Federal Court  Cour fédérale

**Date : 20110314**

**Docket: T-725-08**

**Citation: 2011 FC 305**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, March 14, 2011**

**PRESENT: The Honourable Madam Justice Bédard**

**BETWEEN:**

**ASSOCIATION DES CREVETTIERS ACADIENS DU GOLFE INC., duly incorporated under the laws of New Brunswick, MICHEL LÉGÈRE, in his personal capacity and in his capacity as representative of the Association des crevettiers acadiens du Golfe Inc., ASSOCIATION DES PÊCHEURS DE CREVETTES DE MATANE INC., duly incorporated under the laws of Quebec, PIERRE CANTIN, in his personal capacity and in his capacity as representative of the Association des Pêcheurs de crevettes de Matane Inc., and O'NEIL BOND**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review under subsection 18(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, of the adoption and implementation of certain aspects of the 2008Gulf of St. Lawrence shrimp harvesting plan (the harvesting plan) by the Minster of Fisheries and Oceans (the Minister). The harvesting plan was announced by the Minister on April 4, 2008, and subsequently amended on April 25, 2008.

[2] The applicants are shrimp harvesters' associations and their representatives. The parts of the harvesting plan in issue in this application for judicial review concern the granting of temporary allocations for the shrimp fishery and the issuance of fishing licences to fishers other than traditional shrimp harvesters. More specifically, the applicants are challenging an allocation to "core" fishers in Prince Edward Island and Nova Scotia (groundfish and lobster harvesters) and another allocation to groundfish harvesters in New Brunswick and Quebec.

[3] For the following reasons, I find that the application for judicial review must be dismissed.

## I. Issues

[4] The parties' arguments raise the following issues:

1. Are the proceedings moot? If so, should the Court exercise its discretion to decide the matter?

2. Can this application for judicial review address both the adoption of the harvesting plan and its implementation, including the fishing licences issued under the harvesting plan?

3. Did the Minister act beyond his powers in issuing fishing licences that did not comply with the statutory and regulatory scheme and were not for the purpose of fishing?

4. Did the Minister unlawfully subdelegate his authority to issue fishing licences by allowing fishers' associations to determine how allocations are distributed and who receives fishing licences?

5. Did the Minister fail to give reasons for his decision to amend the harvesting plan, thereby making an arbitrary decision?

6. Did the Minister unlawfully make fishing allocations to groundfish harvesters to fund the groundfish fishery rationalization program?

## II. Background

[5] To understand the nature of the of the parties' arguments, it is helpful to give an overview of the history of the shrimp fishery in the Gulf of St. Lawrence and the context in which the 2008 harvesting plan was adopted.

[6] The Minister is responsible for managing fishery resources and adopting conservation measures for various species, including Gulf of St. Lawrence shrimp. One of the tools he uses to this end is an annual harvesting plan which sets out a number of parameters and conditions governing fishery activities for a given year. The annual harvesting plan establishes the total allowable catch (TAC) for the year, allocates the TAC among different fishing areas and different groups of fishers, sets the opening dates for the fishing season in each area, and so forth.

[7] The shrimp fishery has been subject to management measures since 1976. From 1976 to 1990, the fishery was managed according to a competitive model under which fishers were issued licences allowing them to fish without restrictions until the overall TAC was reached. In 1990, shrimp harvesters were divided into two groups: Group A, which continued to be subject to a competitive fishery model, and Group B, consisting of fishers who chose to submit to an individual quota policy, whereby each fisher in Group B received an individual quota equivalent to a share of the annual allocation to the group. Group B consisted of fishers from Quebec and New Brunswick. First Nation band councils from these two provinces were later added to this group. In the industry's jargon, fishers in Group B who have their fishing licences renewed each year are called "traditional shrimp harvesters". In this application for judicial review, the applicants are traditional shrimp harvesters' associations and their representatives.

[8] In 1993, the government ordered a moratorium on the cod fishery in the Gulf of St. Lawrence, which led to a significant reduction in the allocation for groundfish harvesters and

caused them considerable economic hardship. Meanwhile, shrimp reserves had increased over the years.

[9] To help groundfish harvesters cope with the hardship caused by the moratorium, the Minister decided that, starting in 1997, the TAC for shrimp would be shared between traditional shrimp harvesters and groundfish harvesters. This sharing of resources was designed to help fishers affected by the moratorium diversify their activities, and to create favourable conditions for rationalizing the groundfish fishing fleets (by allowing other fishers in the fleet to buy back fishing licences, thereby reducing the number of licence holders). In 1997, a portion of the annual allocation for traditional shrimp harvesters in Group B was given to groundfish harvesters from New Brunswick and Quebec through temporary allocations.

[10] Starting in 1998, the government also decided to give shrimp fishery access rights to fishers from Prince Edward Island and Nova Scotia, who had never had access to this fishery before. These allocations were always made on a temporary basis out of the overall TAC for shrimp in the Gulf sector. They were not taken directly from the allocation for Group B.

[11] From 1998 to 2007, the Department of Fisheries and Oceans (DFO), traditional shrimp harvesters in Group B and groundfish harvesters' associations entered into five-year co-management agreements. These agreements allowed fishers to better predict the portion of the TAC that would be allocated to them each year and gave them advance knowledge of some of the fishery management measures to be implemented. The co-management agreements set out a formula for sharing the TAC between traditional shrimp harvesters and groundfish harvesters.

[12] In 2008, the Minister announced his intention to make permanent the sharing of a part of the shrimp catch allocation among traditional shrimp harvesters, groundfish harvesters from Quebec and New Brunswick and "core" group fishers from Prince Edward Island and Nova Scotia who until then had been given temporary allocations. Discussions took place between the groups' representatives in hopes of adopting a third co-management agreement with a permanent resource-sharing arrangement, but a consensus could not be reached.

[13] Over the years, the fishers who were given temporary allocations received allocations amounting on average to 21.1% of the allocation for shrimp harvesters in Group B, and they wanted to be entitled to this share permanently. Traditional shrimp harvesters, hit hard by falling shrimp prices and rising fuel costs, claimed that they could no longer afford to share their allocation with groundfish harvesters and wanted the sharing arrangement cancelled.

[14] This is the context in which the Minister adopted the 2008 harvesting plan. The harvesting plan announced on April 4, 2008, established a TAC of 25,153 tonnes divided between the traditional shrimp harvesters, who were given 85% of the TAC, and the groundfish harvesters from Quebec and New Brunswick, who were given 15%. The harvesting plan also provided for a temporary allocation of 526 tonnes for "core" group fishers from Prince Edward Island and Nova Scotia. In addition, the harvesting plan contained a statement of the Minister's intention to find a permanent sharing formula starting in 2009. This part of the harvesting plan was initially challenged in the application for judicial review but was not dealt with in the applicants' memorandum or pleaded at the hearing.

[15] The groundfish harvesters were unhappy with the share given to them, as it was well below the 21% share that they had received, on average, in past years. They argued that this reduction jeopardized their ability to turn a profit, so they demanded an increase in the share that had been granted to them. On April 25, 2008, the Minister announced that the temporary allocation for groundfish harvesters would be raised to 719 tonnes.

## III. Analysis

### *(1) Are the proceedings moot? If so, should the Court exercise its discretion to decide the matter?*

[16] The Attorney General of Canada (the respondent) submits that the 2008 harvesting plan and the fishing licences issued for the 2008 fishing season are no longer of any effect because the fishing season ended long ago; consequently, these proceedings are moot.

[17] The respondent also submits that the Court should not exercise its discretion to hear the case on the merits because the criteria developed in *Borowski v Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 [*Borowski*], have not been met: there is no longer an adversarial relationship between the parties, two other harvesting plans have been adopted since 2008, and the applicants did not challenge those plans.

[18] The applicants do not dispute the mootness of the proceedings but submit that the Court should exercise its discretion to decide the matter on the merits because it raises important issues regarding the Minister's authority, and these issues are likely to come up again. The applicants also state that procedural delays in applications for judicial review make it impossible to hear an application for judicial review of a given year's harvesting plan before the season has ended and the harvesting plan is no longer in effect. Refusing to decide the matter would therefore be tantamount to immunizing the Minister against any challenge to the harvesting plans he adopts each year for various species. The applicants relied on *Area Twenty Three Snow Crab Fisher's Association v Canada (Attorney General)*, 2005 FC 1190, 279 F.T.R. 137, and *Native Council of Nova Scotia v Canada (Attorney General)*, 2007 FC 45, 306 F.T.R. 294, [*Native Council of Nova Scotia*], in support of their arguments.

[19] The issues raised in this application are now moot, but I find that the Court should exercise its discretion to decide the matter.

[20] In *Borowski*, the Supreme Court set out the criteria that must guide the Court in determining whether it would be appropriate to exercise its discretion to hear a moot case, namely, the existence of an adversarial context, concern for judicial economy and the need for the Court's role in the law-making process.

[21] As submitted by the applicants, because of the limited duration of an annual harvesting plan and the delays associated with the judicial process, it is almost impossible to decide an application for judicial review while the harvesting plan is still in effect. In the present case, I

think this point is important. Although moot, the issues raise interesting questions that may arise again in respect of another harvesting plan and that will in all likelihood always be moot by the time the Court is asked to decide an application for judicial review. This situation would have the illogical consequence of immunizing all annual harvesting plans against judicial review. This principle had already been accepted by Justice Layden-Stevenson in *Native Council of Nova Scotia*.

*(2) Can this application for judicial review address both the adoption of the harvesting plan and its implementation, including the fishing licences issued under the harvesting plan?*

[22] The applicants are challenging certain aspects of the harvesting plan, as well as the implementation of these aspects, most notably the issuance of fishing licences. They argue that this application for judicial review may validly challenge both the harvesting plan and the licences subsequently issued under it, without contravening Rule 302 of the *Federal Courts Rules*, SOR/98-106 (the Rules). They submit that the harvesting plan is the product of an ongoing process and is not complete until the announced policies have been implemented by issuing fishing licences. Although they chose not to demand that the fishing licences be cancelled, as the licences have expired, they submit that the notice of application for judicial review clearly challenged the plan's implementation and, more specifically, the issuance of fishing licences, and they maintain their demand for declaratory relief regarding the licensing process. The applicants also submit that, if I find that the application for judicial review is inconsistent with Rule 302 of the Rules, I should order that the file be divided up to allow the applicants to recommence proceedings with regard to the fishing licences.

[23] The respondent, however, submits that the application for judicial review attacks the harvesting plan and cannot be used to challenge, in the same proceeding, all subsequent decisions made when implementing the harvesting plan, which would include the fishing licences issued. The respondent submits that it is important to distinguish the harvesting plan from the fishing licences issued under it by the Minister. The respondent states that Rule 302 of the Rules provides that an application for judicial review is limited to one order at a time and argues that the adoption of a harvesting plan entails a statement of intent informing the interested parties of the parameters that the Minister intends to apply with regard to fishery management for a given year. The plan also serves to guide the Minister in his subsequent actions; however, it is not binding on the Minister and does not create obligations for the Minister, who may amend the plan at any time. The respondent relies on *Canada (Attorney General) v Arsenault*, 2009 FCA 300, 1 Admin. L.R. (5th) 91 [*Arsenault*]. The respondent also submits that an order made by Prothonotary Tabib on August 18, 1998, disposing of a request for material, limited the debate to the fishing licences alone. The respondent further argues that if the application could be viewed as challenging the shrimp fishery licences issued for the 2008 season, then it would not be in compliance with the Rules.

[24] I find that the applicants' arguments must fail.

[25] The Minister's fishery management powers are set out in the *Department of Fisheries and Oceans Act*, R.S.C., 1985, c. F-15 (the DFO Act), and the *Fisheries Act*, R.S.C., 1985, c. F-14 (the Act).

[26] Section 4 of the DFO Act provides as follows:

| | |
|---|---|
| **4.** (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to | **4.** (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés : |
| (*a*) sea coast and inland fisheries; | *a*) à la pêche côtière et à la pêche dans les eaux internes; |
| (*b*) fishing and recreational harbours; | *b*) aux ports de pêche et de plaisance; |
| (*c*) hydrography and marine sciences; and | *c*) à l'hydrographie et aux sciences de la mer; |
| (*d*) the coordination of the policies and programs of the Government of Canada respecting oceans. | *d*) à la coordination des plans et programmes du gouvernement fédéral touchant aux océans. |
| Idem | Idem |
| (2) The powers, duties and functions of the Minister also extend to and include such other matters, relating to oceans and over which Parliament has jurisdiction, as are by law assigned to the Minister. | (2) Les pouvoirs et fonctions du ministre s'étendent en outre aux domaines de compétence du Parlement liés aux océans et qui lui sont attribués de droit. |

[27] Sections 7 to 9 of the Act, which grant the Minister fishery licensing powers, read as follows:

| | |
|---|---|
| Fishery leases and licences | Baux, permis et licences de pêche |

**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.

Idem

(2) Except as otherwise provided in this Act, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.

Fees

**8.** Except where licence fees are prescribed in this Act, the Governor in Council may prescribe the fees that are to be charged for fishery or fishing licences.

Minister may cancel licence

**9.** The Minister may suspend or cancel any lease or licence issued under the authority of this Act, if

(*a*) the Minister has ascertained that the operations under the lease or licence were not conducted in conformity with its provisions; and

(*b*) no proceedings under this Act have been commenced

**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.

Réserve

(2) Sous réserve des autres dispositions de la présente loi, l'octroi de baux, permis et licences pour un terme supérieur à neuf ans est subordonné à l'autorisation du gouverneur général en conseil.

Droits

**8.** Le gouverneur en conseil peut fixer les droits exigibles pour les licences d'exploitation ou les permis de pêche à l'égard desquels aucun droit n'est déjà prévu par la présente loi.

Révocation par le ministre

**9.** Le ministre peut suspendre ou révoquer tous baux, permis ou licences consentis en vertu de la présente loi si :

*a*) d'une part, il constate un manquement à leurs dispositions;

| | |
|---|---|
| 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. |

[28] In *Arsenault*, the Federal Court of Appeal clearly distinguished the decision the Minister makes when adopting a harvesting plan from the one he makes when issuing fishing licences. The harvesting plan is a statement, an announcement by the Minister of the parameters he intends to apply to the management of a fishery for a given year. This plan, which is within the Minister's general jurisdiction over fisheries management, is not binding on the Minister and should not impinge on the discretion he subsequently exercises when deciding to issue a fishing licence. The Court wrote the following regarding the nature of a harvesting plan:

> [34] The Management Plan is at the heart of this appeal. By its issuance, the Minister made it known to interested parties and, in particular, to traditional crabbers, what policy and practice he had decided to adopt or intended to adopt for the coming year. . . .
>
> . . .
>
> [37] The learned Judge appears to have treated the Management Plan as a matter akin to the issuance of a license under section 7 of the Act. In other words, as in the case of a license, once the Management Plan was announced/issued, the Minister's discretion was at an end. In my view, the Judge was wrong in so concluding. I cannot possibly see how sections 7 and 9 of the Act can find application in the present matter since those provisions, on their clear wording, only apply to the Minister's absolute discretion to issue or authorize the issuance of fishing licenses (section 7) and, in the circumstances set out at paragraphs 9(*a*) and (*b*) of the Act, to the Minister's power to suspend or cancel a license. There can be no room to argue that the Management Plan falls within the ambit of those two provisions.
>
> [38] Rather, the Management Plan can only be viewed, in my respectful opinion, as a statement or an expression of the Minister's intent or as a guideline with respect to those matters that are discussed therein. Its clear intent is to outline those

> management and conservation practices and measures which the Minister believes are necessary for the coming year. Further, it is trite law that the Minister's policy does not, and cannot, fetter his discretion with regard to the matters dealt with in the policy. . . .
>
> [39] In my view, the Minister's powers to issue the Management Plan stem from his general authority to manage the fishery, as exemplified by section 4 of the *Department of Fisheries and Oceans Act*, R.S. 1985, c. F-15, which provides that: . . . .
>
> [40] Further, the Management Plan is consistent with the Minister's obligations to manage, conserve and develop the fishery on behalf of Canadians and in the public interest. At paragraph 37 of his Reasons for a unanimous Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, Major J. made the following remarks:
>
> [...]Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the Fisheries Act, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). […]
>
> . . .

[29] Therefore, in the present case, the harvesting plan should be distinguished from the fishing licences issued thereunder, and this application cannot challenge both the harvesting plan and the fishing licences on the basis that they are part of the continuum of the same decision. The decision to adopt a harvesting plan and the decision to issue a fishing licence are different decisions, based on different considerations and made pursuant to distinct powers. Moreover, the harvesting plan announced by the Minister is not static; it can be amended by the Minister and cannot be binding on him when he later decides to issue fishing licences.

[30] Can this application for judicial review be seen on other bases as challenging both the adoption of the harvesting plan and the fishing licences issued for 2008? In my view, it cannot.

[31] First, if the application is viewed as challenging the fishing licences issued after the harvesting plan was adopted, then it is deficient in several respects. It should have stated the date and details of each licence the applicants seek to have cancelled (subparagraph 301(*c*)(ii) of the Rules) and should have joined as respondents all persons affected by the order sought, in this case, the fishers' associations and persons other than traditional shrimp harvesters to whom the Minister issued fishing licences. The applicants' record should also have contained a copy of each licence challenged in the application (Rule 309).

[32] Furthermore, Rule 302 of the Rules provides that an application for judicial review shall be limited to a single order in respect of which relief is sought, unless the Court orders otherwise. In the present case, however, the applicants never filed a motion seeking this Court's authorization to have the review application challenge both the harvesting plan and the fishing licences. In this regard, in her order dated August 18 2008, Prothonotary Tabib clearly stated that the Court found that the application for judicial review did not challenge the fishing licences, and I am of the view that this order circumscribed the debate or, at the very least, clearly informed the applicants that the Court would consider that the review application only challenged the adoption of the harvesting plan. Prothonotary Tabib considered a request for material, pursuant to Rule 317 of the Rules, covering several documents, including the following:

> [TRANSLATION]
> 1. All of the material, internal memos, memoranda, e-mail messages, briefings, (scientific or other) studies, notices, press releases and information sheets pertaining to the design, development and/or adoption of the Plan and the amendment, as well as all correspondence from and/or to the Minister, deputy

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

[33] She denied the applicants' request for material on the basis that there was no evidence that the documents in issue were in the Minister's possession when the Minister adopted the harvesting plan. It is useful to reproduce the following excerpts from the order, which address documents listed in the second group:

> [TRANSLATION]
> . . .
>
> **WHEREAS**, finally, the application for judicial review clearly challenges the part of the harvesting plan dividing the TAC between traditional shrimp harvesters and other fishers; and while the application could perhaps, by extension, affect the administrative decisions and actions directly resulting from the implementation of the harvesting plan, the application clearly cannot combine the judicial review of multiple decisions and actions taken in implementing the harvesting plan but impugned on distinct grounds independent of the harvesting plan's validity.
>
> **WHEREAS** the reasons cited for challenging the issuance of licences to [TRANSLATION] "certain groups of fishers" related to the mechanism adopted by the Minister for issuing licences to groups of fishers on condition that they divide the licences among their members or third parties.
>
> **WHEREAS** counsel for the applicants admitted at the hearing that this mechanism is not provided for in or mandated by the harvesting plan, such that the mechanism and the grounds for judicial review are extraneous to the harvesting plan and the grounds for review raised against it.
>
> **WHEREAS** the application for judicial review, insofar as it claims to challenge the way the licences were issued, therefore contravenes Rule 302.

> **WHEREAS** the Court was never asked to authorize an exception to Rule 302, and no such authorization was granted.
>
> **WHEREAS** the Court deems it appropriate to adopt the approach followed by Prothonotary Morneau in *Associations des crabiers acadiens inc. et al. c. Canada*, 2007 CF 78, and not find that the application for judicial review covers the other decisions, such that the only decision challenged is the adoption of the harvesting plan (as amended) and that the only relevant material under Rule 317 is the documents that the Minister had when he adopted the plan.
>
> . . .

[34] Prothonotary Tabib's order was upheld by the Federal Court of Appeal on March 25, 2010 (Docket A-284-09). The applicants did not then try to file a new application for judicial review to challenge the fishing licences, nor did they apply under Rule 302 for authorization to have the application for judicial review challenge both the harvesting plan and the fishing licences. I find that it is too late at this stage of the proceedings to make such an application or to have the case split up and allow the applicants to recommence the proceedings with regard to the fishing licences issued.

[35] I therefore find that this application for judicial review must be limited to the adoption of the harvesting plan. Some of the issues and arguments raised by the applicants concern the licensing process, so in my view I do not have to decide them. Such is the case with the third and fourth questions, which I will address briefly to set forth the nature of the issues raised.

*(3) Did the Minister act beyond his powers in issuing fishing licences that did not comply with the statutory and regulatory scheme and were not for the purpose of fishing?*

[36] This argument concerns the temporary allocations of the shrimp fishery to “core” group fishers from Prince Edward Island and Nova Scotia. The applicants submit that the evidence shows that the Minister issued fishing licences, not to individual fishers, but to three fishers’ associations: the Gulf Nova Scotia Fleet Planning Board, the PEI Fishermen’s Association (PEIFA) and the PEI Groundfish Association. These associations did not have registered boats and were unable to use the licences they were issued. Instead, they resold their allocations by tender, to finance their activities, and then notified the Minister of the fishers’ identities, their individual quotas and the boats they would use. The Minister thus issued new licences in accordance with the associations’ instructions. The applicants therefore submit that the fishers who ultimately received the licences are not members of the fishers’ associations to which the Minister granted the allocations.

[37] The applicants submit that this procedure, which is authorized by the Minister and in which he is directly involved, is illegal because the licences attributed to the fishers’ associations are not for fishing, as required by the Act, but rather for resale. In the applicants’ opinion, this approach violates section 7 of the Act and is unrelated to the Minister’s fisheries management mandate. They argue that the Minister grants licences to allow fishers’ associations to finance their activities and that, in doing so, the Minister takes into account political and economic considerations that have nothing to do with fishery management and that are not consistent with the purpose of the Act.

[38] The applicants also submit that the initial licences granted by the Minister to the organizations are not compliant with the *Fishery (General) Regulations*, SOR/93-53 (the

Regulations), and the *Atlantic Fishery Regulations, 1985*, SOR/86-21. These licences do not identify any fishing vessel or fisher, whereas the regulations clearly require licences to indicate the name of the person authorized to employ the licence and the fishing vessel used; the regulations also stipulate that the licences be used directly for fishing, not for resale.

[39] The applicants' arguments all concern the licensing procedure, rather than the harvesting plan. In the harvesting plan, the Minister simply announced that shrimp harvesting licences would be granted to "core" group fishers from the two provinces in question. The plan makes no mention of the licensing procedure. Given my finding on the scope of this application for judicial review, I am of the opinion that I need not decide the issue raised by the applicants.

*(4) Did the Minister unlawfully subdelegate his authority to issue fishing licences by allowing fishers' associations to determine how allocations are distributed and who receives fishing licences?*

[40] This argument also concerns the granting of the temporary shrimp harvesting allocation to "core" group fishers of Prince Edward Island and Nova Scotia. The applicants submit that the Minister is illegally subdelegating his power to issue licences under section 7 of the Act, since he is not involved in choosing the individuals authorized to fish under the allocation or determining the quantity of shrimp that each fisher will be authorized to harvest under each licence. The Minister issues a second series of fishing licences to the fishers indicated by the associations under the terms dictated by the associations. However, in doing so, he is subdelegating a power that the Act does not authorize him to subdelegate.

[41] Thus, I am of the opinion that, like the previous question, this question also challenges the licensing procedure and therefore does not need to be decided.

*(5) Did the Minister fail to give reasons for his decision to amend the harvesting plan, thereby making an arbitrary decision?*

[42] This issue involves the granting of the additional allocation of shrimp harvesting licences to Quebec and New Brunswick groundfish harvesters, announced on April 25, 2008.

[43] The applicants submit that the evidence does not show the Minister's reasons for amending the harvesting plan to increase the allocation for groundfish harvesters. The applicants argue that the author of the affidavit filed in evidence by the respondent was not involved in the Minister's decision to amend the harvesting plan and that, in the absence of any justification, this amendment must be deemed to be arbitrary.

[44] The respondent submits that the evidence clearly shows that the amendment was not arbitrary and that the plan was modified to limit the economic effect of reducing the number of groundfishing licences issued under the initial harvesting plan.

[45] In my view, I do not need to determine whether or not the Minister must give reasons for amending the harvesting plan, since I find that the Minister did provide reasons for his decision and that it was in no way arbitrary. The considerations on which the decision was based are

amply demonstrated by the documentary evidence, by Pierre Couillard's affidavit and by his cross-examination on affidavit. Under the circumstances, Pierre Couillard's participation in the decision-making process is not essential to a finding that the decision was supported by reasons.

[46] It is helpful to review the amendment to the harvesting plan, taking into account the overall context in which the initial plan had been announced. As mentioned above, the harvesting plan was adopted after discussions for implementing a new co-management arrangement and a permanent resource-sharing formula had failed.

[47] A memorandum prepared on March 25, 2008, by DFO officials for the Minister refers to the unsuccessful negotiations and the Minister's desire for the negotiations to continue. The Minister was presented with four options: the first eliminated any sharing of shrimp harvesting with groundfish harvesters; the second proposed sharing at 12% of the allocation and stated that a permanent sharing formula would be negotiated in 2008 and put in place in 2009; the third proposed sharing at 18% and stated that a permanent sharing formula would be negotiated in 2008 and put in place in 2009; and the fourth, which was recommended to the Minister, proposed sharing at 15% and stated that a permanent sharing formula would be negotiated in 2008 and put in place in 2009. The summary of the memorandum prepared by the officials for the Minister indicated the following:

> Negotiations have been on-going with the Group B shrimp harvesters, as the sharing formula expires on March 31, 2008; however, no consensus has been reached. Furthermore, there is an expectation from Gulf shrimpers that a decision on licence fee remission will be announced prior to the start of the season on April 1st.

> Considering the current status of the negotiations regarding the sharing arrangement with the Group B shrimp harvesters, the Department recommends a sharing option (Option 4), which will allow additional time for consultations with the fleets while signalling that collectively we need to move forward on resolving the issue of the sharing of the shrimp resource in the Gulf.

[48] The memorandum also discussed the implications for each option. It is useful to quote the implications noted for the third and fourth options:

> **Option 3: Temporary sharing at 18% in 2008. A permanent sharing formula would be negotiated in 2008 to be in place in 2009.**
>
> *Implications*
>
> ► Considering that the negotiations were held mainly in February, this option would provide to opportunity to Group B shrimpers to negotiate a permanent sharing formula acceptable by both parties.
>
> ► Consistent with the Minister's announcement on April 12th, 2007, that his intention is to work with fishers and stakeholders to bring permanence and stability to sharing arrangements by 2010.
>
> ► No insurance that a long-term agreement will be concluded with the shrimpers during the year considering the expected prices and the fuel costs in 2008.
>
> ► At 18%, traditional and FN [First Nations] would receive 24,434t, with allocations of 4,315t to the temporary entrants.
>
> **Option 4: Temporary sharing at 15% in 2008. A permanent sharing formula would be negotiated in 2008 to be in place in 2009.**
>
> *Implications*
>
> ► Same as for option 3, except that at 15%, traditional and FN would receive 25,153t, with allocations of 3,596t for the temporary entrants.

> ► A reduction will signal to the fleets that DFO is ready to negotiate a sharing formula that recognizes the economic hardships of the traditional shrimpers while allowing the temporary entrants access while consultations are ongoing.

[49] The Minister accepted the officials' recommendation and announced an annual harvesting plan on April 4, 2008, that provided for a TAC of 36,184 tonnes divided between traditional shrimp harvesters, who received 85% of the TAC (25,153 tonnes), and Quebec and New Brunswick groundfish harvesters, who received 15% of the TAC (3,596 tonnes). The harvesting plan also provided for a temporary allocation of 526 tonnes for "core" group fishers in Prince Edward Island (263 tonnes) and New Brunswick (263 tonnes). After having described the sharing formula, the April 4, 2008, plan stated the following:

> . . . In accordance to DFO's objective of bringing permanency and stability to sharing arrangements, discussions will be held in 2008 to reach a permanent sharing formula as soon as 2009. A precise calendar will have to be set between DFO and the industry in order to reach a final solution in 2009.

[50] The evidence shows that the groundfish harvesters were dissatisfied with their share, which was well below the 21% that they had received on average in previous years. These harvesters alleged that this reduction jeopardized their profitability, and they clamoured for their allocation to be increased. On April 25, 2008, the Minister stated that the temporary allocation for groundfish harvesters announced on April 4, 2008, would be increased by 719 tonnes. The notice reads as follows:

> [TRANSLATION]
> The Department of Fisheries and Oceans (DFO) of Canada announced an increase in the temporary allocation of shrimp for Group B, provided in most part to mobile gear fleet groundfish harvesters from the Gaspé Peninsula, Quebec's North Shore and New Brunswick, for the 2008 fishing season only.

> The overall temporary allocation granted to Group B will be increased by 719 tonnes, from 3,596 tonnes to 4,315 tonnes. This increase is exceptionally provided in addition to current allocations and in no way affects the quotas already granted to traditional shrimp harvesters.
>
> The increase in the temporary allocation is intended to help groundfish harvesters finalize the restructuring plans to foster their viability. The DFO is maintaining its objective of bringing permanency and stability to long-term resource-sharing arrangements and reaching a permanent sharing formula as soon as 2009. Discussions between representatives of this fleet and the DFO will continue throughout 2008.

[51] It is useful to note that the additional allocation was added to the allocation already granted to the groundfish harvesters through the notice dated April 4, 2008, and brought these harvesters' share to 18% of the Group B allocation, which corresponds to the third option in the memorandum prepared for the Minister on March 25, 2008.

[52] The memorandum dated April 25, 2008, concerning the temporary increase reads in part as follows:

> As instructed, the Department offered an increase equal to what the Group B temporary entrants would have received under the original 18% sharing agreement option. This will not affect the tonnage allocated to the traditional fleet under the 15% sharing formula that you announced on April 4 (see memo attached at TAB 1). The Total Allowable Catch (TAC) was increased by 719t, which was only provided to the Group B temporary entrants as a one-time relief measure for 2008.
>
> This measure is not to prejudice future discussion on a future sharing arrangement for the Group B temporary and traditional fleets.

[53] In light of the foregoing, I am of the view that the Minister gave sufficient reasons for his decision and that it was not arbitrary.

*(6) Did the Minister unlawfully make fishing allocations to groundfish harvesters to fund the groundfish fishery rationalization program?*

[54] The applicants submit that the evidence shows that the Minister granted shrimp allocations to the groundfish harvesters in exchange for their commitment to rationalize their groundfish harvesting activities. Thus, the Minister allegedly used his power to make fishing allocations and issue fishing licences for reasons that were irrelevant or extraneous to the legislation, that is, to finance the groundfish rationalization program in the absence of a budget allotment to do so. The applicants submit that the principles set out in *Larocque v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237, 270 D.L.R. (4th) 552 [*Larocque*], apply directly to this situation.

[55] The respondent submits that there is no evidence that the measures set out in the harvesting plan were based on irrelevant considerations; on the contrary, the considerations outlined by the Minister were established by studying and balancing the socio-economic interests of various groups of fishers, and the Minister's decision is fully compliant with his mandate under the DFO Act. The respondent submits that Mr. Couillard's affidavit clearly shows the procedure followed and the considerations taken into account during the development of the harvesting plan.

[56] The respondent argues that the standard of review that applies here is reasonableness and that the Court's review of a minister's discretionary decision was set out in *Maple Lodge Farms Ltd. v Government of Canada*, [1982] 2 S.C.R. 2 (available on CanLII) [*Maple Lodge*]. The applicants agreed that this was the applicable standard of review for this issue.

[57] I agree with the parties.

[58] In *Arsenault*, the Federal Court of Appeal insisted on the importance of the Minister's discretion in adopting a fishing plan and discussed the standard of review that applies to discretionary decisions. The Court also reiterated the principles it had established in *Carpenter Fishing Corp. v Canada*, [1998] 2 F.C. 548, 155 D.L.R. (4th) 572, on the scope of the Minister's discretion regarding fishing quota policies; in that decision, the Court had adopted the standard of review described in *Maple Lodge*. It is useful to quote the following passage from the judgment:

> [41] In *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548, this Court, at paragraph 28 of its Reasons, discussed the nature of a fishing quota policy imposed by the Minister. Décary J.A., who wrote the Reasons for the Court, indicated that a quota policy, in contrast to a fishing licence granted under s. 7 of the Act, was a discretionary decision and that judicial review thereof was greatly limited. He further indicated that the Minister could issue policy guidelines as long as he did not fetter his discretion with respect to the granting of licenses "by treating the guidelines as binding upon him". His full remarks are as follows:
>
> > 28. The imposition of a quota policy (as opposed to the granting of a specific licence) is a discretionary decision in the nature of policy or legislative action. Policy guidelines outlining the general requirements for the granting of licences are not regulations; nor do they have the force of

> law. It flows from the decision of the Supreme Court of Canada in *Maple Lodge Farms v. Government of Canada* and from the decision of this Court in *Canadian assn. of Regulated Importers v. Canada (Attorney General)*, that the Minister, provided he does not fetter his discretion to grant a licence by treating the guidelines as binding upon him, may validly and properly indicate the kind of considerations by which he will be guided as a general rule when allocating quotas. These discretionary policy guidelines are not subject to judicial review, save according to the three exceptions set out in *Maple Lodge Farms*: bad faith, non-conformity with the principles of natural justice where the application is required by statute and reliance placed upon considerations that are irrelevant or extraneous to the statutory purpose.
>
> [Emphasis added.]

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

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

[59] In *Mainville v Canada (Attorney General)*, 2009 FCA 196, 398 N.R. 249, the Federal Court of Appeal confirmed the review applicable to a fishing plan as follows:

> [4] In reality, the appellants are asking us, as they asked Justice Blanchard, to amend the Minister's March 30, 2006, fishing plan. In other words, the appellants are asking us to exercise, but in a different way, the discretion exercised by the Minister in formulating his fishing plan and issuing fishing licences.

> [5] The fishing plan is under the sole responsibility of the Minister and an integral part of his discretion; therefore, we cannot intervene unless the Minister has devised his plan and issued the licences on the basis of irrelevant considerations, or acted arbitrarily or in bad faith. In our opinion, there is no evidence in the record to support such a proposal.

[60] In my opinion, therefore, the applicable standard of review here is reasonableness, and the review must be guided by the principles set out in *Maple Lodge*. Thus, the Court will not intervene in the absence of bad faith, non-conformity with the principles of nature justice where their application is required by statute, or reliance placed upon considerations that are irrelevant or extraneous to the purpose of the Act. In this case, there is no evidence of bad faith, and no principles of natural justice have been violated. The applicants also failed to satisfy me that the terms set out in the harvesting plan had been adopted on the basis of considerations that were irrelevant or extraneous to the purpose of the legislation.

[61] The evidence showed that the Minister has been imposing shrimp TAC sharing with groundfish harvesters since 1997. The Minister's decision to allocate temporary shrimp quotas to groundfish harvesters falls within his duties and was not based on considerations that were irrelevant or extraneous to the purpose of the DFO Act or the Act.

[62] The evidence also reveals that shrimp quotas were given to groundfish harvesters to help them to cope with economic hardships arising from the cod fishing moratorium imposed in 1993. By granting them shrimp harvesting quotas and licences, the Minister is helping these fishers to diversify their activities and is at the same time promoting groundfish rationalization. I see nothing unlawful or legally irrelevant in these decisions.

[63] The Minister is charged with managing fisheries and fishery resources responsibly. This is what he is doing when he establishes a TAC for a given resource, when he orders a fishing moratorium or when he divides the resources among the various groups of fishers. No group of fishers has vested rights to any monopoly over a given resource or to a given number of licences. Taking into account the socio-economic conditions of all of the groups of fishers and dividing the resources among them is part of the Minister's duties and discretionary powers.

[64] There is no evidence that the measures adopted for 2008 were unreasonable. On the contrary, the evidence shows that they were based on considerations that were relevant and consistent with the purposes of the Act and the DFO Act.

[65] *Comeau's Sea Foods Ltd. v Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, 142 D.L.R. (4th) 193, involved the Minister's power to issue fishing licences, not the power to adopt a fishing plan, but the following comments by Justice Major appear to be no less relevant to fishing plans:

> 36. It is my opinion that the Minister's discretion under s. 7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, no regulations currently being applicable. The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith. The result is an administrative scheme based primarily on the discretion of the Minister: see *Thomson v. Minister of Fisheries and Oceans*, F.C.T.D., No. T-113-84, February 29, 1984.
>
> 37. This interpretation of the breadth of the Minister's discretion is consonant with the overall policy of the *Fisheries Act*. Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the *Fisheries Act*, it is the

> Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). Licensing is a tool in the arsenal of powers available to the Minister under the *Fisheries Act* to manage fisheries. It restricts the entry into the commercial fishery, it limits the numbers of fishermen, vessels, gear and other aspects of commercial fishery.

[66] Here, the evidence on, among other points, the history of shrimp harvesting, the cod moratorium and the temporary quotas allocated since 1997 shows that the considerations relied on by the Minister were relevant and consistent with the purpose of the DFO Act and the Act. The Minister did not act in bad faith or arbitrarily.

[67] In *Association des Senneurs du Golf Inc. v Canada*, 1999 CanLII 8744 (F.C.T.D.), affirmed by 2001 FCA 276, Justice Nadon of the Federal Court, as he then was, recognized the Minister's power, in the course of his duties, to take into account socio-economic considerations. He wrote the following at paragraph 25:

> Since there is no limitation in the *Fisheries Act* or Regulations regarding matters over which the Minister should exercise his powers, there is in my opinion no question that the Minister has the power to manage fishing in accordance with social, economic or other factors. In my view, there is nothing to prevent the Minister favouring one group of fishers at the expense of another. In *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93, Marceau J.A., speaking for the Federal Court of Appeal, said the following at 106 regarding the federal Parliament's jurisdiction under s. 91(12) of the *Constitution Act, 1867*:
>
> > The power conferred on Parliament in subsection 91(12) of the *Constitution Act, 1867* is not qualified, in my understanding, by any inherent condition that it be used to pursue some specific objectives and not others. Parliament may manage the fishery on social, economic or other grounds, either in conjunction with steps taken to conserve, protect, harvest the reserve or simply to carry social, cultural or economic goals and policies. In fact, in my

> view, unless and until the party attacking legislation on division of power grounds identifies a possible trespass on a specific law making power of the other level of government, the purpose for which a piece of legislation was passed is of no concern of the courts.

[68] In my view, that is what the Minister did in this case.

[69] In support of their position, the applicants rely on *Larocque*. With respect, my opinion is that the context in that case differs significantly from the one here. In *Larocque*, the Minister had issued a fishing licence to a fisher as payment for research that he was doing on behalf of the Department. As there were no funds to defray the ship's operating costs, the Minister allowed the fisher to cover those costs by selling snow crab. The Federal Court of Appeal found that the Minister's spending power was at issue in that case and that the Minister did not have the power to pay a supplier with fishing proceeds. Here, the Minister did not buy services allegedly paid for by issuing fishing licences, and there is no evidence that he allocated shrimp in exchange for the fishers' commitment to groundfish rationalization. The evidence shows that the Minister wanted to promote groundfish rationalization, but not that he made the granting of the licences contingent on the fishers' commitment to rationalizing their fleets or that he issued the licences in exchange for any commitment whatsoever on the part of the fishers.

[70] For all of these reasons, the application for judicial review must be dismissed.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** the application for judicial review is dismissed.

Costs are awarded to the respondent.

"Marie-Josée Bédard"
Judge

Certified true translation
Michael Palles

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-725-08 |
| **STYLE OF CAUSE:** | ASSOCIATION DES CREVETTIERS ACADIENS DU GOLFE INC. ET AL.<br>v.<br>ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | December 14, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | Bédard J. |
| **DATED:** | March 14, 2011 |

**APPEARANCES:**

| | |
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| Jean-Robert Noiseux | FOR THE RESPONDENT |

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