Federal Court of Appeal

CANADA

Cour d'appel fédérale

Date: 20091204

Docket: A-632-08

Citation: 2009 FCA 357

CORAM: **BLAIS, C.J.**
LÉTOURNEAU J.A.
NOËL J.A.

BETWEEN:

ASSOCIATION DES CRABIERS ACADIENS INC., a company duly incorporated under the laws of New Brunswick, JEAN-GILLES CHIASSON, 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

THE ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Montréal, Quebec, on November 17, 2009.

Judgment delivered at Ottawa, Ontario, on December 4, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: BLAIS C.J.
NOËL J.A.

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REASONS FOR JUGEMENT

LÉTOURNEAU J.A.

[1] I have included a table of contents to assist in accessing and understanding the reasons.

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Issues and grounds for appeal

[2] The appellants are challenging a decision of Justice Shore of the Federal Court (judge) (*Assoc. des crabiers acadiens inc. v. Canada (Procureur général)*, 2008 CF 1358). In that decision, the judge confirmed the decision by Prothonotary Morneau (prothonotary): see *Assoc. des crabiers acadiens inc. v. Canada (Procureur général)*, 2008 CF 519.

[3] Based on the tests established in the case law, did the prothonotary and the judge err in refusing the appellants' application to have their application for judicial review of a snow crab harvesting management plan adopted in 2007 by the Minister of Fisheries and Oceans Canada (Minister) converted into an action?

[4] Should a conversion be granted, the appellants also asked the prothonotary and the judge to have their action consolidated with the action in damages instituted in Federal Court file T-1271-07: *Anglehart et al. v. Attorney General of Canada*.

[5] Although upon concluding as they did, the prothonotary and the judge did not have to rule on that second question, they did so in *obiter*. The prothonotary and the judge would have dismissed the request for consolidation of the two proceedings in the event of conversion.

[6] The appellants raised several grounds for appeal of the judge's decision. While it is not necessary for me to analyze all of them, I will summarize those grounds. Some of the criticisms of the judge's decision may appear to have merit; however, I believe, for reasons I will state later on, that the judge and the prothonotary came to the right conclusion. But first: the grounds for appeal.

[7] First of all, the appellants submit that the judge applied the wrong standard of review to the prothonotary's decision. According to them, the prothonotary's decision dealt with a question vital to the final issue of the dispute. They state that the judge erred in concluding, to the

contrary, that the question had to be one likely to bring the dispute to an end. In so doing, he distorted the test developed by the courts.

[8] Second, the appellants argue that the judge confused the purposes of an application for conversion under subsection 18.4(2) of the *Federal Courts Act*, R.S., 1985, c. F-7 (Act) with the purpose of a request for disclosure of materials under rule 317 of the *Federal Courts Rules*, SOR/98-106 (Rules). They add that this confusion caused the judge to find a bar to their arguments that they need to obtain additional information and, therefore, proceed by action rather than by way of judicial review.

[9] Third, the appellants take issue with the analysis of their conversion application. In that regard, the alleged error is twofold. The appellants submit that both the prothonotary and the judge who dealt with their conversion application misinterpreted the case law pertaining to such applications, leading them to apply improperly certain analytical tests developed by this Court. They also allegedly neglected to consider certain other relevant tests, which, had they been taken into account, would have led them to grant the appellants' application for conversion rather than dismiss it.

[10] Last, with regard to the consolidation of the actions in damages, the appellants again allege that the judge failed to consider all of the analytical factors he listed and was mistaken about some of the factors that he did analyze.

Relevant legislation

[11] I hasten to reproduce the relevant legislation in this case, namely section 18.4 of the Act and *Federal Courts Rules* 105, 317 and 318:

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.	**18.4** (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.
(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.	(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.
105. The Court may order, in respect of two or more proceedings, (*a*) hat they be consolidated, heard together or heard one immediately after the other; (*b*) that one proceeding be stayed until another proceeding is determined; or (*c*) that one of the proceedings be asserted as a counterclaim or cross-appeal in another proceeding.	**105.** La Cour peut ordonner, à l'égard de deux ou plusieurs instances : *a*) qu'elles soient réunies, instruites conjointement ou instruites successivement; *b*) qu'il soit sursis à une instance jusqu'à ce qu'une décision soit rendue à l'égard d'une autre instance; *c*) que l'une d'elles fasse l'objet d'une demande reconventionnelle ou d'un appel incident dans une autre instance.
317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	**317.** (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.
(2) An applicant may include a	(2) Un demandeur peut inclure sa

request under subsection (1) in its notice of application.

(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.

demande de transmission de documents dans son avis de demande.

(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(*a*) a certified copy of the requested material to the Registry and to the party making the request; or
(*b*) where the material cannot be reproduced, the original material to the Registry.

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :
a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;
b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

Factual and procedural background

[12] The appellants engage in commercial snow crab fishing in the southern Gulf of St. Lawrence. On their own behalf and as administrators of their respective crab fishing associations, they challenged the Snow Crab Management Plan (Plan) by way of judicial review. The Minister announced the Plan on or around April 25, 2007.

[13] As the judge stated at paragraph 4 of his reasons for decision, the appellants challenged the following four aspects of the Plan:

> [TRANSLATION]
>
> (1) Separate fishing season imposed for a particular sector of Area 12;
>
> (2) Distribution of the total allowable catch among the various groups of fishers;
>
> (3) Minister's allocation of part of the total allowable catch to certain groups of fishers; and
>
> (4) Traps having a mesh size exceeding seventy-five (75) millimetres banned in certain areas beginning in 2008.

[14] According to the appellants, the Minister based his decision on grounds that are unrelated to the *Fisheries Act*, R.S., 1985, c. F-14. To prove that, they wish to establish the existence and origin of agreements between the Minister of Fisheries and Oceans Canada (Minister) and crab fishers, particularly the agreement reached in 1990.

[15] In broadening access to the resource by granting additional licences, the Minister allegedly broke that agreement, which limited the number of licences in circulation to 130 for Area 12. This was also in breach of the part of the agreement setting up a program of individual catch quotas, to be permanently distributed among 130 traditional fishers: see Robert Haché's affidavit, Appeal Book, Volume 1, at pages 69 to 73.

[16] In the years following the 1990 agreement, the crab fishers, anxious to rebuild and increase snow crab stocks in Area 12, invested, according to their allegations, over $10 million in funding for research, protection and management activities for this resource. They allegedly invested considerable sums in their respective fishing businesses: *ibid*., at page 74.

[17] The very existence and the contents of the 1990 agreement, which the Minister allegedly breached for reasons unrelated to the *Fisheries Act*, are the cornerstone of the appellants' legal proceedings. However, the respondent objects to those two components: *ibid*., see paragraph 8 of the Rhéal Vienneau's affidavit, at page 99.

[18] The 1990 agreement was followed by subsequent agreements until the challenged adoption of the 2007 Management Plan. According to the appellants, the considerations taken into account by the Minister [TRANSLATION] "are considerations related to the political impact of his decisions on larger groups of fishers with more political clout than the traditional crab fishers": *ibid*., at page 84. In doing so, the Minister allegedly exceeded his jurisdiction.

[19] In a letter to the Minister and the deputy minister, the Area 19 crab fishers requested that fishing be prohibited in part of Area 12 (the appellants' fishing area) or that the opening of the

fishing season there be delayed. Without further detail, a directive was issued by the Minister's deputy minister, requiring staff to implement the Area 19 fishers' request.

[20] The Minister's decision was to delay the start of fishing in part of Area 12, as can be seen from the Management Plan approved by the Minister: see Appeal Book, Volume 2, at Tab G, memorandum submitted to the Minister for decision and endorsed by the Minister.

[21] By way of a preliminary motion, the appellants filed a request for disclosure of evidence in the Federal Court under rule 317. Since the documents sought not were not part of the file on which the Minister based his decision, the prothonotary refused the request: see *Assoc. des crabiers acadiens inc. v. Canada (Procureur général)*, 2007 CF 781, 68 Admin. L.R. (4th) 217. That decision was not appealed.

[22] However, we were informed during the hearing that there is an appeal before our Court for 2008. That appeal seeks to determine the contents of the file that was the basis for the Minister's decision and, thus, the extent of the appellants' right of access to the documents that supported that decision. That appeal is at the requisition for hearing stage: *Assoc. des crabiers acadiens inc. et al. v. Procureur général du Canada*, A-285-09.

[23] The respondent as well refused to give the appellants access to the correspondence exchanged between the Area 19 fishers and the Minister or his representatives. The appellants state that if they had access to this correspondence, they would know the nature of the arguments raised by the fishers and the Minister's grounds for acting on them.

[24] This is the alleged factual background in which the appellants filed their conversion application, stating, among other things, that they were unable to access the information they needed to prove the merits of their allegations or receive appropriate procedural safeguards to obtain the declaratory judgment sought by way of judicial review.

[25] As previously stated, the application for conversion of the application for judicial review into an action was dismissed by the prothonotary and the judge, as was the request for consolidation of the appellants' action, if the conversion was allowed, with the action in damages in *Anglehart et al. v. Attorney General of Canada*, F.C. T-1271-07.

Context, purpose and objectives of subsections 18(3), 18.4(1) and 18.4(2) of the Act

[26] To better inform the reasons to follow, it is useful to recall the context, purpose and objectives of subsections 18(3), 18.4(1) and 18.4(2) of the Act.

[27] In *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287 and *Manuge v. Canada*, 2009 FCA 29 (the latter decision waiting to be heard on the merits by the Supreme Court of Canada), this Court approved Parliament's clear and unequivocal intention to entrust the Federal Court and the Federal Court of Appeal with the authority to perform judicial review of decisions made under federal administrative law. This intention was expressed in the context of the reconsolidation of federal administrative law, which had become dysfunctional as a result of being spread among the provincial courts.

[28] This reform of administrative law begun in the early 1970s was required to meet the demands for justice, equity, efficiency, legal security and finality of administrative decisions in the public interest: see *Grenier* at paragraph 24 and *Manuge* at paragraph 49.

[29] The accepted procedural vehicle for challenges to federal administrative decisions was and is the application for judicial review.

[30] As subsection 18.4(2) makes clear, judicial review is meant to be a timely, summary proceeding allowing the administration to implement its administrative decision with no or little delay if the decision is challenged and deemed to be lawful or, if it is deemed to be unlawful, to quickly make the corrective measures required for it to comply with the law and take effect.

[31] The rights and obligations of citizens are also determined within a short time. If the lawfulness of the decision is confirmed, the citizen must comply with it. If, however, the decision is found to be unlawful, the citizen may, where applicable, bring an action in liability against the administration.

[32] I do say where applicable because, let us recall, an unlawful administrative decision does not inevitably trigger liability. It may be unlawful in a purely technical sense, without having been caused by a wrongful act. Or it may be the result of a mistake made in good faith, a reasonable mistake or an invincible mistake. It may also have had no consequences. Finally, there may be no relationship of cause and effect between the unlawful decision and the resulting damage. Consequently, grounds for an action in damages do not necessarily arise from the mere

fact that the decision was unlawful. The judicial review proceeding is therefore generally the appropriate remedy to determine the lawfulness of a decision.

[33] Conversely, a lawful decision does not necessarily trigger or guarantee immunity. The decision may have been performed so wrongfully, negligently or abusively that it will engage the liability of the person who made it and the person who implemented it. In such a case, an action in damages is the appropriate proceeding since the lawfulness of the decision is not being challenged.

[34] Nonetheless, Parliament did provide an exception to judicial review at subsection 18.4(2) of the Act. This measure overrides the usual procedure and allows judicial review applicants to have their existing application for judicial review converted into an action.

[35] The conversion into an action is not effected by operation of law. It is submitted to the Federal Court for review and must be justified. The Court is vested with the discretionary authority to accept an application for conversion “if it considers it appropriate”.

[36] The proceedings that citizens may use to challenge administrative decisions, namely, the application for judicial review and its conversion into an action when judicial review is applied for in the Federal Court, are ultimately aimed at attaining and meting out administrative justice that is timely, efficient and equitable, both for citizens and the administration.

[37] The courts have developed certain analysis factors that apply to an application for conversion so as to better frame the exercise of the discretion set out at subsection 18.4(2). It

goes without saying that each case involving an application for conversion turns on its own distinct facts and circumstances. And, depending on those facts and circumstances, the individual or collective weight of the factors may vary. We will now go over those factors.

[38] The conversion mechanism makes it possible, where necessary, to blunt the effect of the restrictions and constraints resulting from the summary and expeditious nature of judicial review. These are, for example, far more limited disclosure of evidence, affidavit evidence instead of oral testimony, and different and less advantageous rules for cross-examination on affidavit than for examination on discovery (see *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1998), 146 F.T.R. 249 (F.C.)).

[39] Therefore, conversion is possible (a) when an application for judicial review does not provide appropriate procedural safeguards where declaratory relief is sought (*Haig v. Canada*, [1992] 3 F.C. 611 (F.C.A.)), (b) when the facts allowing the Court to made a decision cannot be satisfactorily established through mere affidavit evidence (*Macinnis v. Canada*, [1994] 2 F.C. 464 (F.C.A.)), (c) when it is desirable to facilitate access to justice and avoid unnecessary cost and delay (*Drapeau v. Canada (Minister of National Defence)*, [1995] F.C.J. No. 536 (F.C.A.)) and (d) when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages (*Hinton v. Canada*, [2009] 1 F.C.R. 476).

Analysis of the decision under appeal and of the appellants' arguments

1. Application for conversion into an action

[40] The way is now paved, with regard to conversion, for the analysis of the decision under appeal and of some of the appellants' arguments. I will begin with the nature of the challenge at issue.

(a) Nature of the challenge at issue

[41] This is a classic case involving a challenge to the legality of a discretionary administrative decision, which should normally be carried out by way of judicial review and, therefore, be dealt with in a summary and timely way in the interests of the parties.

(b) Nature of the impugned decision

[42] The appellants acknowledge that the Minister's decision was the result of the exercise of his discretion. However, they submit that they are unaware of the actual considerations that led to the Minister's decision. The appellants add that the decision does not contain any grounds explaining the reasons for which the Minister granted the Area 19 crab fishers' request. That is the basis for their allegation that the decision was made on grounds unrelated to the *Fisheries Act*.

[43] Last, the appellants state that since the matter concerns a ministerial decision, the record is not as complete as a record that a court would use to make its decision. In the latter case, it would contain the parties' submissions, and the reasons for the court's decision would be set out.

All of these shortcomings allegedly justify conversion of their application for judicial review into an action.

[44] If, as the appellants allege, there was a lack of grounds for the Minister's decision, they may easily argue that point on judicial review. There is no need to transform that proceeding into an action. Either there are grounds for the decision or there are not. The filing of the decision and affidavit evidence into the record may very well establish that fact. The judge ruling on the application for judicial review will be able to ascertain that fact and draw the resulting conclusion as to the lawfulness of the decision.

[45] The debate at the hearing as to whether there were grounds for the Minister's decision could have been cut short had the respondent emphasized Exhibit "G", found at page 464, Volume 2 of the Appeal Book, and carefully reviewed its contents.

[46] Exhibit "G" is a memorandum to the Minister, which, as is typical, contains an analysis of the situation, negative and positive comments on methods for resolving conflicts and a range of possible solutions, including the status quo, with a discussion of the advantages and disadvantages of the various options proposed.

[47] This memorandum contains the recommendations that the appellants are challenging. It is this memorandum that was approved and signed by the Minister and that became the Minister's decision and the 2007 Management Plan. The appellants received a copy of that Plan.

[48] The memorandum contains a statement of the problems that the Area 19 fishers have been making known for a number of years, which are the result of fishing activity near the boundary line separating their area from Area 12 and the fact that the fishing season in Area 12 opens earlier than in Area 19. The memorandum shows the four solutions proposed by the Area 19 fishers, followed by an analysis of the crab migration from one area to the next, an observation that there was an increase in the number of fishing vessels in the area in dispute and that the catch volumes fluctuated over the years, but did not follow any particular trend.

[49] Last, the document remarks on the inevitable complaints from one group of fishers or another, whatever the decision made. Attached to this document are the appellants' submissions to the Minister about the management of snow crab fishing.

[50] The 2007 Management Plan shows that the problem involving Areas 12 and 19 is nothing new and is part of a continuum of discussions, submissions and analysis to which the appellants are no strangers.

[51] With respect, I do not believe that it can be said that there are no grounds set out in the Minister's decision.

[52] I note that at paragraph 96 of Mr. Haché's affidavit, filed in support of the appellants' application (Appeal Book, Volume 1, page 90), Mr. Haché states that the documents he was sent by counsel for the Minister [TRANSLATION] "do not contain any scientific data that can justify the

decision of DFO" (Department of Fisheries and Oceans) "to delay the opening of the fishing season in the corridor of Area 12 (having a width of one nautical mile) that borders Area 19".

[53] To the extent that the appellants are in fact taking issue with the sufficiency, rather than the total lack, of grounds in support of the decision, this is a question that will be up to the judge sitting in judicial review to assess, all the while bearing in mind, as is the judge's duty, that this is an administrative, discretionary and polycentric decision that must be afforded considerable deference. As I stated previously regarding the lack of grounds, I do not believe that the question of whether or not those grounds are sufficient warrants converting the application for judicial review into an action.

[54] At paragraph 97 of his affidavit in support of the appellants' claims, Mr. Haché states the opinion that upon reading the documents he was sent by counsel for the Minister, he believes that the temporary closure of Area 12 [TRANSLATION] "is, in fact, just the result of political pressure applied by the Area 19 fishers".

[55] That is evidence of an opinion that the reviewing judge will have to weigh against the considerations related to the *Fisheries Act* found in the 2007 Management Plan, including those related to protecting, rebuilding and developing the resource.

[56] Once again, I do not believe that the opinion of a witness is a factor warranting the requested conversion.

(c) Insufficiency of affidavit evidence

[57] The appellants wish to provide evidence of the history of agreements possibly reached with the Minister and that the Minister failed to honour. The appellants conclude that affidavit evidence would be far too cumbersome to collect and administer, and practically impossible for the judge to assess.

[58] I do not disagree with that conclusion. However, the evidence to be adduced must be relevant to deciding the issue. In this case, it is a matter of determining whether the Minister had the authority to make the decision he did concerning the 2007 Management Plan, and whether he did so in accordance with the powers conferred on him and the obligations imposed on him by the *Fisheries Act*.

[59] Like the prothonotary and the judge, in the context of this judicial review proceeding and taking into account the issue as defined, I fail to see the relevance of the history of the development of the snow crab fishery or the existence and validity of possible agreements reached by the parties in 1990, 1997 and 2002.

(d) Need to facilitate access to justice and avoid unnecessary cost and delay

[60] It seems clear to me that this factor weighs decidedly against the appellants and their application for conversion.

[61] The application for judicial review in this case is ready to be heard on the merits. Converting it into an action would result in additional delays. It would also result in a considerable increase in cost in comparison to judicial review, considering the extensive body of controversial evidence that the appellants wish to adduce.

[62] This increase in cost and added delay would be all the greater since the appellants wish to have their action consolidated with the action in damages in file T-1271-07: *Anglehart et al. v. Attorney General of Canada*.

[63] First of all, there are a considerable number of applicants in that action (100 corporations and over 200 applicant individuals). Second, the dispute in that action is not limited to 2007 as in the case at bar. The challenge pertains to each of the years from 2003 to 2008 and raises a number of grounds, except for the ground of the lawfulness of the 2007 Management Plan (see *Attorney General of Canada v. Anglehart et al.*, 2009 FCA 241, at paragraph 10), whereas that is the only ground for challenge in this case. The result would introduce an undue and unnecessary complication into the management of the appellants' case and its contents on a single, narrow issue that is well defined and very easy to deal with upon judicial review.

(e) Conclusion

[64] Like the prothonotary and the judge, I am of the opinion that this application for conversion into an action does not meet the established tests for conversion.

2. Consolidation of proceedings

[65] Without conversion, the question of consolidation of the proceedings is moot and requires no answer. I will, however, state the following: the significant differences in the applicant parties, grounds for challenge, years in issue and conclusions sought are, if not overriding, then at least very serious objections to the consolidation of proceedings sought.

Conclusion

[66] For these reasons, I would dismiss the appeal with costs.

"Gilles Létourneau"
J.A.

"I agree.
Pierre Blais, C.J."

"I agree.
Marc Noël, J.A."

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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