**Date: 20090709**

**Docket: 09-A-21**

**Citation: 2009 FCA 230**

**Present:** **DESJARDINS J.A.**

**BETWEEN:**

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

**Appellants**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**Motion dealt with in writing without appearance of the parties**.

Order delivered at Ottawa, Ontario, on July 9, 2009.

REASONS FOR ORDER BY: DESJARDINS J.A.

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**Appellants**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR ORDER**

[1] The appellants bring this motion before the Court under Rule 369 of the *Federal Courts Rules*, SOR/98-106, (the Rules), seeking an extension of time to file a notice of appeal from a

decision of Justice Sean J. Harrington of the Federal Court, dated April 27, 2009. The motion also seeks an order allowing the notice of appeal attached as Exhibit F to David Quesnel's affidavit to be filed in support of the motion.

[2] In his decision, Justice Harrington dismissed the appellants' request for production of materials pursuant to sections 317 and 318 of the Rules.

[3] The appellants explain that the deadline to file the notice of appeal of the judgment *a quo* was missed by reason of a calculation error.

[4] They allege that their appeal raises valid issues, that they have had a continuing intention to appeal the judgment *a quo*, that the respondent will suffer no prejudice if the order the appellants seek is made and that the order is necessary to do justice to the parties.

[5] The respondent challenges but one point. He alleges that the issues the appellants wish to submit to the Federal Court of Appeal are not valid issues and that nothing in their motion establishes that this appeal might have merit. The respondent is not contesting that there might be special circumstances showing or explaining why the appeal was not filed within the required time; that the appellants' intention to appeal existed before the time to appeal ran out; that the delay has not been excessive; that the Crown will not be prejudiced in any way by an extension of time within which to appeal; and that it is in the interests of justice to grant the time extension.

[6] The criteria that must be met in assessing the merits of a motion for an extension of time are common ground. See *La-Z-Boy Canada Ltd. v. Allan Morgan and Sons Ltd*., 2004 FCA 368; *Pharmascience Inc. v. Canada (Minister Of Health)*, 2003 FCA 333; *Karon Resources Inc. v. Canada* (F.C.T.D.), 71 F.T.R. 232, [1994] 1 C.T.C. 307; *Sim v. Canada*, 67 C.P.R. (3d) 334.

**ANALYSIS**

[7] There is no need for the appellants to show that they will succeed on appeal. However, they must show that they have an arguable case (question valable ou défendable) to put before the Court of Appeal. This is a low threshold to meet.

[8] The appellants filed an application for judicial review to set aside the decision of the Minister of Fisheries and Oceans of Canada (the Minister). This decision adopts and implements the shrimp-harvesting plan for the Gulf of St. Lawrence (the Plan), which was publicly announced on or around April 4, 2008, and amended on April 25, 2008.

[9] By means of the Plan and its implementation, the Minister established the parameters according to which he intends to exercise certain powers conferred upon him under the *Fisheries Act*, R.S.C. 1985, c. F-14 (the Act) and the *Fishery (General) Regulations*, SOR/93-53 (the Regulations). The Minister is thus informing interested persons of his intention, for 2008, to impose certain parameters according to which shrimp fishing licences will be issued for the Gulf of St. Lawrence zone (zones 8, 9, 10 and 12). The Minister is also announcing a permanent resource sharing formula to be put in place as early as 2009.

[10] The appellants challenge the Minister's jurisdiction to do so.

[11] In particular, they allege that the Minister lacked jurisdiction or exceeded his jurisdiction to so allocate a total allowable catch (TAC). They state that the adoption of the aspects of the Plan which they mention is attributable to reasons extraneous to the purpose of the Act, the Regulations and the *Atlantic Fishery Regulations, 1985*, SOR/86-21, and is in no way justified or justifiable by the proper management and control of fisheries or the conservation and protection of fishery resources. In fact, they state, the adoption of the aspects that they mention is essentially attributable to purely political or economic considerations extraneous to the Act, and their adoption is mainly aimed at unjustly and unfairly favouring some groups of fishers to the detriment of others. In so doing, the Minister allocated part of the TAC to fishers and groups of fishers other than traditional shrimp fishers. Furthermore, he did not have the jurisdiction to establish a permanent resource sharing formula for 2009, as was announced.

[12] The motion contains a request for material, worded as follows:

> [TRANSLATION]
>
> The applicants request that the Minister send them and the registry a certified copy of the following material, which is not in the applicants' possession but in the possession of the Minister or the Attorney General of Canada:
>
> 1. All of the material, internal memos, memoranda, e-mail messages, briefings, (scientific or other) studies, notices, press releases and information sheets pertaining to the design, development and/or

> adoption of the Plan and the amendment, as well as all correspondence from and/or to the Minister, deputy minister, assistant deputy minister – fisheries management, directors general and officials for the Gulf and Quebec regions and/or the National Office with regard to these elements.
>
> 2. All of the decisions, orders, leases, permits and/or licences granted, renewed and/or amended, in whole or in part, following the adoption of the Plan and/or in accordance with the parameters established by the Plan.

[13] On May 23, 2008, the respondent sent two certification affidavits of Barry Rashotte, Acting Director, Resource Management (Affidavits of Barry Rashotte) and a certified copy of certain documents that [TRANSLATION] "were in the possession of the [Minister] when he made the decision announced on April 25, 2008". These documents, collectively the "Material Produced", are limited to the following:

> (a) A document entitled "Memorandum for the Minister – 2008 Gulf shrimp annual harvesting plan". This memorandum consists of a summary of the analysis performed by Michelle D'Auray, Deputy Minister, and her team. The memorandum sets out four (4) scenarios and identifies the one advocated by the [Minister];
>
> (b) A document entitled "Gulf shrimp fishing areas". This document is a map of the shrimp fishing areas in the Gulf of St. Lawrence;
>
> (c) A document entitled "Memorandum for the Minister – Temporary increase in gulf shrimp quota for Group B Temporary entrants". This memorandum contains three (3) brief paragraphs, drafted on April 20, 2008, at the latest, stating that the [Minister] had already made a decision regarding the TAC increase. It must be emphasized that, although the amendment to the TAC was announced on April 25, 2008, the Minister signed that document on April 28, 2008.

[14] The respondent objects to the transmission of the material requested, other than the documents provided, for the following reasons:

> [TRANSLATION]
>
> (a) the material requested, other than the documents provided, is not relevant to the decisions being challenged in this application for judicial review;
>
> (b) the material requested, other than the documents provided, was not in the possession of the Minister when he made the decisions being challenged in the application for judicial review;
>
> (c) the request for material amounts to a general request similar to a discovery in an action.

[15] Rule 317(1) provides as follows:

| | |
|---|---|
| A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested. | Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés. |

[Emphasis added.]

[16] In *Access Information Agency Inc. v. Canada (Transport)*, 2007 FCA 224, [2007] F.C.J. No. 814, Justice Pelletier confirmed the fundamental principle applying to the interpretation of Rule 317:

> It has been consistently held in the case law that the requesting party is entitled to be sent everything that was before the decision-maker (and that the applicant does not have in its possession) at the time the decision at issue was made: *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 1432 (F.C.A.).

[17] In support, Justice Pelletier cited *1185740 Ontario Ltd. v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 1432 (F.C.A.), in which Justice Sexton had taken care to clarify that pursuant to our Court's decision in *Canada (Human Rights Commission) v. Pathak* (C.A.), [1995] 2 F.C. 455 (*Pathak*), only documents which were actually before the Human Rights Commission had to be produced. The other documents that the investigator relied on did not have to be produced unless there was evidence that the investigator had inaccurately summarized the facts (see also *Quebec Port Terminals Inc. v. Canada (Labour Relations Board)* (F.C.A.), [1993] F.C.J. No. 421, 17 Admin. L.R. (2d) 16). In *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 281, [2002] F.C.J. No. 813, at paragraph 30, Justice Evans, on behalf of the Court, wrote that

> . . . applications for judicial review are normally conducted on the basis of the material before the administrative decision-maker. However, affidavit evidence is admitted on issues of procedural fairness and jurisdiction. Supplementary affidavits and cross-examination on them require leave of the Court; *Federal Court Rules, 1998*, rule 312.

[18] In *Pathak*, Justice Pratt, writing for the majority, explained the notion of relevance at page 460:

> 9. . . . If the material is not relevant, the Tribunal is not obliged to produce it.
>
> 10 A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent.
>
> [Emphasis added.]

[19] The appellants accept these decisions as evidenced at paragraph 3 of the [TRANSLATION] "Appellants' written representations in response to the respondent's record". However, in the same document, they state,

> [TRANSLATION]
>
> 6. Contrary to an application for review of the decision of a court of law or a quasi-judicial tribunal, however, in this case there is no preassembled record that the decision-maker had to use as the exclusive basis for his or her decision; indeed, quite the opposite.
>
> 7. In the context of making his decision, the Minister of Fisheries and Oceans (the Minister) did not limit himself as to the source of the facts he could consider, and everything points to this "decision" being no more than the approval of a proposal for which the parameters were set by the officials tasked with developing the proposal, on the Minister's behalf, on the basis of information that was not even submitted to the Minister at the time of his final approval.
>
> 8. Thus, there is no basis to assert that the material which the defendant has until now agreed to transmit—that is, the material that was physically before the Minister at the specific time of his decision—constitutes all of the documents that the Minister personally considered or reviewed as part of his decision-making process, and still less that it constitutes all of the relevant material for the purposes of the judicial review.

> 9. Another clarification is in order. Some administrative tribunals have the authority to base their decisions on reports prepared for them by an investigator, as was the case in *Pathak*. In such cases, the legislation establishing the tribunal provides for two separate phases (an investigation phase and a decision-making phase), and provides that the tribunal must base its decision on the report prepared by the investigator in the first phase, and not directly on the information gathered over the course of the investigation or on the notes the investigator may have made during the investigation. Consequently, the case law, as a general rule, is against communicating material related to the investigation phase.
>
> 11. In a case such as this one, however, there is no "investigation" phase to distinguish from a "decision-making" phase. The development, adoption and implementation of the measures in the fishing plan constitute a single, uninterrupted decision-making process for which the Minister is solely responsible but which the Minister obviously cannot accomplish alone. The process necessarily requires the involvement of the [Minister]'s officials, who are tasked with developing, on the Minister's behalf, the measures that will be implemented by means of the fishing plan approved by the Minister and the fishing licences issued by the Minister or on his behalf.
>
> [Appellants' emphasis.]

[20] To this end, the appellants rely in particular on the decision of Prothonotary Hargrave in *Deh Cho First Nations v. Canada (Minister of Environment)*, [2005] F.C.J. No. 474, at paragraph 17 (*Deh Cho*) and that of Justice Muldoon in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1997] F.C.J. No. 557, at paragraph 20 (*Friends of the West Country Assn.*).

[21] Both decisions recognize that a greater number of documents may be allowed where there is no investigation phase preceding the decision-making phase.

[22] Thus, Prothonotary Hargrave states the following at paragraph 17 of *Deh Cho* (above):

> Counsel for the Respondents looks upon the task of assembling all of the documents requested by the Applicants as daunting. However, in *Quebec Ports Terminals v. Canada (1993)* 17 Admin. L.R. (2d) 16 the Court of Appeal points out at page 21 that such a request is limited both to material in the possession of the tribunal, and to material which already exists when the request is made: the tribunal is not obliged to prepare anything which it does not already have. In *Quebec Ports* Mr. Justice Décary went on to note, at page 22, that the tribunal need not produce anything which the party requesting the material ought to have in its own material. As a further limitation the Court of Appeal, in *Trans Quebec & Maritimes Pipeline v. National Energy Board* [1984] 2 F.C. 432 at 442 makes it clear that production of documents by a tribunal is not an opportunity for a fishing expedition and thus production under the rules governing judicial review stops short of the full discovery which would enable the other side to make demand for the whole of the tribunal's file so that it might be searched for grounds for an application. For this reason production is limited, as pointed out in *Pathak*, to what is relevant under the originating notice of motion and the affidavit in support, or taking the view of Mr. Justice Hugessen, *Merck Frosst Canada Inc.* (*supra*), to the issues defined by the affidavits filed by the parties. By this measure there may be a considerable number of documents, but that is a necessary result of a situation in which there is not an investigative phase, followed by a decision making phase, but rather where the Minister and the Minister's assistants supervise the procedure leading to the decision. Here I accept the view of counsel for the Applicants that judicial review, in a modern setting, may involve significant questions of broad scope and that being the case there is no limit on the size of the record, which is governed by the affidavit material. Nor is the production requested too broad. The production requested, set out in the notice of application, is fairly specific. The Applicants request documents in existence at each step taken by the Minister and his representatives leading to the final step, the decision in August of 2004, being only those relevant documents which the Applicants have not declared in their extensive affidavit material.
>
> [Emphasis added.]

[23] Justice Muldoon states the following at paragraph 20 of *Friends of the West Country Assn.* (above):

> . . .
>
> The respondents' submission is that the case at bar is analogous to a Human Rights Commission scenario because subsection 20(1) of the [*Canadian Environmental Assessment Act*] CEAA states: "The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening

> report and any comments filed pursuant to subsection 18(3)". That submission must be rejected by virtue of subsection 17(2) of the CEAA (recited above) which states that no action under subsection 20(1) can be taken unless the responsible authority is satisfied that the delegated duty has been carried out in accordance with the CEAA. There is no distinct investigation and decision-making stage, because subsection 17(2) of the CEAA mandates that the Minister (or other responsible authority) take a supervisor rôle over the investigation, and not merely that of a passive recipient.
>
> [Emphasis added.]

[24] The materials and correspondence that the appellants are requesting be produced are related to the design, development and/or adoption of the Minister's Plan and the amendment of that Plan, as well as to the powers held by the Minister pursuant to the Act and the regulations.

[25] The issue raised by the appellants, namely, whether in an application for judicial review, this type of decision by the Minister may lead to an application of Rule 317 which takes into consideration a broader context than that in *Pathak* (above), is an arguable case (question valable ou défendable).

[26] I allow the appellants' motion and make the requested order.

"Alice Desjardins"
J.A.

Certified true translation
Sarah Burns

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | 09-A-21 |
| **STYLE OF CAUSE:** | **ASSOCIATION DES CRABIERS ACADIENS INC.**, a company duly incorporated under the laws of New Brunswick, **JOËL GIONET**, on his own behalf and in his capacity as President of the Association des crabiers acadiens inc., **ASSOCIATION DES CRABIERS GASPÉSIENS INC.**, an incorporated association registered under the laws of Quebec, **MARC COUTURE**, on his own behalf and in his capacity as Administrator of the Association des crabiers gaspésiens inc., **ASSOCIATION DES CRABIERS DE LA BAIE**, an unincorporated association registered under the laws of Quebec, **DANIEL DESBOIS**, on his own behalf and in his capacity as Administrator of the Association des crabiers de la Baie, and **ROBERT F. HACHÉ** |

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES**

| | |
|---|---|
| **REASONS FOR ORDER BY:** | DESJARDINS J.A. |
| **DATED:** | July 9, 2009 |

**WRITTEN REPRESENTATIONS BY:**

| | |
|---|---|
| Patrick Ferland | FOR THE APPELLANTS |
| Jean-Robert Noiseux | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Heenan Blaikie LLP<br>Montréal, Quebec | FOR THE APPELLANTS |
| John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |