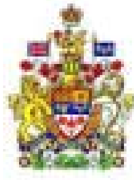
Federal Court of Appeal  Cour d'appel fédérale

Date: 20091020

Docket: A-144-08

Citation: 2009 FCA 300

CORAM: **BLAIS C.J.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

**ROBERT ARSENAULT, JOSEPH AYLWARD, WAYNE AYLWARD,
JAMES BUOTE, BERNARD DIXON, CLIFFORD DOUCETTE,
KENNETH FRASER, TERRANCE GALLANT, DEVIN GAUDET,
CASEY GAVIN, JAMIE PETER GAUDET, RODNEY GAUDET, TAYLOR GAUDET,
GAVIN, SIDNEY GAVIN, DONALD HARPER,
CARTER HUTT, TERRY LLEWELLYN, IVAN MACDONALD,
LANCE MACDONALD, WAYNE MACINTYRE, DAVID MCISAAC,
GORDON MACLEOD, DONALD MAYHEW, AUSTIN O'MEARA**

Respondents

Heard at Charlottetown, P.E.I., on June 11, 2009.

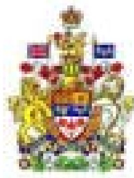
Judgment delivered at Ottawa, Ontario, on October 20, 2009.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: BLAIS C.J.

CONCURRING REASONS BY: PELLETIER J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of Blanchard J. of the Federal Court, 2008 FC 492, dated April 16, 2008, pursuant to which he ordered the Minister of Fisheries and Oceans (the "Minister") to implement the 2006 Management Plan for Snow Crab Areas 12, 18, 25 and 26 (the "Management Plan"). More particularly, Blanchard J. ordered the Minister to pay to the respondents

their share of the $37.4 million of financial assistance provided in the Management Plan for traditional crabbers.

[2] The main issue raised by this appeal is whether the Minister was bound by the Management Plan which he approved on March 30, 2006. In other words, did the Management Plan create rights which the respondents were entitled to enforce against the Minister? For the reasons that follow, that question should be answered in the negative.

THE FACTS

[3] The facts pertinent to this appeal can be summarized as follows.

[4] On September 17, 1999, the Supreme Court of Canada rendered its decision in *R. v. Marshall*, [1999] 3 S.C.R. 456, wherein it held that pursuant to the treaties of 1760-61 entered into by the Crown and the Mi'kmaq Indians, the First Nations signatories were entitled to engage in traditional resource harvesting activities for the purpose of earning a moderate livelihood.

[5] As a result of the Supreme Court's decision in *Marshall, supra*, the Government of Canada put into place in 2001 the "Marshall Response Initiative" (the "Marshall Initiative") which comprised a number of components and was funded by Parliament through the usual processes for appropriations. As part of the Marshall Initiative, the Department of Fisheries and Oceans (the "Department") entered into fishing agreements with First Nations so as to grant them communal

fisheries access in Canadian Atlantic commercial fisheries, including the snow crab fishery, and to enable them to acquire the means and skills required to compete successfully in commercial fishing.

[6] One of the components of the Marshall Initiative was a voluntary license retirement program pursuant to which traditional fishers, including traditional crabbers, would relinquish their fishing licenses which were then to be made available to First Nations. The Department's purpose in seeking the voluntary surrender of fishing licenses was to avoid putting excess pressure on fishing resources.

[7] Twelve of the 30 fisheries agreements concluded with First Nations provided them with access to snow crab. Specifically, the agreements provided First Nations with access to a total of 15.8% of the available total allowable catch (the "TAC").

[8] From 2002 to March 2006, when the Marshall Initiative was scheduled to end, only ten snow crab licenses had been retired under the retirement program, representing 4.96% of the total snow crab access provided for in the fisheries agreements entered into with First Nations, thus leaving a shortfall of 10.85% in voluntary retirement quotas to offset the access provided to First Nations. In other words, offers made by the Department to traditional crabbers to retire their fishing licenses for a specified financial assistance did not meet with much success.

[9] Consequently, the Marshall Initiative was extended to March 31, 2007. In that light and considering the lack of interest shown by traditional crabbers to voluntarily retire their licenses, a

Memorandum dated March 29, 2006, was placed before the Minister seeking his decision with regard to a number of options available to deal with, *inter alia*, financial assistance to traditional crabbers to offset the retirement quotas acquired for First Nations under the Marshall Initiative. Specifically, the Minister was requested to consider the following options:

1. the maintenance of the sharing arrangements that existed in 2005, with no financial assistance to traditional crabbers;
2. the payment of $37.4 million in financial assistance to traditional crabbers to offset 10.85% of the TAC needed to fulfill the First Nations share and the adjustment of the TAC shares that would see 15.186% for First Nations, 65.182% for traditional crabbers, 4.0% for snow crab fishing area 18 fisheries and 15.% for new access;
3. financial assistance of $37.4 million with no adjustment to the sharing arrangement which prevailed in 2005.

[10] The Memorandum recommended to the Minister that he approve option 2. On March 30, 2006, the Minister penned his concurrence to the departmental recommendation. The Minister also approved a TAC of 27,869 tonnes if certain management activities were implemented or a TAC of 20,862 tonnes should no management activities be implemented.

[11] On March 30, 2006, the Management Plan was issued by the Minister. He announced that for the coming year, the TAC would be shared between traditional crabbers, First Nations and new entrants into the fishery, and that this approach resulted in a reduction of the percentage of the TAC to which traditional crabbers had been entitled to in previous years. The Minister also announced

that he had approved financial assistance in the sum of $37.4 million which would be offered to traditional crabbers to compensate them for their share of the TAC which had now been transferred to First Nations.

[12] Subsequently, by way of letters dated July 11, 2006, the respondents were informed of the financial assistance which had now been made available and their entitlement to a share thereof. I hereby reproduce the letter written to Robert Arsenault, one of the respondents:

> Negotiations between the Department of Fisheries and Oceans and the First Nations undertaken under the Marshall Response Initiative are now over. The parties were able to determine the level of access to be allocated to First Nations for snow crab in areas 12, 18, 25 and 26. The access allocated to First Nations is 15.81% of the Total Allowable Catch (TAC) available and, with the participants of 10 traditional enterprises holding the equivalent of 4.96% of the TAC available, the shortfall is reduced to 10.85%.
>
> In order to close the file before the end of the program (March 31, 2007), the Minister announced, in a news release dated March 30, 2006, a final solution regarding the First Nations' access to snow crab and $37.4 million in financial assistance for traditional fleets. This assistance will be distributed to traditional crab fishers, based on their allocation, in order to grant access to snow crab to First Nations on a provincial basis.
>
> The Department of Fisheries and Oceans is prepared to provide you financial assistance in the amount of $72,481 to relinquish your eligibility to receive part of the snow crab allocation related to license #024375. You will find attached three copies of the Financial Assistance Agreement that should be returned to the department (return envelop included). As soon as DFO will have received the 3 signed copies of the Agreement, a cheque will be processed and a copy of the signed Agreement by DFO will be returned to you for your file.
>
> […]
>
> [Emphasis added]

[13] As appears from the above letter, three copies of a document entitled "Financial Assistance Agreement to Provide Access to Snow Crab for Aboriginals, Areas 12, 18, 25/26" (the

"Agreement") were enclosed. The recipient was required, in order to receive financial assistance, to sign three copies of the Agreement and return them to the Department.

[14] Not having received a response from the respondents, Department officials wrote to them on March 15, 2007, reminding them that they were entitled to financial assistance under the Marshall Initiative and that they should return three copies of the Agreement, duly signed, to the Department. Shortly thereafter, on March 21, 2007, the respondents wrote to Department officials, requesting the payment of their share of the financial assistance provided in the Management Plan and making it clear that they did not intend to sign the Agreement.

[15] Further correspondence was exchanged between the respondents and Department officials, but to no avail, between March 21 and March 31, 2007, at which time the Marshall Initiative expired. Hence, the respondents have not received any financial assistance to compensate them for the reduction in their share of the TAC.

[16] The respondents, traditional crabbers from Prince Edward Island, take issue with the implementation of the Management Plan announced by the Minister on March 30, 2006. They argue, *inter alia*, that the release requested by Department officials, found at clause 9 of the Agreement, did not form part of the Management Plan and, thus, they were entitled to refuse to sign the Agreement. Clause 9 of the Agreement reads as follows:

> 9. In consideration for the payment herein, the Recipient here releases Her Majesty the Queen in Right of Canada and Her Ministers, officers, employees and agents from any and all claims, suits, actions or demands of any nature that the Recipient has or may have and that are related to or arise from this Agreement.

[17] Hence, on April 20, 2007, the respondents brought an application before the Federal Court seeking, *inter alia*, a writ of *mandamus* requiring the Minister to pay them the financial assistance provided in the Management Plan.

DECISION OF THE FEDERAL COURT

[18] Blanchard J. allowed the respondent's application for judicial review in part. He ordered the Minister to implement the Management Plan, as approved on March 30, 2006, without the requirement that the respondents sign the release form.

[19] Blanchard J. was satisfied that the requirements for the issuance of a writ of *mandamus* had been demonstrated. More particularly, he was of the view that following the Minister's approval and announcement of the Management Plan, his discretionary power was spent and, as a result, he was legally bound to implement it. In Blanchard J.'s view, since the Management Plan did not contain any requirement that a release be signed by the respondents, this requirement could not be imposed on them. In so concluding, Blanchard J. relied on sections 7 and 9 of the *Fisheries Act*, R.S. 1985, c. F-14 (the "Act") and held that the Management Plan could only be revised or revoked under the specific statutory conditions found in section 9.

[20] Further, Blanchard J. concluded that a public legal duty was owed to the respondents, that there was a clear right to the performance of that duty, that there was no other adequate remedy available to the respondents and that the balance of convenience favoured the respondents.

SUBMISSIONS OF THE PARTIES

[21] In favour of their respective positions on this appeal, the parties make the following arguments.

[22] The appellant submits that Blanchard J. erred in determining that the respondents had established the requisite elements for the issuance of a writ of *mandamus* and, in particular, that the approval of the Management Plan created an enforceable legal duty.

[23] According to the appellant, Blanchard J. erred in holding that the Management Plan is a binding legal document; rather, the appellant submits that the Management Plan is a discretionary policy instrument that could not fetter the Minister's discretion in the management of the fishery and of the Initiative.

[24] Furthermore, the appellant contends that the other elements required for the issuance of a writ of *mandamus* were not satisfied: no duty was owed to the respondents, the respondents had not satisfied the conditions precedent giving rise to the alleged duty to provide financial assistance without condition, there did exist alternative remedies and the balance of convenience favoured the appellant.

[25] The respondents disagree completely with the view put forward by the appellant. They submit that Blanchard J. did not err in finding that all the requisite elements for the issuance of a writ of *mandamus* had been met and in ordering the Minister to implement the Management Plan as

announced. They argue that the Management Plan was a final and binding exercise of discretion, not a statement of policy.

[26] In particular, the respondents contend that there is no evidence that the Minister changed his mind after announcing the Management Plan, but that it was frustrated by officials of the Department of Justice who implemented the requirement to sign a release. The respondents also allege that the appellant is withholding requested information on the basis of cabinet confidence which relates to the terms of the Initiative. As a consequence of the appellant's refusal to produce the documentation, the respondents urge this Court to draw an adverse inference from the appellant's conduct.

THE ISSUES

[27] The issues raised in this appeal are twofold:

1. What is the standard of appellate review?
2. Did Blanchard J. err in holding that the respondents had established the requisite elements for the issuance of a writ of *mandamus* and, in particular, that the approval of the Management Plan created an enforceable legal duty?

LEGISLATION

[28] Before addressing these two issues, it will be useful to reproduce sections 7 and 9 of the Act:

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize	**7.** (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences

to be issued leases and licences for fisheries or fishing, wherever situated or carried on.	d'exploitation de pêcheries — ou en permettre l'octroi —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.
(2) Except as otherwise provided in this Act, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.	(2) Sous réserve des autres dispositions de la présente loi, l'octroi de baux, permis et licences pour un terme supérieur à neuf ans est subordonné à l'autorisation du gouverneur général en conseil.
[…]	[…]
9. The Minister may suspend or cancel any lease or licence issued under the authority of this Act, if *(a)* the Minister has ascertained that the operations under the lease or licence were not conducted in conformity with its provisions; and *(b)* no proceedings under this Act have been commenced with respect to the operations under the lease or licence.	**9.** Le ministre peut suspendre ou révoquer tous baux, permis ou licences consentis en vertu de la présente loi si : *a)* d'une part, il constate un manquement à leurs dispositions; *b)* d'autre part, aucune procédure prévue à la présente loi n'a été engagée à l'égard des opérations qu'ils visent.

ANALYSIS

1. What is the standard of appellate review?

[29] The appellant submits, on the basis of *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, that the applicable standard of review is correctness. In their submission, this appeal raises questions of law or of mixed fact and law where the question of law is readily extricable.

[30] The respondents submit, to the contrary, that Blanchard J.'s decision was in part discretionary and that, as a result, a measure of deference must be afforded to those discretionary aspects of his decision. The respondents contend that the applicable standard comes from this

Court's decision in *Apotex Inc. v. Canada (Governor in Council)*, 207 FCA 374, at paragraph 15: the appellate court may substitute its discretion for that of the lower court if the lower court judge gave insufficient weight to relevant factors or proceeded on a wrong principle of law, or if the judge seriously misapprehended the facts, or where an obvious injustice would otherwise result. In making this contention, the respondents do not say which parts of the judge's decision were discretionary and which parts were not. Nor do the respondents state which standard should apply to the non discretionary parts of Blanchard J.'s decision.

[31] As I need only address the question of whether the judge erred in holding that the Management Plan created an enforceable legal duty in order to dispose of the appeal and that that question is clearly a question of law in respect of which the judge had to give the correct answer, the applicable standard is, without a doubt, that of correctness. In any event, even if the applicable standard were the standard enunciated by this Court in *Apotex, supra*, I would have no difficulty concluding that Blanchard J. proceeded on a wrong principle of law in finding that the respondents had established the requisite elements for the issuance of a writ of *mandamus*.

2. Did Blanchard J. err in holding that the respondents had established the requisite elements for the issuance of a writ of mandamus and, in particular, that the approval of the Management Plan created an enforceable legal duty?

[32] In *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), affirmed by the Supreme Court of Canada in [1994] 3 S.C.R. 110, this Court established the requirements that must be satisfied before a writ of *mandamus* can issue. At pages 766 to 769, Robertson J.A. sets out those requirements in the following terms:

1. There must be a public legal duty to act:
2. The duty must be owed to the applicant:
3. There is a clear right to the performance of that duty, in particular:
   (a) the applicant has satisfied all conditions precedent giving rise to the duty;
   (b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied;
4. Where the duty sought to be enforced is discretionary, the following rules apply:
   (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as “unfair”, “oppressive” or demonstrate “flagrant impropriety” or “bad faith;
   (b) *mandamus* is unavailable if the decision-maker’s discretion is characterized as being “unqualified”, “absolute”, “permissive” or “unfettered”;
   (c) in the exercise of a “fettered” discretion, the decision-maker must act upon “relevant”, as opposed to “irrelevant”, considerations;
   (d) *mandamus* is unavailable to compel the exercise of a “fettered discretion” in a particular way; and
   (e) *mandamus* is only available when the decision-maker’s discretion is “spent”; i.e., the applicant has a vested right to the performance of the duty.
5. No other adequate remedy is available to the applicant:
6. The order sought will be of some practical value or effect:
7. The court in the exercise of its discretion finds no equitable bar to the relief sought:
8. On a “balance of convenience” an order in the nature of *mandamus* favours the applicant: […]

[Citations omitted]

[33] In the present matter, I am satisfied that the Minister did not have a “public legal duty to act” and, thus, Blanchard J. erred in concluding that the respondents had established that the required elements for the issuance of a writ of *mandamus* had been met. In my respectful view, the Management Plan was not a binding legal document and, as a result, it was not enforceable by the respondents.

[34] The Management Plan is at the heart of this appeal. By its issuance, the Minister made it known to interested parties and, in particular, to traditional crabbers, what policy and practice he had decided to adopt or intended to adopt for the coming year. The announcement made on March 30, 2006, is brief and I therefore reproduce it in full:

> **Hearn Announces 2006 Snow Crab Management Plan in Southern Gulf for Crab Fishing Areas 12, 18, 25 and 26**
>
> March 30, 2006
>
> **Moncton** – The Honourable Loyola Hearn, Minister of Fisheries and Oceans (DFO), today announced the 2006 Snow Crab Management Plan for Snow Crab Areas (CFAs) 12, 18, 25 and 26, in the southern Gulf of St. Lawrence.
>
> The total allowable catch (TAC) will be set at 25,869 tonnes (t) if enhanced management activities are in place. "I am aware that industry was looking for a higher level of TAC. However, I believe it is important to apply a prudent approach, as the biomass is currently decreasing and a more cautious approach is likely in 2007", stated the Minister.
>
> The Department is presently reviewing proposals received for enhanced management activities. If these activities doe not proceed, the TAC will be set at 20,862 t. The Department's review will be completed in the coming days and further information will be provided to industry.
>
> Further to the provision of "permanent" access to this fishery and the stabilisation of the levels until 2009, the available TAC is allocated as follows: First Nations receive 15.816%; the traditional fleets receive 65.182%; CFA 18 fishers receive 4.002% and new access receives 15%. The distribution of the TAC takes into account a permanent solution to the quota shortfall required for First Nations and financial assistance of $37.4M to the traditional fleets. When added to the voluntary licence retirement programs, traditional fishers have received payments of over $55 million for quota provided to First Nations under the Marshall Response Initiative.
>
> The management measures from 2005 will be rolled over in 2006. They include dockside monitoring, 30% at-sea coverage, Vessel Monitoring System (VMS), and the Irving Whale exclusion zone. The implementation of the comprehensive soft shell crab protocol will be in place if enhanced management activities proceed. The requests from industry for changes to the management measures will be discussed in the context of a future multi-year plan.

> The Department will turn its attention to consultations with stakeholders, after the fishery, on the development of a long-term management strategy with a preference for establishing a co-management approach will all of the key harvester groups. Discussions could include such issues as the conduct of joint scientific research, the concept of TAC decision rules, development of a strategy for managing the fishery which takes into account fishing efforts in the context of a decreasing biomass and funding for enhanced management of the fishery.
>
> The opening date will be set by DFO taking into consideration operational requirements and a recommendation from the industry-led Ice-Committee. The last day of fishing will be July 15, 2006.

[35] As can be seen from the Minister's announcement, the Management Plan deals with a number of issues, including the TAC for the coming year and the compensation he intends to offer to traditional crabbers whose share of the TAC was reduced by reason of the Marshall Initiative.

[36] The reasoning which led Blanchard J. to conclude that the Minister was legally bound to implement the Management Plan appears clearly from paragraph 32 of his Reasons, where he states:

> [32] Following the decision in *Marshall*, the Minister had a legal obligation to accommodate First Nations fishers. To do so and properly manage the resource, he had no alternative but to reduce the quotas of the traditional crabbers. The Minister was under no obligation to pay any compensation to the traditional crabbers for the reduction in their quotas. However, once he elected to provide financial assistance to them under the MRI and incorporate the financial assistance package as part of the Management Plan, then the financial assistance package became part of his discretionary decision. <u>Once the Management Plan was announced, the Minister's discretionary power under the Act was expended and the Plan could only be revised or revoked under the specific statutory conditions found in s. 9 of the Act.</u> Those conditions find no application here. In these circumstances, the Minister had a public legal duty to implement the Management Plan as announced. The legal duty flows from the Minister's statutory obligation to manage, conserve and develop the fishery under the Act.
>
> [Emphasis added]

[37] The learned Judge appears to have treated the Management Plan as a matter akin to the issuance of a license under section 7 of the Act. In other words, as in the case of a license, once the Management Plan was announced/issued, the Minister's discretion was at an end. In my view, the Judge was wrong in so concluding. I cannot possibly see how sections 7 and 9 of the Act can find application in the present matter since those provisions, on their clear wording, only apply to the Minister's absolute discretion to issue or authorize the issuance of fishing licenses (section 7) and, in the circumstances set out at paragraphs 9(a) and (b) of the Act, to the Minister's power to suspend or cancel a license. There can be no room to argue that the Management Plan falls within the ambit of those two provisions.

[38] Rather, the Management Plan can only be viewed, in my respectful opinion, as a statement or an expression of the Minister's intent or as a guideline with respect to those matters that are discussed therein. Its clear intent is to outline those management and conservation practices and measures which the Minister believes are necessary for the coming year. Further, it is trite law that the Minister's policy does not, and cannot, fetter his discretion with regard to the matters dealt with in the policy. In *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at page 6 to 8, McIntyre J., writing for the Court, made the following remarks concerning the Minister's discretion under section 8 of the *Export and Import Permits Act*, R.S.C. 1979, c. E-17, which remarks are entirely apposite in the present matter:

> […] The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the

> <u>appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion.</u> […]
>
> […]
>
> In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope and legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere. […]

[39] In my view, the Minister's powers to issue the Management Plan stem from his general authority to manage the fishery, as exemplified by section 4 of the *Department of Fisheries and Oceans Act*, R.S. 1985, c. F-15, which provides that:

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to *(a)* sea coast and inland fisheries; *(b)* fishing and recreational harbours; *(c)* hydrography and marine sciences; and (d) the coordination of the policies and programs of the Government of Canada respecting oceans.	**4.** 1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés : *a)* à la pêche côtière et à la pêche dans les eaux internes; *b)* aux ports de pêche et de plaisance; *c)* à l'hydrographie et aux sciences de la mer; *d)* à la coordination des plans et programmes du gouvernement fédéral touchant aux océans.

(2) The powers, duties and functions of the Minister also extend to and include such other matters, relating to oceans and over which Parliament has jurisdiction, as are by law assigned to the Minister.

(2) Les pouvoirs et fonctions du ministre s'étendent en outre aux domaines de compétence du Parlement liés aux océans et qui lui sont attribués de droit.

[40] Further, the Management Plan is consistent with the Minister's obligations to manage, conserve and develop the fishery on behalf of Canadians and in the public interest. At paragraph 37 of his Reasons for a unanimous Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, Major J. made the following remarks:

> […] Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the Fisheries Act, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). […]

[41] In *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548, this Court, at paragraph 28 of its Reasons, discussed the nature of a fishing quota policy imposed by the Minister. Décary J.A., who wrote the Reasons for the Court, indicated that a quota policy, in contrast to a fishing licence granted under s. 7 of the Act, was a discretionary decision and that judicial review thereof was greatly limited. He further indicated that the Minister could issue policy guidelines as long as he did not fetter his discretion with respect to the granting of licenses "by treating the guidelines as binding upon him". His full remarks are as follows:

> 28. The imposition of a quota policy (as opposed to the granting of a specific licence) is a discretionary decision in the nature of policy or legislative action. Policy guidelines outlining the general requirements for the granting of licences are not regulations; nor do they have the force of law. It flows from the decision of the Supreme Court of Canada in *Maple Lodge Farms v. Government of Canada* and from the decision of this Court in *Canadian assn. of Regulated Importers v. Canada (Attorney General)*, that the Minister, provided he does not fetter his discretion to grant a licence by treating the guidelines as binding upon him, may

> validly and properly indicate the kind of considerations by which he will be guided as a general rule when allocating quotas. These discretionary policy guidelines are not subject to judicial review, save according to the three exceptions set out in *Maple Lodge Farms*: bad faith, non-conformity with the principles of natural justice where the application is required by statute and reliance placed upon considerations that are irrelevant or extraneous to the statutory purpose.
>
> [Emphasis added]

[42] Further, in *Carpenter, supra*, Décary J.A. emphasized at paragraph 37 of his Reasons the importance of affording the Minister broad discretion in the exercise of his powers in relation to the establishment of a fishing quota policy:

> **37.** It follows that when examining the exercise by the Minister of his powers, duties, functions and discretion in relation to the establishment and implementation of a fishing quota policy, courts should recognize, and give effect to, the avowed intent of Parliament and of the Governor in Council to confer to the Minister the widest possible freedom to manoeuvre. It is only when actions of the Ministry otherwise authorized by the *Fisheries Act* are clearly beyond the broad purposes permitted under the Act that courts should intervene.

[43] I therefore respectfully believe that Blanchard J. erred in law or that he proceeded on a wrong principle of law in finding that the Minister's discretion was spent when he approved the Management Plan. The Management Plan is an expression of policy, not a decision to grant permits under section 7, and the Minister's discretion is thus not exhausted by the approval thereof. The Minister was not bound by his policy and he could, at any time, make changes thereto. Consequently, whether the Minister turned his mind to a release of liability condition when he issued the Management Plan or whether it was an afterthought resulting from suggestions made by Department officials is, in my view, of no help to the respondents, as the Minister could not fetter his discretion when he issued the Management Plan.

[44] As a result, the fact that the Management Plan, as announced on March 30, 2006, did not require Department officials to obtain a release of liability from the respondents before financial assistance would be provided to them does not constitute a basis for finding that the Minister was bound to implement the Management Plan.

DISPOSITION

[45] For these reasons, I would therefore allow the appeal with costs and, rendering the judgment which ought to have been rendered, I would dismiss the respondents' judicial review application, also with costs.

"M. Nadon"
J.A.

"I agree.
Pierre Blais C.J."

<u>PELLETIER J.A.</u> (Concurring Reasons)

[46] I have read in draft the reasons of my colleague Nadon J.A. and though I come to the same conclusion as he does, I do so for different reasons.

[47] In my view, it is misleading to speak of the Snow Crab Management Plan (which, like my colleague and the application judge, I will refer to as the Management Plan) as though it were a single decision. The Management Plan, as set out in the press release, had a number of components:

- the Total Allowable Catch (TAC) was set at 25,869 tonnes if certain conservation measures were in place, 20,862 tonnes if they were not.
- the TAC was allocated among stakeholders as follows: First Nations, 15.816%; the traditional fleets, 65.182%; CFA 18 fishers, 4.002% and new access 15%.
- certain management measures from the previous years were continued: dockside monitoring, 30% at-sea coverage, Vessel Monitoring System (VMS), the Irving Whale exclusion zone and implementation of the comprehensive soft shell crab protocol if enhanced management measures were in place.
- the opening date of the season was to be set in consultation with an industry group; the closing date was set at July 15, 2006.
- financial assistance of $37.4 was available for the traditional fishery.

[48] While some of these measures are related, nonetheless each represents a discrete decision which was to have effect in the 2006 fishery. Various statutory or regulatory authorizations or approvals were involved. The issuance of fishing licences with a reduced quota was an exercise of the statutory discretion found at section 7 of the *Fisheries Act* R.S.C. 1985 c. F-14 (the Act). The funding of the compensation plan required a Parliamentary appropriation. Other measures may

have required other types of regulatory approvals or authorizations. In other words, the Management Plan was not a single decision, or a one-time exercise of discretion.

[49] To the extent that the Management Plan represented decisions taken, it is not a policy, that is, a guide to future decision-making. The decisions had been taken. Only their implementation remained. Any rights which arose as a result of the Management Plan arose as a result of the decisions which were actually taken. As a result, I do not think that one can say that the Management Plan created no legal duties because it was simply policy. Various rights and duties flowed from each of the decisions taken. For example, the traditional crabbers' licences were issued, subject to a lower quota than they had been in the past. The TAC was fixed at a given level, subject to modification if certain conservation measures were in place. Each of these decisions had legal consequences.

[50] The issue in this appeal is whether the decision to offer compensation to the traditional crabbers in conjunction with the a reduction in the quota attached to their licences created a right, on the part of the crabbers, to receive that compensation free of any limitation on their future claims for compensation and a corresponding public legal duty, on the part of the Minister, to pay the compensation without requiring the crabbers to surrender any rights to further compensation.

[51] The crabbers assert that the source of their rights is the Memorandum dated March 29, 2006, in which certain options were laid before the Minister together with a departmental recommendation, and the Minister's selection of one of those options. The crabbers' describe this

ministerial approval as a Ministerial Order. For example, under the heading "public legal duty to act" in their Memorandum, the crabbers say:

> 43. There is no issue as to the Minister's authority to issue the Ministerial Order that the Judgment under appeal enforces.
>
> 44. Upon issuing his Order, the Minister created a public legal duty for his officials to distribute financial assistance to traditional snow crabbers from snow crab areas 12, 18, 25 and 26. It is important to note that in issuing the order, the Minster did not impose any conditions on the release of the said financial assistance.
>
> 45. Being traditional crabbers in the affected areas, the aforementioned legal duty was owed to the Respondents.

[52] The crabbers' view is that by indicating his concurrence with the departmental recommendation, the Minister was ordering the department to implement that recommendation exactly as he had approved it.

[53] The application judge linked the compensation plan to the issuance of the crabber's fishing licences, reasoning that since the compensation was intimately linked with the reduction of the crabbers' quotas, the two elements were but aspects of a single decision under the Act. The application judge considered that the decision was in substance a decision with respect to fishing licences, which provided the statutory basis for the public legal duty to act.

[54] In my view, neither analysis withstands scrutiny. The crabbers' position is that on a proper construction of the Minister's decision, it did not include the requirement that crabbers waive their right to additional compensation in order to obtain the benefit of the compensation being offered. Since this is a matter of the interpretation of the document, it is a question of law and is a matter on

which no deference is owed, either to the application judge or to the crabbers. There is nothing in the document itself which supports the conclusion that the payment to the crabbers was to be made unconditionally. The recognition that the crabbers would not be happy with the amount proposed and that they would expect to receive more from litigation is nothing more than an acknowledgement of the known facts. It is not an argument for or against the proposition that the funds were to be paid unconditionally.

[55] It is, I believe, simply unrealistic to assume that in signing off on Option 2, the Minister was thereby fixing all the terms of the compensation plan. He was simply authorizing the continuance of the existing compensation plan in the circumstances where quota re-allocation on the basis of voluntary surrender had been abandoned. The details of the administration of the plan were, as they had always been, in the hands of department officials and their legal advisers. Had the ministry wished to recommend that the payments be made unconditionally, it would have done so and had the Minister wished to insist that the payment be made unconditionally, he would have done so as well. It is unlikely that the Minister would authorize a partial payment to the crabbers which would exhaust the appropriation for the Marshall initiative without addressing his mind to the absence of Parliamentary authority for the balance of any amounts to be paid. In my view, the crabbers have misinterpreted the document on which they base their claim for mandamus.

[56] The application judge did not adopt the crabbers' claim of a right to *mandamus* based on a public legal duty arising from a ministerial directive. He acknowledged that a public legal duty was one arising in a statute or a regulation: see *Arsenault v. Canada (Attorney General)* 2008 FC 492,

[2008] F.C.J. No. 604 at paragraph 27. As noted above, he found the public legal duty to act by conflating the right to compensation with the issuance of fishing licences subject to reduced quotas.

[57] The crabbers had no legal right to any particular amount of quota. This flows from the nature of fishing licences, in respect of whose issuance the Minister has the broadest discretion: see *Comeau's Sea Foods Ltd v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, [1997] S.C.J. No.5, at paragraph 49. Consequently, if there is no vested right to a given quota, there can be no right to compensation arising purely from the fact of loss of quota. As a result, the decision to offer compensation for lost quota is not one which is based on a statute or a regulation. In fact, the crabbers allege in their action that their right to compensation is a matter of contract. The exercise of the minister's discretion to issue fishing licences with reduced quota under section 7 of the Act did not result in a public legal duty to pay compensation for the lost quota. There being no public legal duty, the crabbers are not entitled to an order of *mandamus*.

[58] I would therefore allow the appeal with costs and set aside the decision of the Federal Court judge.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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