Date: 20081209

Docket: T-895-07

Citation: 2008 FC 1358

[ENGLISH TRANSLATION]

Ottawa (Ontario), December 9, 2008

Present: Shore J.

BETWEEN:

**ASSOCIATION DES CRABIERS ACADIENS INC.,
being a company duly incorporated under the laws of New Brunswick,
JEAN-GILLES CHIASSON, in his personal name 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,
in his personal capacity 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 Québec,
DANIEL DESBOIS, in his personal name *and in his capacity as* administrator
of the l'Association des crabiers de la Baie, and ROBERT F. HACHÉ**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Previously

[1] [1] [...] On an appeal from a discretionary decision of the Prothonotary, the Court must first ascertain whether the decision was "clearly wrong" in the sense that his exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts, or that the Prothonotary improperly exercised his discretion on a question vital to the final issue of the case (see ***Canada v. Aqua-Gem Investments Ltd.,*** 1993 CanLII 2939 (FCA), [1993] 2 F.C. 425 at 463). If the exercise of the Prothonotary's discretion is neither clearly wrong nor concerns a question vital to the final issue of the case, the Court will summarily dismiss the appeal without reconsidering it on its merits.

[6] [...]

[TRANSLATION]

It is not whether evidence through a trial might be superior, but whether the affidavit evidence heard on judicial review would be inadequate.

[17] What seems to be lost sight of is that the learned Prothonotary was considering only whether to convert the judicial review into an action. In exercising his discretion not to do so in this case, he made findings respecting the irrelevance of the economics of power generation and the other findings cited by the respondents. However, any incidental findings made by him are not binding on the judge hearing the judicial review and therefore do not constitute determinations vital to the final issue of the judicial review.

(*British Columbia Hydro Power Authority v. Canada (Attorney General)* (1997), 137 F.T.R. 259,

[1997] F.C.J. n^{o} 1333 (QL), as specified by Justice Marshall Rothstein).

II. Judicial proceedings

[2] This is an appeal filed by the applicants against a decision issued by prothonotary Richard

Morneau dated April 22, 2008 (Decision), dismissing the applicants' motion to have the application

for judicial review heard as if it were an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, L.R., 1985, c F-7 and to have it combined with case T-1271-07 under Rule 105 of the *Federal Courts Rules*, SOR/98-106).

III. Facts

[3] On May 24, 2007, the applicants filed an application for judicial review against the Attorney General of Canada to contest the adoption by the Minister of Fisheries and Oceans of a fisheries management plan for snow crab announced on April 25, 2007 (Plan). This Plan was supported with a decision note entitled "Memorandum to the Minister: 2007 Management Plan Snow Crab Areas 12, 18, 25, 26" signed by the Minister on April 20, 2007 (decision note). The minister approved the Plan by basing himself on the reasons set out in the decision note.

[4] The purpose of the application is to cancel and invalidate the Plan and all decisions made concerning the implementation of elements of the Plan. The applicants contested four elements of the Plan for which the Minister of Fisheries and Oceans exceeded his jurisdiction by deviating from the principles set out in the *Fisheries Act*, L.R., 1985, c F-14, the *Fishery regulations (general provisions)*, SOR/93-53 and the *Atlantic Fishery Regulations, 1985, SOR-86-21/*, (Regulations) :

a) The imposition of a specific fishing period for a particular sector of area 12 (which is a nautical mile wide and stretches along zone 19);

b) The repartition of the Total Allowable Catch (TAC) among the various groups of fishermen;

c) The assignment--made by the Minister of Fisheries and Oceans--of a part of the TAC to some groups of fishermen;

d) The prohibition on using--in some areas and starting from 2008--crab pots with mesh sizes that are over seventy-five (75) millimeters.

[5] The application was accompanied by a request for access to records under Rule 317 of the *Federal Courts Rules*. The applicants requested--through a motion dated July 23, 2007--that the Court issue an order to have the respondents fully disclose the documents similar to the one found in a cause of action. In his decision dated July 27, 2007, (*Assoc. des crabiers acadiens Inc. v. Canada (Attorney General)*, 2007 FC 781, 68 Admin. L.R. (4th) 217 (*Crabiers acadien*)), prothonotary Morneau dismissed the motion because the documents sought were not before the Minister when the Plan was adopted. The request for access to records was--in nature--a request for information and documents that is found at the interlocutory stage of an action rather than in an application for judicial review.

[6] Following this decision dated July 27, 2007, the parties filed their affidavits. Mr. Robert Haché, on behalf of the applicants, filed an affidavit in which he provided details concerning the historical facts of the connection between the parties and the development of snow crab fishing. Mr. Rhéal Vienneau, Regional Manager, Resources Management Division of the Fisheries and Aquaculture Management Branch, Gulf region, filed an affidavit in response to Mr. Haché's.

[7] Mr. Vienneau was subjected to a long examination on affidavit on November 23, 2007. During this examination, the respondent's attorneys were against—among other things—producing additional documents.

[8] On December 13, 2007, the applicants filed a motion asking this Court to order that the judicial review in question be heard as if it were an action pursuant to paragraph 18.4(2) of the Federal Courts Act and joined to T-1271-07 under Rule 105 of the *Federal Courts Rules* (discussed above).

IV. The decision that is the subject of the application

[9] By dismissing the motion to convert and to join, prothonotary Morneau underpins his decision by basing himself on three criteria in *Macinnis c. Canada (Attorney General)*, [1994] 2 F.C. 464, 166 N.R. 57 (C.A.):

a) The true nature of the questions the Court must answer in the Application;

b) The sufficiency of the assessment of the affidavit evidence;

c) The necessity of assessing the attitude and the credibility of the witnesses.

[10] By applying the first criterion, prothonotary Morneau determined that the real questions that the Court must answer with respect to the application have to do with knowing whether the Minister, by implementing the Plan, acted in compliance with the powers and obligations that were conferred on him by the *Fisheries Act* as a result of the relevant considerations rather than those that are subject to this Act. Prothonotary Morneau concluded that the history of the connection between

the parties and the development of snow crab fishing in addition to the validity and the existence of the alleged agreements between the parties are included among the relevant aspects in the context of the subject matter of the Application.

[11] As for the sufficiency of the assessment of the affidavit evidence and the credibility of the witnesses, prothonotary Morneau determined that Mr. Vienneau sufficiently evinced his knowledge concerning the information on the delayed fishery opening in area 12 and the mesh restrictions. The fact that during the examination on affidavit, the respondent refused to produce the exchange of correspondence that could have been relevant is, "A situation that could have been settled in a timely fashion by a motion to decide an objection, and not by an application for conversion" (Decision at para 25). The prothonotary added that "The applicants could also have sought affidavits to that effect from fishers in zone 19" (Decision at para 26).

[12] By dismissing the application for conversion, prothonotary Morneau did not decide the issue of joining the current case to the action for damages. Furthermore, he dismissed the application for consolidation, having accepted the respondent's argument that the remedies requested in the two cases are different.

[13] The action for damages is against the Attorney General of Canada and filed by the former and current members of the applicant associations in this case in addition to the members of a fourth association: les Crabiers du Nord-est inc. (whose president, Mr. Robert F. Haché, is the applicant in this case). These applicants claim that by adopting the Plan, the Minister set aside the agreements

that he has made since 1990 with traditional fishermen (elaborated upon below). These applicants claimed damages due to a breach of contract, tort of misfeasance in public office, expropriation without compensation, negligence in the exercise of discretion, inaccurate statements, unjustified enrichment, and breach of fiduciary duty. This action involves historical background of Snow Crab fishery, including the Plan.

[14] On the other hand, the applicants in this case are submitting a claim for a declaration of invalidity of the Minister's decisions regarding the Plan. The questions of law are completely different in the two cases. The action for damages will be settled with the assistance of the law of contract and torts; however, this case will be settled under administrative law. Finally, the current case had already reached a fairly advanced stage, that is to say the hearing itself. However, the action for damages had only just begun. When the decision was made, the action for damages was suspended pending a decision in a similar case.

V. Relevant provisions

[15] The Federal Court must use a summary procedure to rule on the applications for judicial review. However, there is an exception at paragraph 18.4(2) of the *Federal Courts Act*, which grants the Federal Court the power to convert an application for judicial review into an action:

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.

[16] According to Rule 105 of the *Federal Courts Rules*, the Federal Court has the power to join two cases:

105. The Court may order, in respect of two or more proceedings,	**105.** La Cour peut ordonner, à l'égard de deux ou plusieurs instances :
(*a*) that they be consolidated, heard together or heard one immediately after the other;	*a*) qu'elles soient réunies, instruites conjointement ou instruites successivement;
(*b*) that one proceeding be stayed until another proceeding is determined; or	*b*) qu'il soit sursit à une instance jusqu'à ce qu'une décision soit rendue à l'égard d'une autre instance;
(*c*) that one of the proceedings be asserted as a counterclaim or cross-appeal in another proceeding.	*c*) que l'une d'elles fasse l'objet d'une demande reconventionnelle ou d'un appel incident dans une autre instance.

VI. Matters in question

[17] The three questions raised are the following:

(1) What is the standard of review that applies to the prothonotary's decision?

(2) Should the application for judicial review proceed as an action pursuant to paragraph 18.4(2) of the Federal Courts Act?

(3) If this is the case, could this application for judicial review be joined to the action for damages pursuant to Rule 105 of the *Federal Courts Rules*?

VII. Analysis

(1) What is the standard of review that applies to the prothonotary's decision?

[18] In *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459, the Federal Court of Appeal found that Federal Court judges, on appeal of a prothonotary's decision, retain the right to exercise their discretion *de novo*, but this power must be exercised only in certain circumstances:

> [19] […]
>
> The judge on appeal against the discretionary order of a prothonotary must not intervene except in the two following cases:
>
> a) the order addresses issues that have a decisive influence on the outcome of the main case,
>
> b) the order is tainted by an overriding error, in the sense that the prothonotary exercised his discretion due to an incorrect principle or an incorrect assessment of the facts.

[19] With respect to the first step, in *Merck v. Apotex*, above, it was affirmed that the decisive test is strict:

> [22] [...] In my respectful view it cannot reasonably be said that a standard of review which subjects all impugned decisions of prothonotaries to hearings de novo regardless of the issues involved in the decision or whether they decide the substantive rights of the parties is consistent with the statutory objective Such a standard conserves neither "judge power" nor "judge time". In every case, it would oblige the motions judge to re-hear the matter. Furthermore, it would reduce the office of a prothonotary to that of a preliminary "rest stop" along the procedural route to a motions judge. I do not think that Parliament could have intended this result.
> [23] One should not, therefore, come too hastily to the conclusion that a question, however important it might be, is a vital one. Yet one should remain

> alert that a vital question not be reviewed de novo merely because of a natural propensity to defer to prothonotaries in procedural matters.

[20] In *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, [1993] F.C.J. n^{o} 130 (QL) (C.A.), Justice Mark MacGuigan concluded that emphasis must be placed on the subject of the orders as opposed to their effects:

> [98] [...] It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to before the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a pro forma matter) should be put after the prothonotary's decision. Any other approach, it seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law).

[21] In the same judgment, Chief Judge Julius A. Isaac suggested in his dissent that only orders on the merits that decide on the rights of the parties meet the requirement of a decisive influence. Thus, the issues that are "wholly collateral to the issues in dispute between the parties in the litigation" are not a part of the decisive influence on the main conclusion. Furthermore, by examining Ontario case law, Chief Judge Isaac noted that only decisions that prevent delivering a judgment on the merits of the case would be considered to have raised an issue that has a decisive influence (*Aqua-Gem*, above).

[22] We must ask ourselves if the proposed changes are decisive, whether they are authorized or not. If they are decisive, the judge must exercise his discretion *de novo*.

[23] If we determine that the order in the case does not have a decisive influence on the main conclusion, we must move on to the second step of the test established in *Merck v. Apotex*, above, before this Court determines that it should intervene in one of the prothonotary's decisions. With respect to the second step, in *Aqua-Gem*, MacGuigan J. explained what this step involves as follows:

> [95] Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion de novo.

(*Aqua-Gem*, above; also, *Merck v. Apotex*, above at para 17).

[24] Paragraph 18.4(2) of the *Federal Courts Act* is an exception to paragraph (1) and must be analyzed while considering this paragraph. Thus, in *Macinnis*, below, the Federal Court of Appeal noted that the "clearest of circumstances" are required to hear an application for judicial review as if it were an action:

> [9] [...] One should not lose sight of the clear intention of Parliament to have applications for judicial review determined whenever possible with as much speed and as little encumbrances and delays of the kind associated with trials as are possible The "clearest of circumstances", to use the words of Muldoon, J., where that subsection may be used, is where there is a need for viva voce evidence, either to assess demeanour and credibility of witnesses or to allow the court to have a full grasp of the whole of the evidence whenever it feels the case cries out for the full panoply of a trial [...]

[25] The criteria that can be analyzed as part of a motion under paragraph 18.4(2) of the *Federal Courts Act* are not limited to the those that are adopted in *Macinnis*. In *Drapeau v. Canada (Minister of National Defence)* (1995), 179 N.R. 398, 54 A.C.W.S. (3d) 893 (F.C.A.), at paragraph 1, Justice James Hugessen concluded that paragraph 18.4(2) of the *Federal Courts Act* "places no

limits on the consider-ations which may properly be taken into account in deciding whether or not to allow a judicial review application to be converted into an action."

[26] It is only when one of these two situations are present that the court can hear the case de novo and substitute its discretion for the prothonotary's. Otherwise, the Court must summarily dismiss the appeal without re-examining the merits of the case (*British Columbia British Columbia Hydro*, above, para 1).

(2) Should the application for judicial review be heard as if it were an action pursuant to paragraph 18.4(2) of the *Federal Courts Act*?

Does the order concern issues that have a decisive influence on the conclusion of the main case?

[27] The question of knowing whether this case should be heard as if it were an action is not a question that has a decisive influence on the conclusion of the main case, namely the contestation of the Minister's decision, whether it was authorized or not (*McLeod Lake Indian Band v. Chingee* (1997), 144 F.T.R. 218, 76 A.C.W.S. (3d) 888 (F.C.) at para 10).

[28] By applying *Merck v. Apotex*, above, if the application for judicial review were heard as if it were an action, then the process would continue, but it would take another shape. However, if the application for judicial review were not heard as if it were an action—and thus were not joined—the process could continue nonetheless in an eventual and separate procedure. As a result, a de novo review of the prothonotary's decision is not justified in this respect considering that the two procedures are considered to be distinct and separate.

> Is the order clearly wrong, meaning that the prothonotary exercised his discretion based upon a wrong principle or upon a misapprehension of the facts?

[29] The applicants claim that prothonotary Morneau erred in law by choosing the criteria established in *Macinnis* only, above. They claim that prothonotary Morneau did not examine all the reasons that were submitted to him, such as the undesirable multiplicity of the procedures, the desire to avoid expenses and the useless delays, and the way the case was decided, which reflected a lack of urgency.

[30] However, at paragraph 21 of the Decision, prothonotary Morneau specifically mentioned that he did not ignore these other relevant criteria. He simply said that the analysis of the three stated criteria is sufficient to justify dismissing the motion. This does not imply that the prothonotary refused to consider the other criteria. Even if case law sets out many criteria to be considered to determine whether the application for judicial review must be heard as if it were an action, the prothonotary was free to determine which criteria he would give more weight to. Thus, considering the fact that prothonotary Morneau's decision was not manifestly wrong, this Court does not have to rule on the additional items raised by the applicants.

[31] The three criteria used by prothonotary Morneau are the following:

a) The true nature of the questions the Court must answer in the Application;

b) The sufficiency of the assessment of the affidavit evidence;

c) The necessity of assessing the attitude and credibility of the witnesses.

a) The true nature of the questions the Court must answer in the Application

[32] Justice Robert Décary explained that a judge "would err in accepting that a party could only introduce the evidence it wants by way of a trial if that evidence was not related to the narrow issues to be answered by the court" (*Macinnis*, above, at para 10). During an application for judicial review, the Court must determine whether the Minister committed a reversible error. In this case, the Court will have to determine whether the Minister exceeded his jurisdiction by basing his decision on grounds unrelated to fishery rules and regulations.

[33] According to his mandate, the Minister is obliged to manage, conserve and develop fisheries on behalf of all Canadians (*Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 R.C.S. 12, 142 D.L.R. (4th) 193, at para 36 to 37); thus, the only evidence that is relevant in this respect is the documentation that the Minister had before him when he made his decision:

> [6] [...] Relevance is determined from the Notice of Application and affidavits filed if any. It is to be remembered that the proceeding is an Application for Judicial Review of the decision of a tribunal. What is relevant is what was before the decision maker when he was reaching his decision. That is not quite the same as what was considered or taken into account by him. In my view what is included is everything that was put before him for the purposes of the decision-making process. It does not include everything dealing with the subject which may have crossed his desk at a prior time. It certainly does not include everything in his department or area of responsibility.

(*Ecology Action Centre Society v. Canada (Attorney General)*, 2001 FCT 1164, 109 A.C.W.S. (3d) 388).

[34] In a similar judgment, *British Columbia Hydro*, above, the applicant contested the validity of an order issued by the Minister of Fisheries and Oceans enjoining the respondent to open the

floodgates of the Daisy Lake dam. The order is designated by the expression "order concerning minimum flow rate." The respondent claimed that the Minister could not issue the order in question because, when Daisy Lake dam was built, the government of Canada had declared that no order concerning the minimum flow rate would be made and that it was based on this declaration that it agreed to build the dam.

[35] In *British Columbia Hydro*, the prothonotary considered the respondents' arguments, according to which it was necessary to hear the testimony concerning the declarations and the authority that was granted to them. Rothstein J. confirmed that the prothonotary's conclusion at trial, which dismissed the motion as a result:

> [18] [...]
>
> The Prothonotary was of the opinion that viva voce evidence of representations made over forty years ago and a wide-ranging investigation into the economics of the Daisy Lake Dam were unnecessary and in exercising his discretion against acceding to the respondents' position, his decision was not based on any wrong principle, misapprehension of the facts, nor did it raise a question vital to the final issue of the case.

[36] In this case, the applicants are claiming that the repartition of the TAC among the various groups of fishermen added new participants to the snow crab fishery in the Southern Gulf of St. Lawrence. Prothonotary Morneau considered the applicants' arguments, according to which it was necessary to hear the testimony concerning the alleged agreements between the parties dated 1990, 1997, and 2002, though which the Minister committed himself to permanently limiting the number of snow crab fishery licenses to 130. The holders of these 130 licences were called traditional

crabbers (traditional fishers). The applicants are claiming that by issuing new licenses to fishing organizations (new access fishers), the Minister reneged on the agreements reached with traditional fishers.

[37] Like the prothonotary in *British Columbia Hydro*, above, prothonotary Morneau also reasonably concluded that the alleged agreements are not relevant to this Application because they are not a part of the core Application itself (Decision at para 23).

[38] However, prothonotary Morneau already ruled on a motion requesting such information. In a judgment on a motion to have documents related to this case forwarded, prothonotary Morneau concluded that "with respect to the decision referred to, namely the adoption of the Plan, I consider that the applicants can only request the documents that were before the Minister when the Plan was adopted" (*Crabiers acadiens*, above at para 11); thus, the applicants cannot do what they were prevented from doing in the motion to have documents forwarded.

[39] By dismissing the application of *Jazz Air LP v. Toronto Port Authority*, 2006 FC 705, 294 F.T.R. 278, reasons adopted, but remedy varied by *Jazz Air LP v. Ports Toronto*, 2006 FC 904, [2006] F.C.J. n^{o} 1155 (QL), on the basis of the necessity of having had bad faith for a motion to convert to be granted, the prothonotary misinterpreted case law. In *Jazz Air*, prothonotary Martha Milczynski granted the conversion based on three items. Only two items concern bad faith: (1) The need to assess *viva voce* the attitude and the credibility of the witnesses, and (2) the undesirable multiplicity of the procedures in which there are many decisions that were supposedly made in bad

faith. She also concluded that it was a complex trade dispute; and, as a result, it was necessary to obtain the history of the exchanges between the parties by means of an action. Furthermore, prothonotary Milczynski concluded that the application was difficult to manage, complex, and without the procedural guarantees of an action. In her opinion, the matters in question could not be established or assessed in a satisfactory way through considering an item of affidavit evidence.

[40] However, *Jazz Air* can be distinguished from this case by means of its facts, considering that among all the other items specified above, Jazz Air did not contest any decision or conduct, but rather alleged that the governmental organization breached its duty to act fairly.

b) The sufficiency of the assessment of the affidavit evidence

[41] The person subject to an examination plays a different role based on the context of the proceedings, namely either that of a counter-examination on affidavit or an examination for discovery. *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1997), 146 F.T.R. 249, 80 C.P.R. (3d) 550 established the distinctions between these proceedings:

> [4] […]
>
> a) the person examined is a witness as opposed to a party;
>
> b) the answers given are items of evidence as opposed to admissions;
>
> c) the witness can legitimately answer that he or she ignores something; the witness is under no obligation to make enquiries.
>
> d) a witness cannot be required to produce a document unless it is in his or her custody or possession, and the same rules apply to all witnesses
>
> e) rules concerning relevance are more limited.

[42] Whether an item of evidence presented during a trail could be superior to affidavit evidence during a judicial review is not a factor the Court must consider:

> [10] [...] the key test is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior.

(*Macinnis*, above).

The right to a counter-examination is not sufficiently judicially thwarted due to the lack of personal knowledge alleged by the affiant.

[43] In this case, the applicants are claiming that the decision note expressly indicates that the decision to delay opening a part of area 12 was due to pressure exerted by the fisherman of area 19, namely the neighbouring fishermen of area 12; however, the Plan does not contain specific grounds justifying the measure. The applicants are claiming that neither Mr. Vienneau's affidavit nor his cross-examination reveal the reasons for which the application made by the fishermen of area 19 was accepted.

[44] Contrary to the applicant's claim, the documents that were produced by the Minister under Rule 318 of the *Federal Courts Rules* are sufficient to assess the evidence. Tab 6 of the decision note, entitled "Additional Information: Boundary Line Between Crab Fishing Area 12 and Crab Fishing Area 19," provides a detailed analysis explaining the issue regarding the delayed opening. Tab 6 summarized the grounds for the pressure exerted by the fishermen of area 19 in addition to their recommendations. Furthermore, the documents that were requested in the cross-examination of Mr. Vienneau's affidavit had been deemed to be irrelevant by prothonotary Morneau in *Crabiers*

acadiens, above. Prothonotary Morneau dismissed the applicant's motion because the required documents were not before the Minister when the Plan was adopted.

[45] Furthermore, prothonotary Morneau reasonably concluded that the applicants could have obtained the affidavits of the fishermen of area 19. No evidence in the file proves that the applicants took unsuccessful steps toward obtaining these affidavits nor that these fishermen have interests that oppose the applicants'.

[46] It is appropriate to note that the rules governing the admissibility of evidence and the relevance of the facts are the same in either case regardless of whether the evidence is presented in the shape of an affidavit or viva voce. The issue of the sufficiency of the affidavit evidence in a motion to convert is not intended to determine or rule on the relevance or admissibility of the evidence that a party would like to present during the Application hearing. These issues raise points that must be ruled on by distinct motions rather than a conversion.

[47] As for assigning part of the TAC to new access fishing groups, the applicants are claiming that it was intended to rationalize lobster fishing. As Mr. Vienneau explains in his affidavit, the expression "streamlining" is one of [translation] "the measures taken to decrease the number of fishermen involved in a particular fishery" (Mr. Vienneau's affidavit, para 26). Relying on *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, 270 D.L.R. (4th) 552, which confirmed that it is illegal for the Minister to use halieutic resources to finance government activities, the applicants claim that the Minister apparently uses the snow crab resource as a leverage

to finance the streamlining of some other fisheries, namely lobster and ground fish fisheries. The applicants maintain that such a streamlining method represents an illegal appropriation of halieutic resources by the Minister.

[48] Following *Larocque*, above, the Minister changed the rationale behind the grants issued to new access fishermen. In his affidavit, Mr. Vienneau claims that such grants are now based on the principle of fairness:

> 29. […] The intended objective remains the same: a fair repartition of the resource intended to grant [new access] fishermen the opportunity to generate additional income from their fishing business that will thus provide them with greater financial stability.

In addition, the Minister's representative notes that "the Minister of Fisheries and Oceans did not receive any funding or compensation what-so-ever" (Mr. Vienneau's affidavit, at para 35).

[49] However, according to the applicants, the summary procedure, which is unique to judicial reviews, deprives them of the ability to examine the representatives of the groups of fishermen to check whether the policy described by Mr. Vienneau is complied with and to confirm whether the explicit or implicit conditions continue to be imposed by the Minister of Fisheries and Oceans to ensure the streamlining of lobster and ground fish fisheries. In particular, the applicants claim that a group, the Maritimes Fishermen’s Union (MFU), still has a plan to streamline lobster fisheries. The applicants contest prothonotary Morneau's conclusion regarding the possibility of obtaining affidavits from MFU to prove that it has a lobster fishery streamlining plan, and by that means obtain all the evidence necessary to pursue the application for judicial review. According to the applicants, since MFU members benefit from snow crab allowances, they have no interest in

subscribing to affidavits that would eventually attack the way the Minister proceeds. Thus, it is impossible to claim that the applicants must obtain affidavits from individuals whose interests diverge from theirs.

[50] In a stand that is similar to the one toward fisherman of area 19, prothonotary Morneau also concluded that the applicants could have sought to obtain affidavits from MFU fishermen. No evidence in the file proves that the applicants took unsuccessful steps toward this objective and that the fishermen have interests that oppose the applicants'. In the case of the MFU, Mr. Haché proved that some MFU lobstermen who fish for snow crabs voluntarily give him information (Mr. Haché's affidavit, at para 42). With respect to this question, prothonotary Morneau's decision is not clearly wrong and his discretion is not exercised under a wrong principle or a misapprehension of the facts.

[51] As for the prohibition—from 2008 onwards—in some areas on using crab pots with mesh sizes superior to 75 millimetres, Mr. Vienneau stated during his cross-examination that this limit was a proactive conservation measure and that the traditional fleet had been consulted by the Minister about a scientific study on this subject. Prothonotary Morneau found the clarifications provided by Mr. Vienneau were sufficient during his examination. In the present context, this conclusion is not erroneous.

c) <u>The necessity of assessing the attitude and credibility of the witnesses.</u>

[52] As for the necessity of assessing the attitude and credibility of the witnesses concerning the alleged agreement dated 1990, the relevance of this to the present judicial review has already been

dismissed, as explained above on the subject of the true nature of the questions the Court must answer in the Application. Furthermore, the applicants allege that they question the validity of Mr. Vienneau's affirmations in both his affidavit and his cross-examination. However, even if Mr. Vienneau did not participate in the negotiations pertaining to the alleged agreement, he inquired into them. The applicants did not successfully prove that Mr. Vienneau contradicted himself during his cross-examination, nor that he contradicted himself with respect to his affidavit or the documentation submitted as evidence. The applicants did not prove that the transcript of the cross examination dated November 23, 2007, is not sufficient for the Court to be able to assess the questions surrounding the credibility of the witness.

[53] The applicants drew attention to *Radil Bros. Fishing Co. v. Canada (Department of Fisheries and Oceans, Pacific Region)* (1998), 78 A.C.W.S. (3d) 451, [1998] F.C.J. n^{o} 292 (QL), to suggest that the affidavit evidence is insufficient when a past transaction is related to an application for judicial review. However, the transaction in *Radil Bros* was a commercial transaction concerning licenses. In this case, there is no transaction that requires an assessment of the attitude and credibility of the witnesses.

(3) If this is the case, could this application for judicial review be joined to the action for damages pursuant to Rule 105 of the Federal Courts Rules?

Does the order concern issues that have a decisive influence on the main conclusion?

[54] The question of whether the present remedy must be joined with another case does not have a decisive influence (*Vogo Inc. v. Acme Window Hardware Ltd.*, 2004 FC 851, 256 F.T.R. 37 at para 75). By applying *Merck v. Apotex*, above, if the application for judicial review is heard as if it

were an action and is then joined with another case, the process would continue. The opposite is also true. Both can be done another way, that is to say separately, one after the other. Thus, the aforementioned orders do not concern the issues that have a decisive influence on the main conclusion, so a de novo review of the prothonotary's decision is not justified in this case.

Is the order tainted by an overriding error, in the sense that the prothonotary exercised his discretion due to an incorrect principle or an incorrect assessment of the facts?

[55] The objectives of joining cases consist of preventing the multiplication of cases and to promote a quick and relatively inexpensive settlement of these cases (*Global Restaurant Operations of Ireland Ltd. v. Boston Pizza Royalties Limited Partnership*, 2005 FC 317, 38 C.P.R. (4th) 551 at para 11; also, *John E. Canning Ltd. v. Tripap Inc.* (1999), 167 F.T.R. 93, 88 A.C.W.S. (3d) 543 (F.C.) at para 27). Relevant factors to consider in determining whether joining cases is appropriate include the following factors: the same parties are involved, judicial and factual questions are shared in common, causes for actions and evidence are similar, and the probability that the decision in a case will allow another case to be settled (*Global Restaurant*, above at para 11; also, *Canning*, above at para 27). All that to say that joining cases is justified only if there are substantial questions of law and facts and requested remedies are shared in common (*Canning*, above at para 33).

[56] Having dismissed the applicants' motion in order for the present remedy to be heard as if it were an action, prothonotary Morneau had not addressed the additional application concerning joining the present remedy to the action for damages. However, he remarked that he would have dismissed this application for reasons put forward by the respondent in his written representations,

that is to say that the essential identity of the requested remedies, the essential identity of the questions of law, and the requested remedies in both cases are different.

[57] As for the essential identity of the requested remedies in the action for damages, the applicants are seeking compensation due to breaches of contracts, tort of misfeasance in public office, expropriation without compensation, negligence in the exercise of discretion, inaccurate statements, unjustified enrichment, and breach of fiduciary duty. However, the applicants in the case are seeking a declaration of invalidity of the Minister's decisions concerning the Plan.

[58] The issues of law are completely different in both cases. The action for damages will be decided with the assistance of issues related to the law of contracts and torts, so this case will be decided with the assistance of issues related to administrative law, namely the Minister's exercise of his discretion.

[59] Finally, this case has reached a fairly advanced stage because the affidavits were filed and the cross-examinations on affidavits were completed. The parties need only to file their documents for the process to proceed to a hearing. Furthermore, the action for damages is in its early stages. When the Decision was made, the action for damages was suspended while waiting for a decision to be made concerning a similar case.

[60] Since the Court is not involved in a *de novo* analysis, prothonotary Morneau's reasons for not granting the joining of the cases are reasonable.

VIII. Conclusion

[61] The Court concludes that prothonotary Morneau's order does not concern the issues that have a decisive influence on the main conclusion and that the order is reasonable given the context of the case.

JUDGMENT

THE COURTS ORDERS that the appeal be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-895-07
STYLE OF CAUSE:	**ASSOCIATION DES CRABIERS ACADIENS INC., being a company duly incorporated under the laws of New Brunswick, *JEAN-GILLES CHIASSON, in his personal name 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, in his personal capacity 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 Québec, DANIEL DESBOIS, in his personal name and in his capacity as administrator of Association des crabiers de la Baie, and ROBERT F. HACHÉ**
PLACE OF HEARING:	Montréal (Quebec)
DATE OF HEARING:	November 25, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	December 9, 2008

APPEARANCES:

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Ginette Mazerolle	FOR THE RESPONDENT

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