the 35% reduction during the period from 2003 to 2008.

[144] Moreover, Justice Décary, in *Larocque* at para 13, used the following terms to characterize the Minister's decision to appropriate a portion of the resource to fund his undertakings:

> . . . [W]hen the Minister decided to pay a contracting party with the proceeds of sale of the snow crab, he was paying with assets that did not belong to him. Paying with the assets of a third party is, to say the very least, an extraordinary act that the Administration could not perform unless so authorized by an act or by duly enacted regulations. Such an act, on its very face, is like an expropriation of fishery resources or a tax on them for the purposes of funding the Crown's undertakings (emphasis added).

[145] Similarly, in *Assoc des crabiers acadiens* at para 6, Justice Martineau concluded that "by deducting an allocation of 480 mt from the TAC, the Minister deprived each licensee of this share of the TAC and indirectly imposed an additional charge on them". At para 8, he added:

> As the Federal Court of Appeal held recently in *Larocque v. Canada (Minister of Fisheries and Oceans)*, [2006] F.C.J. No. 985, 2006 FCA 237, the Minister simply does not have the power under the Act to finance DFO scientific research from the sale of snow crabs, and I see no particular reason not to reach the same conclusion in the case of the financing of the DFO's additional activities that were the subject matter of the agreement signed in April 2005 with the AGFA. In this case the Minister allocated to the AGFA the 480 mt snow crab quota that he had unlawfully appropriated for himself in order to finance the DFO's additional activities. It follows that the Minister exceeded his power under the Act by issuing a 2005 snow crab fishing licence to the AGFA in exchange for a payment of $1,900,000 to be used to finance the DFO's additional activities from the moneys that the AGFA has in turn obtained from the licensees who were designated as operators under the AGFA licence (emphasis added).

[146] In *Saulnier* at para 14, the Supreme Court of Canada wrote that

> . . . the fact is that the stability of the fishing industry depends on the Minister's predictable renewal of such licences year after year. Few fishers expect to see their loans paid off with the proceeds of a single year's catch. In an industry where holding one of a very restricted number of licences is a condition precedent to participation, the licence unlocks the value in the fishers' other marine assets.

[147] It noted that "the fishing licence is more than a 'mere licence' to do that which is otherwise illegal. It is a licence coupled with a proprietary interest in the harvest from the fishing effort" (*Saulnier* at para 22). A fishing licence "is unquestionably a major commercial asset", and

"the market attributes a high market value to what might otherwise be seen . . . as a 'transitory and ephemeral' right" (*Saulnier* at paras 23-24).

[148] In that case at para 43, the concept of a "bundle of rights" is described as follows:

> . . . The holder acquires the right to engage in an exclusive fishery under the conditions imposed by the licence and, what is of prime importance, a proprietary right in the wild fish harvested thereunder, and the earnings from their sale. While these elements do not wholly correspond to the full range of rights necessary to characterize something as "property" at common law, the question is whether (even leaving aside the debate about the prospects of renewal) they are sufficient to qualify the "bundle of rights" the appellant Saulnier *did* possess as property for purposes of the statutes (emphasis added).

[149] The idea of a "bundle of rights" is repeated in *Haché* at para 13, a case that came after *Chiasson*. In *Haché*, the Court explained as follows at paras 27-28:

> Furthermore, a fishing licence does not confer any vested rights on its holder (subsection 16(2) of the *Fishery (General) Regulations*, SOR/93-53) (Regulations) and may be suspended or revoked by the MFO if, among other reasons, he notes that its conditions have been breached (section 9 FA).
>
> There is no doubt that fishing licence holders are subject to the limits set out in the FA concerning the period during which, the location where and terms under which the licence may be exercised (together, the conditions of the licence), but the fact remains that the commercial reality in this industry is that licences will be renewed from one year to the next and that departmental policy will protect those who already hold licences (emphasis added).

[150] So on the one hand, the defendant relies on paragraph 28 of *Chiasson* to plead that the plaintiffs are not entitled to a specific percentage of the TAC, and on the other hand, the plaintiffs state that the Supreme Court and the Federal Court of Appeal have recognized that fishing licence holders have a "bundle of rights".

[151] It is interesting to note that after determining that the respondents (some of whom are now plaintiffs here) were not entitled to a specific percentage of the TAC, Justice Nadon, at paragraph 38 of *Chiasson*, suggested that if the respondents wish to claim the amount paid to a third party, they should bring an action in the Federal Court. The plaintiffs reply that this is exactly what they have done in this case.

[152] The Court therefore finds that the following issues should be tried:

1. Do the plaintiffs in this case have a "bundle of rights" related to their licences, as in *Saulnier* (para 36), or a right to participate in exclusive fishing activities in accordance with the conditions of the licence, as in *Haché* (para 13)?
2. If so, did the MFO expropriate it in part by his decision dated May 2, 2003?
3. If the answer to the second question is affirmative, are the plaintiffs entitled to compensation despite the compensation they have already received?

4. Is the defendant justified in raising section 9 of the *Crown Liability and Proceedings Act* against the causes of action set out by the plaintiffs in their amended statement of claim (fifth)?

[153] These issues are in no way binding on the judge who will be appointed to hear the parties on the merits. The judge may, at his or her discretion, set aside, amend, split, recast or add to the issues on the basis of the evidence presented.

[154] The parties jointly asked the Court for the opportunity to make submissions on costs. The Court would have agreed to let the parties put forward their positions on this subject if the motion had been allowed, or if the Court had found an abuse of process on the part of the defendant.

[155] Given the conclusion that the Court has reached, the Court, in exercising its discretion, finds that a lump sum for costs is entirely appropriate.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The defendant's motion for summary judgment be dismissed.

2. The defendant shall pay costs in a lump sum in the amount of $10,000 plus disbursements.

"Michel Beaudry"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1271-07
STYLE OF CAUSE:	ROLAND ANGLEHART SR. ET AL v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF HEARING:	September 24, 25 and 26, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	BEAUDRY J.
DATED:	October 18, 2012

APPEARANCES:

Patrick Ferland, Bernard Jolin and David Quesnel	FOR THE PLAINTIFFS
Michel Turbide	FOR THE PLAINTIFF (SELF-REPRESENTED)
Paul Marquis, Edith Campbell and Toni Abinasr	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Heenan Blaikie Montréal, Quebec	FOR THE PLAINTIFFS
Myles J. Kirvan, Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE DEFENDANT