Federal Court Cour fédérale

Date: 20150730

Docket: T-378-07

Citation: 2015 FC 932

Ottawa, Ontario, July 30, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

100193 P.E.I. INC., 100259 P.E.I. INC., 100412 P.E.I. INC., ROBERT ARSENAULT, JOSEPH AYLWARD, WAYNE AYLWARD, B & F FISHERIES LTD., BERGAYLE FISHERIES LTD., JAMES BUOTE, BULLWINKLE FISHERIES LTD., C.D. HUTT ENTERPRISES LTD., CODY-RAY ENTERPRISES LTD., DALLAN J. LTD., RICHARD BLANCHARD, EXECUTOR OF THE ESTATE OF MICHAEL DEAGLE, PAMELA DEAGLE, BERNARD DIXON, CLIFFORD DOUCETTE, FISHING 2000 INC., KENNETH FRASER, FREE SPIRIT INC., TERRANCE GALLANT, BONNIE GAUDET, DEVIN GAUDET, NORMAN GAUDET, PETER GAUDET, RODNEY GAUDET, TAYLOR GAUDET, GAVCO FISHING ENTERPRISES LTD., CASEY GAVIN, JAMIE GAVIN, LEIGH GAVIN, SIDNEY GAVIN, GRAY LADY ENTERPRISES LTD., DONALD HARPER, HARPER'S FISH HOLDINGS LTD., JAMIE HUSTLER, CARTER HUTT, KRISTA B FISHING CO. LTD., LAUNCHING FISHERIES INC., TERRY LLEWELLYN, IVAN MACDONALD, LANCE MACDONALD, WAYNE MACINTYRE, DAVID MCISAAC, GORDON L. MACLEOD, DONALD MAYHEW, MEGA FISH CO. LTD., AUSTIN O'MEARA, PAMELA RICHARDS AND TRACEY GAUDET, ADMINISTRATORS OF THE ESTATE OF PATRICK ROCHFORD,

TWIN CONNECTIONS INC., W.F.M. INC., WATERWALKER FISHING CO. LTD. AND BOYD VUOZZO

Plaintiffs

And

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Introduction

[1] The Defendant brings this motion pursuant to subsection 213(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*], requesting a summary judgment dismissing the Plaintiffs' action in its entirety. The Defendant argues that there is no genuine issue for trial with respect to any of the Plaintiffs' claims.

[2] The Plaintiffs dispute that argument and contend the Defendant's motion is an abuse of process. They argue that there are genuine issues for trial, and that their action - which seeks compensation for losses they allegedly sustained because of how the Defendant has managed the commercial snow crab fishery in the southern region of the Gulf of St. Lawrence since 2003 - should proceed to trial as soon as possible.

[3] The circumstances giving rise to the Plaintiffs' action have been described in *Arsenault v Canada*, 2008 FC 299 at paragraphs 2-10, 330 FTR 8 [*Arsenault* (Martineau)], aff'd 2009 FCA 242 at paragraph 2, 395 NR 377 [*Arsenault* (FCA)], leave to appeal to SCC refused, 33385 (January 13, 2011)). These circumstances do not warrant repetition at length at the outset of these reasons as they will be discussed in detail when addressing the evidence below. For now, it suffices to outline some of the background allegations in support of the Plaintiffs' claims.

II. <u>Background</u>

[4] The individual Plaintiffs are residents of Prince Edward Island who have benefitted from licences to fish snow crab at some point during the last 12 years (or, in some cases, the personal representatives of those fishers' estates). The corporate Plaintiffs are companies that operate or have operated the fishing enterprises of some of those fishers.

[5] Before the 1990s, the snow crab fishery was competitive, meaning that the 30 P.E.I. fishers licenced in Crab Fishing Areas [CFAs] 25 and 26 (sometimes called the "traditional inshore fishermen") and the 130 fishers from New Brunswick, Quebec and Nova Scotia who were licenced to fish in CFA 12 (sometimes called the "traditional mid-shore fishermen") were allowed to catch as many snow crabs as they could until the Total Allowable Catch [TAC] for their respective CFAs had been reached for the fishing season. Following a crisis in the snow crab stock, the competitive system was replaced by an individual quota system whereby each P.E.I. licence-holder received an equal share in the TAC of CFAs 25 and 26. The Plaintiffs allege that this change happened in 1993 through an oral agreement with the federal Department of Fisheries and Oceans [DFO] which guaranteed the P.E.I. fishers their share of the TAC in

exchange for giving up the competitive fishery and agreeing to finance research and conservation measures.

[6] In 1997, CFAs 25 and 26 were integrated into CFA 12 and the fishers agreed to a five-year co-management approach. This approach established percentage shares of the TAC for the traditional fishers and a formula for sharing abundant stock once certain monetary thresholds were exceeded. It also involved an agreement whereby the fishers would contribute significant sums of money to DFO's management activities, including trawl surveys and other scientific monitoring of the fishery.

[7] In 1999, the Supreme Court of Canada decided that some First Nations in Atlantic Canada had a treaty right to earn a moderate livelihood from the fishery (*R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513 [*Marshall*]). One way DFO attempted to introduce First Nations to the commercial fishery was by enticing fishers to voluntarily give up their licences in exchange for substantial sums of money. The Plaintiffs refer to this as a "buy-back" initiative, while the Defendant says DFO offered the traditional fishers "financial assistance in exchange for their voluntary retirement from the snow crab fishery." It is not necessary for the purposes of this motion to decide the legal significance of these characterizations, but the Plaintiffs' terminology is more convenient and reflects the language commonly used at the time.

[8] At that time, fishers from Prince Edward Island held 30 of the 160 licences issued to fish snow crab and their combined share of the TAC was allegedly about 5.325%. Two of those licences were eventually "bought out" by DFO in an attempt to comply with the *Marshall*

decision. Collectively, the Plaintiffs have stakes in 27 of the remaining licences issued to the traditional inshore fishermen.

[9] The present dispute originates from a three-year management plan which the Minister of Fisheries and Oceans [Minister] approved in 2003. This plan, according to the Plaintiffs, ultimately reduced each P.E.I. licence-holder's share in the TAC in three ways: (1) by integrating CFA 18 with CFAs 12, 25, and 26, 4.7081% of the combined TAC was allocated to those fishers who had previously been licenced in only CFA 18; (2) by allocating about 15.8% of the TAC to First Nations, even though only about 5% of that quota had been freed up through voluntary agreements with existing fishers; and (3) by reserving an additional 15% of the TAC for new entrants, which reduced the share fished by the traditional fishers proportionately. Management plans since 2003 have essentially retained these allocations, although the Plaintiffs allege their shares of the TAC have been further reduced.

[10] The Defendant also began setting aside part of the snow crab resource to finance research activities that had previously been funded by the fishing industry. Fifty tonnes were set aside in 2003, and that number had increased to 1000 tonnes by the time the Federal Court of Appeal ruled that this practice was illegal in 2006 (*Larocque v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237 at paragraphs 26-27, 270 DLR (4th) 552 [*Larocque*]).

[11] The Plaintiffs now seek compensation for the financial impact the above actions have had on them, and they allege the following causes of action in their thrice amended statement of claim:

- Breach of contract: The Plaintiffs claim that in 1999, following the *Marshall* decision, DFO contracted with them to ensure that the only way First Nations would gain access to the commercial fishery would be through a program where DFO "bought out" the existing licences of commercial fishers [*Marshall* Agreement]. The Plaintiffs allege that the Defendant breached that agreement in 2003 when they allocated about 15.8% of the TAC to First Nations, which was substantially more than the portion that had been freed up through the voluntary "buy-back" initiative.

- Expropriation: By allocating portions of the TAC to other groups, the Plaintiffs say the Defendant expropriated their shares in the resource without compensating them.

- Breach of fiduciary duty: Because the fishery is their sole source of income, the Plaintiffs claim the Defendant owes them a fiduciary duty to manage it well. In their view, the Defendant breached this duty by its actions and by failing to conserve and protect the snow crab stock in CFAs 12, 18, 25 and 26.

- Negligence: For similar reasons, the Plaintiffs assert that the Defendant owed them a duty of care which was breached when DFO negligently managed the fishery and made misrepresentations which induced the Plaintiffs to relinquish certain rights and invest in their fishing enterprises.

- Misfeasance in public office: The Plaintiffs claim that the Defendant's actions were illegal and done in bad faith.

- Unjust enrichment: By reducing the Plaintiffs' share of the TAC to meet extrinsic obligations which it would otherwise have had to pay for, the Plaintiffs allege that the Defendant has unjustly enriched itself.

III. Litigation History

[12] In 2006, DFO had not spent all of the money it had been allocated to retire existing snow crab licences under the "buy-back" initiative. The Minister decided to offer a "voluntary payment" of $72,481.00 to each P.E.I. fisher in exchange for relinquishing their "eligibility to receive 14.6427% of the snow crab allocation" related to their licences. This offer included a release of liability though, and all but two of the P.E.I. fishers refused to accept the offer. Many of those fishers asked this Court to order the payment without requiring them to sign the release, but that application for judicial review was ultimately unsuccessful (*Canada (AG) v Arsenault*,

2009 FCA 300, 395 NR 223 [*Arsenault* (JR)]). Consequently, very few of the Plaintiffs received any money from this initiative.

[13] As for the present action, the Defendant originally moved to strike out the statement of claim, primarily arguing that the action could not proceed until after the Plaintiffs had challenged the legality of the Minister's decisions by way of judicial review (citing *Canada v Grenier*, 2005 FCA 348, [2006] 2 FCR 287 [*Grenier*]). Prothonotary Morneau agreed with the Defendant and stayed the action (*Arsenault v Canada*, 2007 FC 876), but the Plaintiffs successfully appealed the Prothonotary's decision to Justice Martineau (*Arsenault* (Martineau) at paragraphs 34, 43 and 61). Justice Martineau's decision, which allowed the action to proceed, was upheld by the Federal Court of Appeal (*Arsenault* (FCA) at paragraph 11), and leave to appeal to the Supreme Court of Canada was refused in January, 2011. Since then, various procedural steps have been completed and documentation exchanged.

IV. Summary Judgment

[14] Although the parties disagree about whether summary judgment should be granted, they do not really dispute the test for summary judgment. Sections 213-219 of the *Rules* (the relevant portions of which are reproduced in Annex "A") govern this issue, and subsection 215(1) provides as follows:

215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	**215.** (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

[15] This rule has been applied liberally in this Court "so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits" (*Rules*, s 3; *Garford Pty Ltd v Dywidag Systems International, Canada, Ltd*, 2010 FC 996 at paragraph 5, 375 FTR 38 [*Garford* (FC)], aff'd 2012 FCA 48 at paragraphs 7 and 9, 428 NR 306). Summary judgment should be granted if the case is "so doubtful that it does not deserve consideration by the trier of fact at a future trial" (*Garford* (FC) at paragraph 2, citing *Granville Shipping Co v Pegasus Lines Ltd*, [1996] 2 FCR 853 at paragraph 8, 111 FTR 189 (TD) [*Granville Shipping*]). Summary judgment is not, however, an all-or-nothing matter; some claims in an action can be summarily dismissed even if there is a genuine issue for trial with respect to other claims (*Rules*, s 213(1), 215(1), 215(3)(b)).

[16] The onus is on the moving party, here the Defendant, to establish that there is no genuine issue for trial with respect to every cause of action. While each party must "put its best foot forward" (*Canada (AG) v Lameman*, 2008 SCC 14 at paragraph 11, [2008] 1 SCR 372; *Rules*, s 214), the "burden on a plaintiff responding to a motion for summary dismissal of a claim is not, and is not intended to be, as onerous as the plaintiff's burden in a trial. It is an evidentiary burden only" (*TPG Technology Consulting Ltd v Canada*, 2013 FCA 183 at paragraph 4, 363 DLR (4th) 370). The Court can make some findings of fact, but that depends on the strength of the record

and on whether it would be just to make such findings by a summary process. Serious credibility issues and true disputes should usually be reserved for trial (*Garford* (FC) at paragraph 10; *Granville Shipping* at paragraph 8; *Society of Composers, Authors and Music Publishers of Canada v Maple Leaf Sports & Entertainment*, 2010 FC 731 at paragraph 15 [*SOCAN*]).

[17] Both parties rely to some extent on *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*], the Defendant more so than the Plaintiffs insofar as *Hryniak* arguably established a more intensive fact-finding role for a judge hearing a summary judgment motion. However, *Hryniak* was about the summary judgment rule in Ontario; judges in that jurisdiction have powers of examination which judges of this Court would only have on a motion for summary trial (*Rules*, s 216; *Manitoba v Canada*, 2015 FCA 57 at paragraph 16, 470 NR 187 [*Manitoba*]). The Federal Court of Appeal has therefore cautioned that *Hryniak* "does not materially change the procedures or standards to be applied in summary judgment motions brought in the Federal Court under Rule 215(1)" (*Manitoba* at paragraph 11).

[18] Even if there is a genuine issue for trial though, the Court has the power to "determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial" (*Rules*, s 215(3)(a)). In *SOCAN*, Mr. Justice Michael Phelan stated (at paragraph 40) that this rule imposes a duty on the Court to consider whether a summary trial is appropriate at the end of a summary judgment motion, even if the parties do not ask for one.

V. Issues

[19] The Defendant argues that there is no genuine issue for trial with respect to any of the Plaintiffs' claims. The Plaintiffs dispute that, and they also contend that the Defendant's motion is an abuse of process.

[20] At the hearing of this matter, the Plaintiffs acknowledged that their causes of action in negligence and for breach of fiduciary duty would not be advanced at trial, so it is not necessary to address the Defendant's written arguments in this regard. It is necessary, however, to consider whether the Plaintiffs' remaining claims relating to expropriation (or taking without compensation), unjust enrichment, breach of the *Marshall* Agreement, and misfeasance in public office, do raise genuine issues for a trial.

[21] Accordingly, I will address the issues raised by this motion in the following order:

1. Is this motion for summary judgment an abuse of process?
2. Have some of the Plaintiffs relinquished any cause of action they might have?
3. Are there any material facts in dispute?
4. Does the Plaintiffs' breach of contract claim raise a genuine issue for trial?
5. Does the Plaintiffs' expropriation claim (or taking without compensation) raise a genuine issue for trial?
6. Does the Plaintiffs' misfeasance in public office claim raise a genuine issue for trial?
7. Does the Plaintiffs' unjust enrichment claim raise a genuine issue for trial?

8. If there are any genuine issues for trial, can they be resolved by a summary trial?

9. Should costs be awarded and to whom?

VI. Analysis

A. *Is this motion for summary judgment an abuse of process?*

(1) Parties' Arguments

[22] The Plaintiffs contend that the Defendant's motion for summary judgment is an abuse of process for three reasons: (1) the Defendant has revived the same arguments which were dismissed in its motion to strike out the statement of claim; (2) the Defendant lost a virtually identical motion for summary judgment in the similar case of *Anglehart Sr v Canada*, 2012 FC 1205 [*Anglehart*]; and (3) the Defendant's position that a licence is not property and there is no right to renewal contradicts the position it took in *Canada v Haché*, 2011 FCA 104, 417 NR 231 [*Haché*]. Accordingly, the Plaintiffs argue that "allowing the litigation to proceed would … violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice" (citing *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at paragraph 37, [2003] 3 SCR 77 [*Toronto*]).

[23] The Defendant argued at the hearing of this matter that it was not making a collateral attack upon or re-litigating the motion to strike the statement of claim, and that the Plaintiffs' reliance upon *Anglehart* is misguided inasmuch as that case is distinguishable on the basis there is no breach of contract claim in that case and the record there was not as comprehensive as the one here.

(2) Analysis

[24] Abuse of process is a flexible doctrine unencumbered by any specific requirements (see: *Toronto* at paragraph 42). It is not limited to precluding re-litigation, and "it exists to ensure that the administration of justice is not brought into disrepute" (see: *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paragraph 41, [2013] 2 SCR 227).

[25] However flexible this doctrine is though, I fail to see how or why the Defendant's present motion is an abuse of process. The fact the Defendant's motion to strike the statement of claim was dismissed has little, if any, bearing on the issues now before the Court. A motion to strike asks only whether "it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paragraph 17, [2011] 3 SCR 45). A decision dismissing such a motion is not final because it only means that the action will not inevitably fail; the facts upon which the decision was premised must still be proven. In contrast, a motion for summary judgment permits the introduction of evidence, and that evidence could affect the viability of whatever legal claims are being advanced. As Mr. Justice Michel Beaudry said when rejecting a very similar argument in *Anglehart* (at paragraph 53), "[t]he fact that a motion to strike has been filed does not prevent the defendant from filing a motion for summary judgment, so long as it meets the conditions of subsection 213(1) of the Rules. Ultimately, one does not bar the other."

[26] Moreover, the Defendant is not re-litigating anything, since neither Justice Martineau nor the Court of Appeal decided the legal issues now raised by the Defendant. Most of Justice

Martineau's reasoning focused on whether *Grenier* applied to preclude this Court's jurisdiction to consider this action. That argument has not been advanced again, nor could it be since *Grenier* was overruled by the Supreme Court of Canada in *Canada (AG) v TeleZone Inc*, 2010 SCC 62 at paragraphs 32-78, [2010] 3 SCR 585 [*TeleZone*]. Although the Defendant did make some arguments on the motion to strike that it now repeats, Justice Martineau declined to offer any conclusive opinion about them. On the contrary, he repeatedly said he was "not in a position to decide" those issues without evidence since they involved complex questions of fact and law (*Arsenault* (Martineau) at paragraph 54). After striking out the Plaintiffs' claim for specific performance, Justice Martineau stated (at paragraph 61) that "[t]his is not to suggest the plaintiffs' remaining claims in damages are likely to succeed," and he expressly noted that a motion for summary judgment would be available once the Defendant filed its defence. It is not an abuse of process for the Defendant to bring the very motion suggested by Justice Martineau.

[27] The Plaintiffs also contend that the Defendant's present motion is an abuse of process because a similar motion was dismissed in *Anglehart*. That decision is certainly relevant. However, I do not see how the administration of justice is brought into disrepute to permit this motion to proceed. As the Defendant accurately points out, a motion for summary judgment ultimately succeeds or fails based on the strength of the record. The fact the plaintiffs in *Anglehart* had enough evidence to raise a genuine issue for trial does not automatically mean that the Plaintiffs' similar allegations in this case also raise a genuine issue for trial. The Defendant is entitled to test the Plaintiffs' case by way of the present motion.

[28] As to the Plaintiffs' argument that the Defendant cannot argue that fishing licences do not accord their bearers a right to renewal because it advanced the opposite position in *Haché*, and that this about-face is an abuse of process, this argument is without merit. The Plaintiffs' reliance upon the principle of approbation and reprobation (sometimes called the doctrine of election in litigation) is misguided.

[29] *Haché* only decided whether a snow crab licence was "property" within the meaning of subsection 248(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (as it appeared on 17 March 2011), which stated as follows:

248. (1) In this Act,	**248.** (1) Les définitions qui suivent s'appliquent à la présente loi.
…	…
"property" means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes	« biens » Biens de toute nature, meubles ou immeubles, corporels ou incorporels, y compris, sans préjudice de la portée générale de ce qui précède :
(*a*) a right of any kind whatever, a share or a chose in action,	*a*) les droits de quelque nature qu'ils soient, les actions ou parts;
(*b*) unless a contrary intention is evident, money,	*b*) à moins d'une intention contraire évidente, l'argent;
(*c*) a timber resource property, and	*c*) les avoirs forestiers;
(*d*) the work in progress of a business that is a profession;	*d*) les travaux en cours d'une entreprise qui est une profession libérale.

[30] This is a broad, statutory definition (see e.g. *Manrell v Canada*, 2003 FCA 128 at paragraphs 48-54, [2003] 3 FCR 727). As the Supreme Court said with respect to a different statutory definition of property, the fact that "a fishing licence may not qualify as 'property' for the general purposes of the common law does not mean that it is also excluded from the reach of the statutes. For particular purposes Parliament can and does create its own lexicon" (*Saulnier v Royal Bank of Canada*, 2008 SCC 58 at paragraph 16, [2008] 3 SCR 166 [*Saulnier*]). It is not an abuse of process for the Defendant to advance a different conception of property in the present action, since its position is not necessarily inconsistent with the one advanced in *Haché*.

B. *Have some of the Plaintiffs relinquished any cause of action?*

[31] As mentioned above, DFO offered compensation for lost quota but most P.E.I. fishers rejected that offer. Two of the Plaintiffs, however, did accept the offer of compensation: namely, Boyd Vuozzo; and Richard Blanchard, on behalf of the estate of Michael Jos Deagle. They both signed agreements which included the following provision:

> 9. In consideration for the payments 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.

[32] This release of liability could also affect the claims of B&F Fisheries Ltd. (which has operated Mr. Vuozzo's fishing enterprise since 2006), and Pamela Deagle (who received Mr. Deagle's licence in 2010).

[33] Apart from mentioning that these agreements were signed though, the Defendant has not argued that the action insofar as it relates to these Plaintiffs should be dismissed. In this regard, although some of the plaintiffs in *Anglehart* had signed similar agreements, Justice Beaudry nonetheless held (at paragraph 131) that there were still genuine issues for trial for the following three reasons:

> First of all, the Court does not know which plaintiffs were compensated or exactly how much was paid out. No list was provided. Second, the document on which the defendant relies, namely, the [TRANSLATION] "Financial Aid Agreement to Give Aboriginal Fishers Access to the Snow Crab Fishery – Areas 12, 18, 25/26", is not so clear on this point that it can be determined whether the compensation was for the past or the future. Third, the Court cannot determine for what portion of the 35% reduction the plaintiffs were allegedly compensated.

[34] The first rationale above does not apply in this case since the evidence shows which Plaintiffs accepted the offer and how much they received. The other two reasons, however, could apply in this case. The agreement here is written in the future tense when it states that the Recipient "will … relinquish his or her eligibility to receive **14.6427%** of the snow crab allocation" (underlining added, bold in original). These releases signed in this case might not apply to extinguish any claims from 2003 to the dates they were signed and, also, may not have relinquished all of the claims now asserted by these Plaintiffs.

[35] As Justice Martineau said in *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at paragraph 45: "a judge should follow a decision on the same question of one of his or her colleagues, unless the previous decision differs in the facts, a different question is asked, the decision is clearly wrong or the application of the decision would create an injustice." Accordingly, the interests of judicial comity require that I find there is a genuine issue for trial as

to whether these Plaintiffs may have relinquished any or all of their claims. The words of a release take their meaning from the context in which they are used and the intent of the parties. In considering what was in the contemplation of the parties, a court should consider the context, including the circumstances surrounding the execution of the document and evidence of the intention of parties (see: *Arcand v Abiwin Co-Operative Inc*, 2010 FC 529 at paragraphs 40-42, 368 FTR 145, aff'd 2011 FCA 170 at paragraph 2, 423 NR 268). This is something which cannot be ascertained on the basis of the record now before the Court and should be addressed by way of a trial.

C. *Are there any material facts in dispute?*

[36] The Defendant submits that most of the material facts are not disputed, and that the only ones which are have not been substantiated by the Plaintiffs. Specifically, the Defendant states the Plaintiffs have not provided evidence to support any of the following allegations:

- The switch to an individual quota system in 1993 was done through an oral agreement with DFO;
- In 1997, DFO agreed to grant P.E.I. fishers a permanent 5.325% share in the TAC of CFAs 12, 25, and 26;
- Following the *Marshall* decision, DFO and other officials promised the Plaintiffs that the only way that First Nations would gain access to the fishery was through a voluntary buy-back system;
- The Plaintiffs were told that First Nations would only get between 1-2% of the TAC;
- DFO's distribution of quota in 2003 endangered the viability of the Plaintiffs' crab fishing enterprises and put the resource in peril;
- DFO set a low TAC in 2003 contrary to the recommendations of DFO's own scientists; and
- The integration of CFA 18 reduced the Plaintiffs' quota by 4.7081%.

[37] The Plaintiffs argue that the factual claims of the parties are far more divergent than the Defendant admits, and they disagree on all but the most non-contentious historical facts. The two affiants, Jim Jones on behalf of the Defendant, and Carter Hutt, on behalf of all the Plaintiffs, are diametrically opposed on many issues, and the Plaintiffs therefore submit that a credibility assessment at trial is the only way to resolve those inconsistencies. The Plaintiffs also challenge the Defendant's assertion that they have supplied no proof for many of their claims, saying that all are clearly supported by the documents attached to Carter Hutt's affidavit.

[38] I will deal with the issue of whether there are material facts in dispute shortly below in addressing the remaining issues.

D. *Does the Plaintiffs' breach of contract claim raise a genuine issue for trial?*

(1) Parties' Arguments

[39] The Plaintiffs argue there are material issues of fact regarding whether the Defendant breached its agreement to pay fair market value for licences before allocating any share in the TAC to First Nations. While the Defendant denies DFO would ever make a contract to govern how it allocates the TAC, the Plaintiffs point out that the Defendant admits it has entered into several negotiated agreements with First Nations in its own memorandum of fact and law. The Plaintiffs contend there are many examples in the record of contracts which require the Minister to deliver quota in the future. Furthermore, the Plaintiffs emphasize that the Minister at the time said in 1999 that “if conservation's a priority you don't want to put pressure on an existing resource that's fully subscribed. If you want new entrants you'll have to buy new licences. I think

that's common sense." In the Plaintiffs' view, the Defendant has not even tried to justify breaking that commitment.

[40] In addition to issues of fact, the Plaintiffs argue there are significant legal issues which also require a trial. The Plaintiffs dispute the Defendant's argument that it cannot possibly be liable for any contracts it entered since that would fetter the Minister's discretion. According to the Plaintiffs, the law on the anti-fettering doctrine is still in a state of flux (citing *Andrews v Canada (AG)*, 2014 NLCA 32 at paragraphs 34-42, 376 DLR (4th) 719). While this doctrine may preclude some remedies for breach of contract such as specific performance, they contend that does not mean the government can escape the consequences of making such contracts altogether (citing *Wells v Newfoundland*, [1999] 3 SCR 199 at paragraph 41, 177 DLR (4th) 73).

[41] The Plaintiffs further point out that duties of good faith and honesty arise in contractual dealings (citing *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 495 [*Bhasin*]), and the Defendant led the Plaintiffs to believe the agreements it was making were legally binding. The Plaintiffs also contend that both the *Fisheries Development Act*, RSC 1985, c F-21, s 3(4), and the *Atlantic Fisheries Restructuring Act*, RSC 1985, c A-14, expressly authorize the Minister to make contracts, and a full trial is required to determine whether those provisions apply to the *Marshall* Agreement.

[42] The Defendant argues there never was any so-called *Marshall* Agreement. That claim is based only on supposed representations from DFO officials, and the Defendant says there is no evidence as to any intention to contract, any negotiations, or any consideration provided by the

Plaintiffs. DFO officials, including the Minister, had expressed a desire not to increase access to the fishery at the expense of the traditional fishers, but those comments were about a policy initiative and did not create a contract. Nor could it have, according to the Defendant, because the executive cannot agree to any contractual term which would fetter its statutory discretion, and no such term could ever be enforced by a court (citing e.g. *Pacific National Investments Ltd v Victoria (City)*, 2000 SCC 64 at paragraphs 59, 65-66, 74, [2000] 2 SCR 919; and *Happy Adventure Sea Products (1991) Ltd v Newfoundland and Labrador (Minister of Fisheries and Aquaculture)*, 2006 NLCA 61 at paragraphs 1 and 27-28, 277 DLR (4th) 117).

(2) Analysis

[43] Following the *Marshall* decision, it is undisputed that DFO wanted to find a way to give First Nations access to the commercial fishery without affecting the existing fishers, and the record shows that it frequently said so. For instance, on October 21, 1999, the Minister at the time said in the House of Commons that: “the long term solution in terms of the treaty right will not be at the expense of traditional commercial fishermen or their families” (Plaintiffs’ motion record at page 982); and on February 11, 2001, the Minister told the Maritime Fishermen's Union that: “any increase in Aboriginal participation in the commercial fishery will not come at the expense of fairness to other users of the resource” (Plaintiffs’ motion record at page 1212, emphasis omitted). One way DFO endeavoured to do this was through the “buy-back” initiative.

[44] The Plaintiffs also properly point out that DFO encouraged fishers to show patience, restraint, and goodwill. For example, the Minister said at a meeting on February 21, 2001, that the “patience and calm you demonstrated in the face of last year's tension bears testament to this

fact [Canada's ability to peacefully and harmoniously build a diverse population]. And more of the same is needed in the time ahead."

[45] The primary factual dispute between the parties is whether the representations made by the Minister and other DFO officials formed a contract, and therefore the question to decide is whether that issue deserves a trial. For the following reasons, I conclude that it does not.

[46] In *Scotsburn Co-Operative Services v WT Goodwin Ltd*, [1985] 1 SCR 54 at 63, 16 DLR (4th) 161, the Supreme Court stated that, in general, an enforceable agreement is "manifested by an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration." In *Allergan, Inc v Apotex Inc*, 2015 FC 367 (at paragraph 41), Mr. Justice Roger Hughes reviewed the jurisprudence on formation of a contract and concisely stated four governing principles. Of those, the first two are pertinent to the question at hand:

- for there to be a binding contract, there must be an offer and acceptance wherein the terms of the offer are matched by the terms of the acceptance;
- the acceptance must be unequivocal;

[47] In *Bhasin*, the Supreme Court confirmed (at paragraph 45) that the "primary object of contractual interpretation is … to give effect to the intentions of the parties at the time of contract formation," and the same is true when deciding if a contract was formed. The test is objective, however, and it "does not depend on an inquiry into the actual state of mind of the parties or on the parole evidence of one party's subjective intention. Rather, it depends on whether the words or acts of the parties, judged by a reasonable standard, manifest an intention to agree with respect to the matter in question" (*Chippewas of Mnjikaning First Nation v Ontario (Minister*

Responsible for Native Affairs), 2010 ONCA 47 at paragraph 192, 265 OAC 247; *Saint John Tug Boat Co Ltd v Irving Refining Ltd*, [1964] SCR 614 at 621-622, 46 DLR (2d) 1; *Ehler Marine & Industrial Service Co v M/V Pacific Yellowfin (Ship)*, 2015 FC 324 at paragraphs 26-28).

[48] Therefore, the following question must be answered: "would an objective, reasonable bystander conclude that, in all the circumstances, the parties intended to contract?" (*UBS Securities Canada, Inc v Sands Brothers Canada, Ltd*, 2009 ONCA 328 at paragraph 47, 95 OR (3d) 93; *Remington Energy Ltd v British Columbia (Hydro and Power Authority)*, 2005 BCCA 191 at paragraph 31, 210 BCAC 293; *Jeffrie v Hendriksen*, 2015 NSCA 49 at paragraph 36). The only direct evidence of the so-called *Marshall* Agreement is supplied by Carter Hutt in his affidavit:

> 31. DFO represented to the traditional fishers from the outset that the integration of aboriginal fishers into the snow crab fishery would not be accomplished "on the backs" of the traditional fishers and was to be achieved only by a process of voluntary buy-back of existing licences. In exchange, DFO asked the traditional fishers to exercise restraint in the pursuit of their legal options and to cooperate in the integration of aboriginal fishers into the commercial crab fishery. We were assured that no increase in the number of fishing licences, or in the total fishery itself, would result from the integration. We were told by DFO that only a small portion of the TAC would be required. DFO initially told us 1% to 2% would be required but that number rose quickly as aboriginal access agreements were negotiated. It is my understanding that this range was stated to representatives of the traditional fishers by Mr. Jones, by Monique Baker and by Gilles Theriault, all senior DFO employees. In reliance on these covenants and on DFO's assurances and representations, we the Plaintiffs herein, or their predecessors in title, continued to invest in our enterprises and pay DFO amounts due under the Co-management Agreement. We cooperated with patience and restraint in the integration of aboriginals into the snow crab fishery. In short, we lived up to our side of the bargain (the "Marshall Agreement").

[49] Even taken at face value, this evidence immediately raises many questions. For instance: were these alleged representations made at one time or at different times? Which representations constituted the offer? Did the offer have any terms when it was made? Did any negotiations take place? Was the offer accepted? When did the Plaintiffs accept the offer? Was anyone appointed as an agent of the fishers, or did they all individually accept the offer? How did they communicate their acceptance of the offer? If the agreement was made orally, where did they accept the offer? What "legal options" did the commercial fishers give up?

[50] None of the documentary evidence in the record reveals any answers to such questions. During his cross-examination, Mr. Hutt identified the date of the *Marshall* agreement as December 6, 1999, when Minister Dhaliwal gave a speech to the mid-shore Southern Gulf fishery in Moncton that touched on the impact of the *Marshall* decision. Minister Dhaliwal said during that speech that: "[t]his problem will not be resolved on the backs of traditional commercial fishermen and their families. But we will do it through negotiations, sitting at the table, and that that's [*sic*] the way to resolve this issue" (Plaintiffs' motion record at page 1006). At a media scrum afterward, he explained that: "if conservation's a priority you don't want to put pressure on an existing resource that's fully subscribed. If you want new entrants you'll have to buy new licences. I think that's common sense" (Plaintiffs' motion record at page 1008).

[51] The transcript of Minister Dhaliwal's speech reveals nothing which could reasonably be construed as an offer capable of acceptance. While the Minister emphasized the voluntary buy-back program and was encouraging fishers to be calm, this speech included no terms and merely expressed a policy objective. If there was any doubt about that, the fact the Minister says these

issues will be negotiated indicates they have not been negotiated or finalized yet. As for the alleged representation that a voluntary buy-back was the only option on the table, the Minister plainly said at the meeting: "license buy-out is one of the options that we have to look at but we have to look at all the options available out there to deal with it but I don't want to prejudge the process. I don't want to impose. This is something that will have to be settled through negotiations and that's exactly what we're doing" (Plaintiffs' motion record at page 1008).

[52] Moreover, there is nothing in this transcript to suggest the fishers present at the meeting accepted the Minister's alleged offer. There is no contemporaneous documentation which suggests any fisher or DFO official thought they had a binding agreement following the December 6th meeting or that they intended there to be a binding agreement. All that the Plaintiffs have attached as exhibits to Mr. Hutt's affidavit are documents showing that DFO attempted to buy back licences, and that this was its preferred strategy for freeing up TAC. DFO officials often said as much at meetings with industry representatives, but nothing indicated that this was the only option on the table.

[53] On the contrary, at a meeting with the snow crab co-management committee on March 8, 2000, Gilles Thériault, the assistant federal representative in negotiations with the First Nations, "reminded the participants that DFO has an obligation to provide access to the snow crab fishery to the [First Nations] whether or not DFO is successful in acquiring quotas." There is no indication that the fishers present at this meeting protested that this would be a breach of contract.

[54] There is also nothing to suggest the government considered there to be a binding agreement. On March 30, 2000, a DFO official was being harshly questioned by the Standing Committee of Fisheries and Oceans about the impact of the *Marshall* decision on the commercial fishery, but the official did not reassure the Committee by saying that DFO had promised fishers that quota would only be bought back voluntarily, as one would expect him to do had the *Marshall* Agreement in fact been made. Instead, the DFO official said the following (at page 1095 of the Plaintiffs' motion record):

> If we can't get an agreement with people to provide access, obviously, the minister has absolute discretion in licensing and providing access. So there are other opportunities. But we are not inclined to expropriate. We have funds available to compensate people for the access so we will work on agreements. In the absence of agreements we do have other options but we are not going to just take without compensation. I'm hopeful that we won't have any need to exercise unilateral authority in taking access.

[55] In addition, there is nothing in the record before the Court to indicate that a contract was formed at a later date through other meetings, or that there were unqualified representations that purchasing quota would be the only way quota would be freed up. The evidence presented by the Plaintiffs is not reasonably capable of proving that DFO ever made them an offer saying the only way quota would be freed up would be by buy-backs or that the Plaintiffs accepted any offer, or proving that either party ever intended to enter a binding agreement. This cause of action is so doubtful it does not deserve a trial.

[56] The so-called *Marshall* Agreement does not exist. This being so, there is no need to address whether the anti-fettering doctrine would preclude its enforcement.

E. *Does the Plaintiffs' claim of expropriation (or taking without compensation) raise a genuine issue for trial?*

(1) Parties' Arguments

[57] The Plaintiffs argue that, in the absence of express language, statutes should not be construed "so as to take away the property of a subject without compensation" (citing *Attorney-General v De Keyser's Royal Hotel, Limited*, [1920] All ER Rep 80 at 94, [1920] AC 508 (HL), Lord Atkinson; *Manitoba Fisheries Ltd v Canada* (1978), [1979] 1 SCR 101 at 109-110, 88 DLR (3d) 462 [*Manitoba Fisheries*]). They say (at paragraph 74 of their memorandum) they are entitled to compensation so long as they can prove two things: (1) that the Defendant's "use of private property … is so restrictive that it amounts to the confiscation from the private owner of virtually all of the rights of ownership"; and (2) that the Defendant acquired "benefits comparable to those taken away from the private owner."

[58] In the Plaintiffs' view, the Defendant unduly focuses on a technical or narrow definition of "property" to say that nothing at all was taken from the Plaintiffs when it reduced their shares in the TAC. Not only have fishing licences been held to be property in other contexts (citing *Saulnier* at paragraph 43; *Haché*), but the Plaintiffs argue they do not need to prove that a licence is property in the common law sense; they only need to show that the Defendant has taken something of value from them. The Plaintiffs draw an analogy to *Manitoba Fisheries* where the Supreme Court held (at page 118) that the government was required to compensate a company which it had driven out of business by enacting a monopolistic statute. The Supreme Court found (at page 108): "goodwill, although intangible in character is a part of the property of a business

just as much as the premises, machinery and equipment employed in the production of the product whose quality engenders that goodwill.” The Plaintiffs say the same is true of their fishing licences, and the fact these licences are ultimately contingent on an exercise of Ministerial discretion does not change that (citing e.g. *British Columbia v Tener*, [1985] 1 SCR 533, 17 DLR (4th) 1; *Rock Resources Inc v British Columbia*, 2003 BCCA 324 at paragraphs 48 and 50, 229 DLR (4th) 115; *Canadian Pacific Railway Co v Vancouver (City)*, 2006 SCC 5 at paragraph 32, [2006] 1 SCR 227).

[59] The Plaintiffs say their licences, however characterized, are assets with major commercial value (citing *Saulnier* at paragraphs 14, 22-23). The Defendant has bought, sold, leased, and taxed licences in the past, and DFO officials have described allocating quota to other groups as “borrowing” and “expropriation” publicly and in internal memoranda (see: e.g. pages 785, 797, 804, 808, 818-819, and 1095 of the Plaintiffs' motion record). The Plaintiffs point out that in *Anglehart*, Justice Beaudry said (at paragraph 141) the “case law has not yet clearly determined what rights fishers who have their licences renewed year after year have.” Just like in that case, the Plaintiffs say this issue deserves a trial.

[60] The Defendant submits there was no expropriation since nothing was taken from the Plaintiffs, and no property, nor a beneficial interest in property, was acquired by the state for its own use or destruction. The Defendant premises this argument on its view that the quota allocated to the Plaintiffs is not property (*Taylor v Dairy Farmers of Nova Scotia*, 2010 NSSC 436 at paragraphs 63 and 68, 298 NSR (2d) 116, aff'd on other grounds, 2012 NSCA 1 at paragraph 22, 311 NSR (2d) 300). According to the Defendant, fishing licences are issued

annually and their issuance "does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type" (*Fishery (General) Regulations*, SOR/93-53, ss 2, 16). A licence simply grants permission to do what is otherwise unlawful, and the only proprietary interest is in the harvest from the fishing effort (*Saulnier* at paragraph 22). The Defendant says that neither the licence nor the quota attached to it can be property in the common law sense, since it does not impart "the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right" (*Re National Trust Co and Bouckhuyt* (1987), 61 OR (2d) 640 at paragraph 24, 43 DLR (4th) 543).

[61] Furthermore, the Defendant submits that licence-holders are "not entitled to a specific percentage of the TAC" (*Canada (AG) v Chiasson*, 2009 FCA 299 at paragraph 28, 314 DLR (4th) 512 [*Chiasson*]), and points out that the Court of Appeal has said: "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" (*Arsenault* (JR) at paragraph 57, Pelletier JA, concurring). In the Defendant's view, any decisions in the past to offer compensation for reducing quota were simply policy decisions which did not reflect any legal obligation.

(2) Analysis

[62] With respect to this issue, there is no material reason or any substantial basis upon which to distinguish this case from *Anglehart*. The facts are essentially the same on this point as they were in *Anglehart* and the same arguments were advanced by the Defendant in that case as in this one (see: *Anglehart* at paragraphs 109-113). Yet, Justice Beaudry found there was a genuine

issue for trial (*Anglehart* at paragraphs 141-152). It cannot be said that Justice Beaudry's decision was clearly wrong.

[63] Nor has the law of summary judgment changed since the time of Justice Beaudry's decision (see: *Manitoba* at paragraph 11). The issue as to whether an interest in a fishing licence is capable of being expropriated is essentially a question of law, so it could be decided pursuant to paragraph 215(2)(b) of the *Rules*. However, this question is complicated; it requires a factual underpinning which can only be produced by way of a trial. This is all the more apparent in view of a history of co-management and negotiations between the Plaintiffs and the Minister's officials which could, conceivably, affect the interests conveyed by a licence. As such, there are genuine factual disputes that could affect the resolution of this legal issue.

[64] There have also not been any relevant legal developments which would affect Justice Beaudry's conclusion that the "case law has not yet clearly determined what rights fishers who have their licences renewed year after year have" (*Anglehart* at paragraph 141). If anything, the plaintiffs in *Anglehart* had a weaker argument since they also had to overcome the fact they had accepted financial assistance; whereas in this case all but two of the Plaintiffs in this case rejected such assistance (*Anglehart* at paragraphs 23 and 131).

[65] As noted above with respect to the issue of whether some of the Plaintiffs may have relinquished any cause of action, judicial comity suggests there is a genuine issue for trial in this case with respect to the Applicants' claim of expropriation or taking without compensation.

There is no reason that the claim in *Anglehart* should proceed to trial next year while the nearly identical claim in this case flounders.

F. *Does the Plaintiffs' misfeasance in public office claim raise a genuine issue for trial?*

(1) Parties' Arguments

[66] The parties agree that the leading case on misfeasance in public office is *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263, where the Supreme Court summarized the basic elements of this tort as follows:

> 32 …the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[67] The Plaintiffs say they never conceded that the Defendant's actions were legal when they opposed its earlier motion to strike. Their point at that time was only that they were not attacking the Minister's actions from an administrative law standpoint, so the now-defunct *Grenier* case was inapplicable. Their claim for misfeasance in public office has never been struck, and the Plaintiffs submit there are several reasons this claim should proceed to trial.

[68] The Plaintiffs submit that, as early as 1991, the Defendant knew it could not use fish resources to fund management activities. It did so anyway when it started funding research that way in 2003, thus intentionally depriving the Plaintiffs and other fishers of the TAC they

otherwise would have had an exclusive right to harvest. Not only that, but the Plaintiffs argue the Defendant has used some of the TAC set aside for new entrants to issue licences to organizations like the PEI Fishermen's Association (whose members are fishers of lobster and other ground fish); this Association then distributes those licences to its members and uses some of the proceeds to purchase and retire lobster licences. This activity, the Plaintiffs submit, is indistinguishable from that prohibited in *Larocque*; DFO is using the snow crab resource to pay for its programs instead of general revenues budgeted to it by Parliament. The same applies to the Defendant's decision to allocate some of the TAC to First Nations, and the Plaintiffs say all of these actions constitute misfeasance in public office.

[69] The Plaintiffs further attack the Minister's decision to integrate CFA 18 into CFAs 12, 25, and 26. DFO originally had a mandate to allocate only between 2.2% and 3% of the combined TAC to fishers from CFA 18, based on the historical catches from that area from 1995 to 2002. However, DFO ultimately abandoned that methodology and based its decision not on the actual historical harvest from CFA 18, but on the average allowable harvest from 1987 to 1996 irrespective of whether it had been reached. CFA 18 fishers thus ended up with a 4.708% share of the combined TAC of CFAs 12, 18, 25, and 26. The Plaintiffs allege that was far greater than what was added to the stock by the integration of CFA 18 because the government created a no-fish zone in CFA 18 which covered a large portion of CFA 18's supposed contribution to the number of snow crabs in the combined area. The Plaintiffs allege the Minister's decision was made in bad faith and was calculated to injure them.

[70] The Plaintiffs also contend that DFO deliberately set the TAC in 2003 lower than that recommended by their own scientists in order to punish the Plaintiffs for refusing to finance DFO's management measures. This too, they say, was misfeasance in public office.

[71] The Defendant contends that the Plaintiffs strenuously argued at the motion to strike the statement of claim they were not challenging the legality of any of the Defendant's actions. According to the Defendant, that concession dooms this cause of action to failure. Equally fatal, in the Defendant's view, is the absence of any intention to do harm or act in a way incompatible with the statute (citing *Canada v Cheticamp Fisheries Co-op Ltd* (1995), 139 NSR (2d) 224 at paragraph 74, 123 DLR (4th) 121 (NSCA)). The Defendant asserts (at paragraph 121 of its written memorandum):

> There is no evidence before the Court (i) to establish that the Minister or DFO officials acted unlawfully, (ii) that the Minister or DFO officials specifically intended to injure the Respondents, and (iii) of any deliberate unlawful activity with knowledge of the lack of power to do the act complained of and that the act was likely to injure the Respondents. Finally, it cannot be said that a public official's tortious conduct was the legal cause of the alleged losses.

(2) Analysis

[72] In the memorandum the Plaintiffs submitted when defending the motion to strike, they stated they were "in no way challenging the scope of the Minister's statutory discretionary power under the *Fisheries Act*. Rather, the [Plaintiffs] contend that during a valid exercise of his discretion, the Minister violated the terms of a binding contract with the [Plaintiffs]." The Defendant argues that this concession precludes any action in misfeasance in public office.

[73] The Defendant states its case too broadly, however, when it argues that all of the Plaintiffs' claims are defeated by this alleged concession. While the Plaintiffs did make the above submission to avoid the application of *Grenier*, they always maintained in their memorandum on the motion to strike that "the Minister's actions in allocating quota to DFO for financing purposes is an invalid exercise of ministerial discretion." To avoid *Grenier* with respect to those claims, they simply argued they did not need to challenge the Minister's decision through judicial review first since *Larocque* had already settled that issue, and Justice Martineau accepted that argument (*Arsenault* (Martineau) at paragraph 44). Thus, the Defendant's argument can apply only to the last four misfeasance claims advanced by the Plaintiffs.

[74] Even with respect to those four claims though, I reject the Defendant's argument. It bears some similarity to the doctrine of election in litigation relied upon by the Plaintiffs with respect to the Defendant's position in *Haché*. That doctrine, however, typically applies only to someone who pursues inconsistent or irreconcilable rights or remedies (*Harbuz v Capital Construction Supplies Ltd*, 2013 BCSC 1624 at paragraphs 47 and 49), and this is not the case here. On the contrary, the Plaintiffs have just advanced a different legal characterization of their causes of action. Since "a trial judge is not bound by concessions of law if those concessions are erroneous" (*R v Barabash*, 2015 SCC 29 at paragraph 54, [2015] 7 WWR 1), there is no particular reason why a party should not be permitted to withdraw such a concession in response to a significant change in the law (*TeleZone* at paragraph 32). Moreover, there is no prejudice to the Defendant, since this cause of action is supported by the same facts underlying the rest of the action and the amended statement of claim plainly alleges that the Defendant acted "illegally" and "not in furtherance of the statutory authority which the Defendant's servants purported to

exercise." Consequently, the Plaintiffs are not estopped from advancing any of their arguments as to this cause of action.

[75] Turning now to the Plaintiffs' specific claims, some of them clearly raise a genuine issue for trial. In *Larocque*, the Court of Appeal held (at paragraph 26): "the Minister financed his scientific research program without first appropriating the funds necessary and by misappropriating, for all intents and purposes, resources that do not belong to him." The Court of Appeal also held (at paragraph 20) the Minister was "aware of the risks that he was taking in funding using fishery resources," and in the record now before the Court there is some evidence to support a similar conclusion in this case. For example, in an e-mail to David Bevan dated August 2, 2002 (reproduced at pages 933-934 of the Plaintiffs' motion record), Bernard Vezina reviewed a 2002 report from the Review Directorate about the Regulatory Process in Fisheries and Oceans. He noted that:

> The report includes many references to using fish resources to pay for some of DFO's management costs and that this was providing operating funds not voted by Parliament. The Auditor General had concluded years ago in a previous report that this was not consistant [*sic*] with legislation. … Legal Services has also advised that, as a well recognized principle, government or DFO cannot do indirectly what it does not have the legal authority to do directly. Using the S-F snow crab fishery as an example (see page 32), DFO cannot (directly) use the fish resources to pay for its fish management programs. We would not either have the authority to give the fish to industry who would then turn around and then pay for DFO's programs.

[76] It could be argued that DFO knew this would harm the Plaintiffs insofar as the snow crab sold to finance other programs might have been part of the TAC otherwise available (*Association*

des crabiers Acadiens v Canada (AG), 2006 FC 1241 at paragraph 6, 301 FTR 297 [*Association des crabiers*]). There is a genuine issue for trial with respect to this claim.

[77] The Plaintiffs also dispute the use of the snow crab resource to give First Nations access to the fishery and to rationalize other fisheries (i.e. reduce the number of licences in other fisheries by, essentially, permitting fishers to exchange those licences for a snow crab licence). Arguably, that falls much more squarely within the Minister's "absolute discretion" to "issue or authorize to be issued leases and licences for fisheries or fishing" (*Fisheries Act*, s 7(1)), and so is not unlawful. However, if the Plaintiffs prevail at trial with respect to their expropriation arguments, a failure to compensate them could be unlawful. Since that issue deserves a trial, so too does this one.

[78] The Plaintiffs further contend that the Defendant spitefully lowered the TAC in 2003 to put pressure on the Plaintiffs to agree to finance conservation measures. The stock status report for CFA 12 in 2003 indicated "it would be prudent for the 2003 quota to not exceed 20,000 [tonnes]" (Plaintiffs' motion record at page 1645). Mr. Hutt says the TAC should have been 21,600 tonnes by adding in an amount from CFA 18. The Minister ultimately set the TAC to 17,148 tonnes, however, on a recommendation from DFO that a "more conservative approach is needed to ensure future recruitment into the fishery", and was "even more justified in the absence of comprehensive and detailed monitoring of the fishery that would enable small areas to be closed to fishing quickly when the incidence of soft-shelled crab increased" (Plaintiffs' motion record at page 1391). Subsequently, the Minister proposed to increase the TAC to "20,000 [tonnes] subject to a co-management approach, funded at $1.7 million for 2003"

(Defendant's motion record at page 948). That deal ultimately fell through despite agreement from the P.E.I. fishers.

[79] The Defendant replies that the TAC was set to 17,148 tonnes based on legitimate and lawful concerns, and it was consistent with the average exploitation rate over the past decade. There is some evidence to support that proposition. However, as noted above, there is also evidence it was lower than the stock status report said was necessary, and the Minister used it as a bargaining chip to entice the fishers into a deal where they would supply funding for DFO's management program. This occurred after the e-mail quoted above which questioned whether DFO had "the authority to give the fish to industry who would then turn around and then pay for DFO's programs." There are thus genuine issues for trial regarding whether DFO was acting unlawfully and whether it was aware it was so doing.

[80] The Plaintiffs also criticize the integration of CFA 18. Although there is little evidence in the record to support the Plaintiffs' claims in this regard, there is a memo dated November 21, 2002 (reproduced at pages 1368-1375 of their motion record), which authorized the mandate for discussing the integration of CFA 18. This memo states (at page 1371): "the fishery in CFA 18 has been in a precarious state since the mid-1990s. Uncaught quotas and early closures due to the incidence of soft-shell crab have been frequent. … As well, indications are that CFA 18 does not contain large areas of habitat favourable to snow crab." A lower portion of the TAC than they eventually received was therefore contemplated in this mandate.

[81] However, the Plaintiffs have supplied no evidence that the integration has caused any damages to them. In 2003, the stock status reports indicated that the estimated commercial biomass in CFA 18 was 3,369 tonnes, which was reduced to 2,986 tonnes once a new no-fishing area was established. When integrated with CFA 12, the combined stock was 44,540 tonnes (Defendant's motion record at pages 647 and 649). The TAC was 38.5% of that amount, so the integration of CFA 18 added about 1,150 tonnes to the TAC. Fishers from CFA 18 only caught about 578 tonnes (Defendants' motion record at page 963). Since the fishers from CFA 18 brought more snow crab with them than they received, there is no evidence to support the Plaintiffs' claim that this integration cut into the Plaintiffs' share of the TAC. There is also no evidence in the record to suggest this has changed in the years since then. This claim does not warrant a trial.

G. *Does the Plaintiffs' unjust enrichment claim raise a genuine issue for trial?*

(1) Parties' Arguments

[82] The parties do not dispute the test for unjust enrichment. As stated in *Kerr v Baranow*, 2011 SCC 10 at paragraph 32, [2011] 1 SCR 269 [*Kerr*], a plaintiff needs to prove three things: "an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment." The first two criteria are satisfied whenever a plaintiff's loss has conveyed a benefit which has "enriched the defendant and which can be restored to the plaintiff *in specie* or by money" (*Kerr* at paragraph 38). The benefit must be tangible and it can be either "positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake" (*Kerr* at

paragraph 38). As for the third element, this simply "means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff" (*Kerr* at paragraph 40).

[83] The Plaintiffs argue there are three ways the Defendant has been unjustly enriched. First, they criticize DFO for its practice from 2003 to 2006 of selling a portion of the TAC in order to fund research. In *Association des crabiers* (at paragraph 6), Justice Martineau agreed with the applicants' submission that, "by deducting an allocation of 480 [metric tonnes] from the TAC, the Minister deprived each licensee of this share of the TAC and indirectly imposed an additional charge on them." That, the Plaintiffs claim, enriched the Defendant since it would otherwise have had to pay for the research out of its own budget. The Plaintiffs submit there was no juristic reason for the deprivation because that practice was illegal (*Larocque* at paragraphs 26-27; and *Association des crabiers* at paragraphs 7-10).

[84] Second, the Plaintiffs contend that the Defendant was unjustly enriched when the Minister allocated part of the TAC to other groups in 2003 in order to meet other self-imposed obligations. The Defendant was enriched, the Plaintiffs say, since DFO otherwise would have had to buy that TAC back from the existing fishers, and those fishers suffered a deprivation since their quotas were reduced to about two-thirds of what they would otherwise be. The Plaintiffs submit there was no juristic reason for this, and they distinguish *Gladstone v Canada (AG)*, 2005 SCC 21, [2005] 1 SCR 325, on the basis there was an extensive legislative framework governing the seizure of fish in that case.

[85] Third, the Plaintiffs point out that DFO had funded scientific research on crab stocks out of its own budget until the 1990s, at which time fishers agreed to fund management measures and research. That co-operation continued until 2003, and the Plaintiffs say eliciting payments from fishers was illegal for the same reasons it was illegal for DFO to sell TAC directly to pay for those management measures. The Plaintiffs argue that was an unjust enrichment too, and they want to recover their contribution to the costs of fishery science and monitoring.

[86] The Defendant submits it has never received any tangible benefit from any of the actions criticized by the Plaintiffs. The Minister was simply managing the fishery in the public interest. In any event, there was no corresponding deprivation, according to the Defendant, since the Plaintiffs have no property interest in any share of the TAC. As for the financial contributions to science and monitoring made by Prince Edward Island Snow Crab Fishermen Inc., those contributions ceased in 2003 and the Plaintiffs' claims do not extend back that far.

[87] Furthermore, the Defendant says there was a juristic reason for sharing the resource with First Nations and new entrants because the Minister was lawfully executing his statutory duties. As for DFO's actions in selling the resource to fund science and management, the Defendant argues the Plaintiffs actually benefitted from that since it permitted the Minister to set a more aggressive TAC.

(2) Analysis

[88] I reject the Plaintiffs' assertion that they are seeking to recover the costs of their contributions to DFO's research prior to 2003. As the Defendant points out (at page 1085 of its motion record),the following exchange occurred during Mr. Hutt's cross-examination:

> **Q.** Right. So just to be absolutely clear, because it's important to both of us, the Plaintiffs are not looking to recover their or their association's financial contribution to Fisheries Science or fishery monitoring ever. Period.
>
> **A.** No, not to my knowledge. No.

[89] The Plaintiffs protest they have not "amended their claim in relation to recovering their contribution to the costs of fishery science and monitoring," and their amended statement of claim does say that one of the deprivations they suffered was "cash paid for scientific research and monitoring activities." However, their amended statement of claim does not allege the source of this deprivation. Rather, when describing the nature of their action, the third amended statement of claim states (at paragraph 8) the Plaintiffs "are seeking compensation for the losses they sustained because of the actions of DFO in the management of the commercial snow crab fishery in the southern region of the Gulf of St. Lawrence <u>since 2003</u>" (emphasis added), which was after those contributions had ceased. Furthermore, the Plaintiffs identify the actions which have allegedly resulted in an unjust enrichment to the Defendant at paragraph 73 of their third amended statement of claim:

> The Plaintiffs state that the use by DFO of the Plaintiffs' share of the TAC for the purposes of funding its purported obligations to Atlantic Region First Nations, rationalizing the lobster and ground fish fisheries, and the integration of Fishing Area 18 snow crab fishery has resulted in a financial benefit to the Defendant.

[90] The funds the Plaintiffs paid prior to 2003 are not included on the above list, and the Plaintiffs refer to the same list when discussing the source of their deprivations at paragraph 74 of their third amended statement of claim. Having failed to plead that their pre-2003 contributions to fishery science and monitoring unjustly enriched the Defendant, this allegation does not give rise to a genuine issue for trial.

[91] As well, there is no genuine issue for trial regarding the Plaintiffs' claim that they were deprived of anything when CFA 18 was integrated into CFAs 12, 25 and 26. As mentioned above with respect to the misfeasance claim, that actually increased the total amount of snow crab the Plaintiffs could fish in 2003 and subsequent years.

[92] As for the remaining claims, the Defendant argues the Plaintiffs were not deprived of any TAC because they had no right to it. In allowing the application for judicial review in *Association des crabiers*, however, Justice Martineau stated (at paragraph 7) he agreed with the applicants' submissions, one of which was that "by deducting an allocation of 480 [metric tonnes] from the TAC, the Minister deprived each licensee of this share of the TAC and indirectly imposed an additional charge on them" (*Association des crabiers* at paragraph 6). If the trial judge should agree with that finding, it could establish both the deprivation and the corresponding enrichment, since DFO might otherwise have had to meet its objectives in some other way which could have involved purchasing the quota or finding other financing. This claim thus depends on the nature of the Plaintiffs' interest in their fishing licences, and it deserves a trial for the same reason that the expropriation or taking without compensation claim does.

[93] The same is true when considering whether there is a juristic reason for the absence of compensation, and selling the quota directly has already been held to be unlawful in *Larocque*. While the Defendant might be right that the Plaintiffs benefitted from the scientific monitoring DFO unlawfully purchased (*Chiasson* at paragraph 27), that argument presumes DFO had no obligation to conduct research and monitor the fishery anyway – an obligation which it might have violated had it not undertaken those activities.

[94] There is therefore a genuine issue for trial on the Plaintiffs' unjust enrichment claims.

H. *If there is a genuine issue for trial, can it be determined by a summary trial?*

[95] While the parties have not asked for a summary trial, there is a duty to consider whether any genuine issues for trial could suitably be resolved by a summary trial (*Rules*, s 215(3)(a), 216(5); *SOCAN* at paragraph 40). In *Tremblay v Orio Canada Inc*, 2013 FC 109, [2014] 3 FCR 404, Mr. Justice Richard Boivin summarized the appropriate considerations for this issue concisely (at paragraph 24):

> The plaintiff bears the burden of demonstrating that a summary trial is appropriate ([*Teva Canada Ltd v Wyeth LLC*, 2011 FC 1169], at para 35). In deciding whether a file lends itself to a summary trial, a judge may consider, among other things, the complexity of the matter, its urgency, the cost of taking the case forward to a conventional trial in relation to the amount involved (*Inspiration Management Ltd v McDermid St. Lawrence Ltd* (BCCA) (1989), [1989] BCJ no 1003, 36 BCLR (2d) 202), whether the litigation is extensive, whether the summary trial will take considerable time, whether credibility is a crucial factor, whether the summary trial will involve a substantial risk of wasting time and effort and whether the summary trial will result in litigating in slices (*Wenzel Downhole*, above, at para 37, citing *Dahl v Royal Bank*, 2005 BCSC 1263 at para 12, 46 BCLR (4th) 342).

[96] Applying these principles, a summary trial is neither suitable nor appropriate here. This matter is complex and the litigation is (and has been to date) extensive, and it is not urgent. A trial likely will be expensive (especially considering that the trial in *Anglehart* is presently scheduled for 49½ days), and the Plaintiffs are seeking over $17,000,000; the costs of a trial are therefore reasonably proportionate to the amount involved. Even if one of the issues raised above could be resolved justly by way of a summary trial, it would in all likelihood be a waste of time since it would not obviate the need for a full trial on the other issues. In any event, while it may have been appropriate to bi-furcate the issues of liability and quantum in this proceeding, the same cannot be said for ordering a summary trial in respect of any of the Plaintiffs' remaining claims since the facts underlying all of such claims are inextricably intertwined.

I. *Should costs be awarded and to whom?*

[97] The parties' submissions with respect to costs made at the hearing of this matter were, to say the least, widely divergent. On the one hand, the Defendant submitted that in the event it was successful, even in part, costs should be awarded and assessed at the middle column of Tariff B or, alternatively, in a lump sum amount of $7,000 plus disbursements. On the other, the Plaintiffs submitted a Bill of Costs in a total amount of $123,914.14 (including HST and disbursements) or, alternatively, a proposed lump sum of $99,404.42 (including HST and disbursements).

[98] The Plaintiffs have requested their costs on a substantial indemnity basis because the motion was an abuse of process. Their arguments in this regard were rejected. Nevertheless, there is some authority to suggest that costs should be enhanced when a defendant's motion for

summary judgment is dismissed. Mr. Justice James Hugessen explained why in *Crocs Canada Inc v Holey Soles Holdings Ltd*, 2008 FC 384 [*Crocs Canada*]:

> [2] …where a defendant moves for summary judgment it is appropriate to order costs on a higher scale because of the disproportionate risk which such a motion places on the plaintiffs in comparison to the defendant. If the motion succeeds the plaintiffs are out of court and the defendant has the benefit of a final judgment dismissing the action, normally including costs. On the other hand, if the action survives the motion it is unfair that the defendant should only have been exposed to costs of a motion on the ordinary scale of Column III of the Tariff.

[99] There is no question that the Defendant's motion for summary judgment has served, at a minimum, to reduce some of the issues for trial. The Plaintiffs' claims for breach of contract in respect of the so-called *Marshall* Agreement and their claims relating to the integration of CFA 18 do not raise genuine issues for trial. I reject the Defendant's suggestion, however, that the Plaintiffs' abandonment of their claims in negligence and for breach of fiduciary duty was precipitated only by reason of the Defendant's motion for summary judgment.

[100] This motion was heard over the course of three days. The motion records compiled by the parties ran to a combined total of some 3,200 pages. The record before the Court was voluminous (all the more so, I must say, because it was duplicative in many respects and might well have been reduced with some coordination or co-operation between the parties' counsel; for example, some form of agreed statement of facts and a common list of exhibits would have assisted not only the Court but the parties as well).

[101] In addition, while the Defendant was successful in part, inasmuch as the Plaintiffs' claims for breach of contract and those relating to the integration of CFA 18 do not raise genuine issues

for trial, the Defendant's motion was not entirely successful. The Plaintiffs' remaining claims relating to expropriation (or taking without compensation), unjust enrichment, and misfeasance in public office, all raise genuine and substantial issues for a trial. The Plaintiffs' risk on this motion was disproportionate in comparison to the Defendant. The Plaintiffs successfully defended substantial portions of their claims and the remaining claims should proceed to trial as soon as possible. It has now been more than eight years since the Plaintiffs filed their initial statement of claim. This case has a protracted litigation history. It should move beyond procedural wrangling and to a trial on the merits.

[102] Having regard to the outcome of the motion, it is unfair that the Defendant should only have been exposed to the costs of a motion, notwithstanding its partial success. I appreciate that the plaintiffs in *Crocs Canada* were awarded an enhanced amount of costs because the defendant's motion for summary judgment was dismissed in its entirety, unlike the case here. However, in view of the decisions in *Larocque*, *Association des crabiers* and, especially, *Anglehart*, some aspects of the Defendant's challenges to the Plaintiffs' claims were, to say the least, of doubtful merit. Accordingly, I exercise my discretion under Rules 400(1) and 400(4) and award the Plaintiffs a lump sum amount of $25,000, inclusive of all disbursements and any taxes thereon, for their costs on this motion. These costs shall be payable in any event of the cause.

VII. Conclusion

[103] In the result, therefore, the Defendant's motion for summary judgment is granted in part; in that the Plaintiffs' claims and causes of action grounded on breach of contract and breach of

fiduciary duty, and in negligence, along with their claims relating to the integration of CFA 18, are dismissed. The Plaintiffs' other claims, however, should proceed to trial for the reasons stated above.

ORDER

THIS COURT ORDERS that: the Defendant's Motion dated March 21, 2014 is dismissed in part; the Plaintiffs' causes of action grounded on breach of contract and breach of fiduciary duty, and in negligence, along with their claims relating to the integration of CFA 18, are dismissed; the Plaintiffs' remaining claims and causes of action relating to expropriation (or taking without compensation), unjust enrichment, and misfeasance in public office, raise genuine issues for a trial; and the Plaintiffs are awarded a lump sum amount of $25,000 (inclusive of all disbursements and any taxes thereon) for their costs and such costs shall be payable by the Defendant to the Plaintiffs in any event of the cause.

"Keith M. Boswell"

Judge

Annex A – Relevant Enactments

Federal Courts Rules, SOR/98-106

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	**3.** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.
…	…
213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed	**213.** (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.
…	…
214. A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.	**214.** La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.
215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	**215.** (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement

sommaire en conséquence.

(2) If the Court is satisfied that the only genuine issue is

(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

(*a*) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

a) la somme à laquelle le requérant a droit, elle peut ordonner l'instruction de cette question ou rendre un jugement sommaire assorti d'un renvoi pour détermination de la somme conformément à la règle 153;

(*b*) a question of law, the Court may determine the question and grant summary judgment accordingly.

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :

(*a*) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;

(*b*) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

216. (1) The motion record for a summary trial shall contain all of the evidence on which a party seeks to rely, including

216. (1) Le dossier de requête en procès sommaire contient la totalité des éléments de preuve sur lesquels une partie compte se fonder, notamment :

(*a*) affidavits;	*a*) les affidavits;
(*b*) admissions under rule 256;	*b*) les aveux visés à la règle 256;
(*c*) affidavits or statements of an expert witness prepared in accordance with subsection 258(5); and	*c*) les affidavits et les déclarations des témoins experts établis conformément au paragraphe 258(5);
(*d*) any part of the evidence that would be admissible under rules 288 and 289.	*d*) les éléments de preuve admissibles en vertu des règles 288 et 289.
…	…
(3) The Court may make any order required for the conduct of the summary trial, including an order requiring a deponent or an expert who has given a statement to attend for cross-examination before the Court.	(3) La Cour peut rendre toute ordonnance nécessaire au déroulement du procès sommaire, notamment pour obliger le déclarant d'un affidavit ou le témoin expert ayant fait une déclaration à se présenter à un contre-interrogatoire devant la Cour.
(4) The Court may draw an adverse inference if a party fails to cross-examine on an affidavit or to file responding or rebuttal evidence.	(4) La Cour peut tirer des conclusions défavorables du fait qu'une partie ne procède pas au contre-interrogatoire du déclarant d'un affidavit ou ne dépose pas de preuve contradictoire.
(5) The Court shall dismiss the motion if	(5) La Cour rejete la requête si, selon le cas :
(*a*) the issues raised are not suitable for summary trial; or	*a*) les questions soulevées ne se prêtent pas à la tenue d'un procès sommaire;
(*b*) a summary trial would not assist in the efficient resolution of the action.	*b*) un procès sommaire n'est pas susceptible de contribuer efficacement au règlement de l'action.
…	…

218. If judgment under rule 215 or 216 is refused or is granted only in part, the Court may make an order specifying which material facts are not in dispute and defining the issues to be tried and may also make an order

(*a*) for payment into court of all or part of the claim;

(*b*) for security for costs; or

(*c*) limiting the nature and scope of the examination for discovery to matters not covered by the affidavits filed on the motion for summary judgment or summary trial or by any cross-examination on them and providing for their use at trial in the same manner as an examination for discovery.

218. Si le jugement visé aux règles 215 ou 216 est refusé ou n'est accordé qu'en partie, la Cour peut, par ordonnance, préciser les faits substantiels qui ne sont pas en litige et déterminer les questions à instruire, ainsi que :

a) ordonner la consignation à la Cour d'une somme d'argent représentant la totalité ou une partie de la réclamation;

b) ordonner la fourniture d'un cautionnement pour dépens;

c) limiter la nature et l'étendue de l'interrogatoire préalable aux questions non visées par les affidavits déposés à l'appui de la requête en jugement sommaire ou en procès sommaire, ou par tout contre-interrogatoire s'y rapportant, et permettre leur utilisation à l'instruction de la même manière qu'un interrogatoire préalable.

219. On granting judgment under rule 215 or 216, the Court may order that enforcement of the judgment be stayed pending the determination of any other issue in the action or in a counterclaim or third party claim.

219. Au moment de rendre un jugement en application des règles 215 ou 216, la Cour peut ordonner de surseoir à l'exécution forcée du jugement jusqu'à la détermination de toute autre question soulevée dans l'action ou dans une demande reconventionnelle ou une mise en cause.

Fisheries Act, RSC 1985, c F-14

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 to be issued leases and licences for fisheries or fishing, wherever situated or carried on.	**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 d'exploitation de pêcheries — ou en permettre l'octroi —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.
…	…
9. The Minister may suspend or cancel any lease or licence issued under the authority of this Act, if	**9.** Le ministre peut suspendre ou révoquer tous baux, permis ou licences consentis en vertu de la présente loi si :
(*a*) the Minister has ascertained that the operations under the lease or licence were not conducted in conformity with its provisions; and	*a*) d'une part, il constate un manquement à leurs dispositions;
(*b*) no proceedings under this Act have been commenced with respect to the operations under the lease or licence.	*b*) d'autre part, aucune procédure prévue à la présente loi n'a été engagée à l'égard des opérations qu'ils visent.

Fishery (General) Regulations, SOR/93-53

2. In these Regulations,	**2.** Les définitions qui suivent s'appliquent au présent règlement.
…	…
"document" means a licence, fisher's registration card or vessel registration card that grants a legal privilege to engage in fishing or any other activity related to fishing and	« document » Permis, carte d'enregistrement de pêcheur ou carte d'enregistrement de bateau accordant le privilège légal de pratiquer la pêche ou des activités relatives à la

fisheries;	pêche et aux pêches en général.
…	…
16. (1) A document is the property of the Crown and is not transferable.	**16.** (1) Tout document appartient à la Couronne et est incessible.
(2) The issuance of a document of any type to any person does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type.	(2) La délivrance d’un document quelconque à une personne n’implique ou ne lui confère aucun droit ou privilège futur quant à l’obtention d’un document du même type ou non.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-378-07
STYLE OF CAUSE:	100193 P.E.I. INC., 100259 P.E.I. INC., 100412 P.E.I. INC., ROBERT ARSENAULT, JOSEPH AYLWARD, WAYNE AYLWARD, B & F FISHERIES LTD., BERGAYLE FISHERIES LTD., JAMES BUOTE, BULLWINKLE FISHERIES LTD., C.D. HUTT ENTERPRISES LTD., CODY-RAY ENTERPRISES LTD., DALLAN J. LTD., RICHARD BLANCHARD, EXECUTOR OF THE ESTATE OF MICHAEL DEAGLE, PAMELA DEAGLE, BERNARD DIXON, CLIFFORD DOUCETTE, FISHING 2000 INC., KENNETH FRASER, FREE SPIRIT INC., TERRANCE GALLANT, BONNIE GAUDET, DEVIN GAUDET, NORMAN GAUDET, PETER GAUDET, RODNEY GAUDET, TAYLOR GAUDET, GAVCO FISHING ENTERPRISES LTD., CASEY GAVIN, JAMIE GAVIN, LEIGH GAVIN, SIDNEY GAVIN, GRAY LADY ENTERPRISES LTD., DONALD HARPER, HARPER'S FISH HOLDINGS LTD., JAMIE HUSTLER, CARTER HUTT, KRISTA B FISHING CO. LTD., LAUNCHING FISHERIES INC., TERRY LLEWELLYN, IVAN MACDONALD, LANCE MACDONALD, WAYNE MACINTYRE, DAVID MCISAAC, GORDON L. MACLEOD, DONALD MAYHEW, MEGA FISH CO. LTD., AUSTIN O'MEARA, PAMELA RICHARDS AND TRACEY GAUDET, ADMINISTRATORS OF THE ESTATE OF PATRICK ROCHFORD, TWIN CONNECTIONS INC., W.F.M. INC., WATERWALKER FISHING CO. LTD. AND BOYD VUOZZO v HER MAJESTY THE QUEEN
PLACE OF HEARING:	CHARLOTTETOWN, PRINCE EDWARD ISLAND
DATE OF HEARING:	MAY 26-28, 2015
ORDER AND REASONS:	BOSWELL J.
DATED:	JULY 30, 2015

APPEARANCES:

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SOLICITORS OF RECORD:

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