"**Federal Court Fisheries Issues**" by Brad M. Caldwell
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Federal Court Fisheries Issues:

A survey of fisheries cases commonly heard in the Federal Court

I. Introduction

This paper is written as a general overview of the types of fisheries cases that are commonly heard in the Federal Court.

II. Legal Nature of a Fishing Licence

A. Introduction

A fundamental concept to most fisheries related cases is the legal nature of a fishing licence. In the 2008 case of *Saulnier v. Royal Bank of Canada,* the Supreme Court of Canada carefully reviewed the concept and described a fishing licence as "more than a 'mere licence' to do that which is otherwise illegal. It is a licence coupled with a proprietary interest in the harvest from the fishing effort contingent, of course, on first catching it."[1] Although the court concluded that fishing licences could not be characterized as property at common law[2], the court held that they qualified as property under the expansive definitions of property in both the Federal *Bankruptcy and Insolvency Act*[3] and the Nova Scotia *Personal Property Security Act*.[4]

Cases decided prior to *Saulnier* should be relied upon with caution, as the court in *Saulnier* rejected the "traditional property approach" espoused by *National Trust v. Bouckhuyt*[5] along with the "regulatory approach" espoused by *Sugarman (in trust) v. Duca Community Credit Union Ltd. (1999)*[6] and the "commercial realities approach" espoused by the trial court in *Saulnier*[7].

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[1] *Saulnier v. Royal Bank of Canada,* 2008 SCC 58, para. 22, see also para 43.
[2] *Saulnier, supra* note 1, paras. 23 & 43.
[3] *Bankruptcy and Insolvency Act,* R.S.C., 1985 c. B-3.
[4] *Personal Property Security Act*, S.N.S. 1995-96 c. 13; Saulnier, paras. 43-53.
[5] *National Trust v. Bouckhuyt* (1987), 61 O.R. (2d) 640; See *Saulnier,* paras. 26-35.
[6] *Sugarman (in trust) v. Duca Community Credit Union Ltd. (1999),* 44 O.R. (3rd) 257.
[7] *Royal Bank of Canada v. Saulnier,* 2006 NSSC 34.

The legal nature of a fishing licence, or at least the consequences that flow from it, will often depend upon whether one is dealing with a dispute between a licence holder and the government or alternatively a dispute between private individuals.

B. Disputes Between Licence Holders and Government

In the Federal Court, disputes between licence holders and the government arise most frequently in the context of judicial review of decisions of the Minister of Fisheries regarding licensing decisions. A Federal Court case cited with approval by the Supreme Court of Canada in both *Saulnier v. Royal Bank of Canada*[8] and *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans*[9] is *Jollife v. The Queen*[10]. In *Comeau's Sea Foods,* the Supreme Court of Canada describes the *Jollife* decision as follows:

> *Joliffe held that there is no such thing as a vested right in a licence beyond those rights granted for the period for which the licence was issued.* ***In Joliffe, the plaintiffs sought a declaration against the Minister*** *on their entitlement to fish for salmon by purse seine after he had failed to deliver on assurances he had given them that he would re-issue a licence for salmon purse-seining. Upon termination of a licence, the Minister has an "absolute discretion" in the issuance of new ones, per Strayer J. (later J.A.), at p. 520:*
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> > ***While there is a good deal of force in the contention of the plaintiffs that licences, because they have a recognized commercial value and are frequently bought and sold, should be regarded as vesting in their holders a right which is indefeasible*** *except (as contemplated by section 9 of the Act) where there has been a breach of the conditions of the licence,* ***I am unable to find support for that conception of licences in the Act or Regulations*** (emphasis added).

The discretion of the Minister with respect to the issuance of fishing licences was affirmed in the *Saulnier* decision as follows:

> *Counsel for the Attorney General of Canada was greatly concerned that a holding that the fishing licence is property in the hands of the holder even for limited statutory purposes might be raised in future litigation to fetter the Minister's discretion, but I do not think this concern is well founded. The licence is a creature of the regulatory system. Section 7(1) of the Fisheries Act speaks of the Minister's "absolute discretion".* ***The Minister gives and the Minister*** *(when*

[8] *Saulnier, supra* note 1, para. 39.
[9] *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans),* [1997] 1 S.C.R.12 (S.C.C.) upholding for different reasons [1995] 2 F.C. 467 (F.C.A.) reversing [1992] 3 F.C. 54 (T.D.) (Strayer J.).
[10] *Jollife v. The Queen* [1986] 1 F.C. 511 (T.D.)

> *acting properly within his jurisdiction under s. 9 of the Act)* ***can take away, according to the exigencies of his or her management of the fisheries***[11] [emphasis added].

A case, which illustrates the difficulty the courts have had, dealing with the licence concept involving disputes between licence holders and government, is *Timothy Joys v. Minister of National Revenue*.[12] This case involved a large commercial fishing vessel that was seized for illegal importing of drugs pursuant to the provisions of the *Customs Act.* The issue in the case was whether in the evaluation of a "conveyance" duly seized and forfeited, the value of the commercial fishing licence "issued in respect of that vessel" could be included. The trial judge (Teitelbaum J.) and the dissenting judge in the appeal (Marceau J.A.) defined "conveyance by looking at the "aggregate values it might have if it were sold on the open market *qua* licensed fishing vessel".[13] In doing so, they relied upon cases where mortgage holders had, with the blessing of D.F.O., successfully transferred fishing vessels along with the vessel's licences[14] to new holders.[15]

The majority of the Federal Court of Appeal (Decary J.A. with concurring judgement by Robertson J.A.), viewed the matter differently. They adopted a more restrictive view of the word "conveyance" as defined in the *Customs Act* to "mean" any "water-borne . . . craft . . . that is used to move persons or goods." Since the fishing licence was not necessary for the vessel's purpose as a means of transport of goods, it was not part of the conveyance. In the view of Decary J.A., this interpretation was supported by the fact under the *Fisheries Act* and *Regulations* "licences being the property of the Crown and issued at the discretion of the Minister, can simply not be disposed of in the same manner as other things legally subject to seizure."[16]

C. Disputes Between Private Individuals

As discussed above with respect to the *Saulnier* decision, in disputes between private individuals involving the federal *Bankruptcy and Insolvency Act,* personal property security legislation[17] and other similar legislation[18], licences will often be treated like property.

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[11] *Saulnier, supra* note 1, para 48. See also the minority concurring decision of Pelletier, J in *Arsenault v. Canada* (A.G.), 2009 FCA 300 where he relies upon *Comeau's Sea Foods* for the proposition that "the Minister has the broadest discretion" (para. 57) with respect to the issuance of fishing licences.
[12] *Timothy Joys v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 385 (F.C.A.).
[13] *Joys, supra* note 12, page 391.
[14] *Waryk v. Bank of Montreal* (1990), 80 C.B.R. (N.S.) 44, aff'd (1991) 85 D.L.R. (4th) 514 (B.C.C.A.*); CCR Fishing Ltd. et al. v. The Queen* (19 October 1988) T-2043-83.
[15] They also took a different view of the distinction between a licence issued to a person and a licence issued in respect of a vessel. Decary J.A. was of the view that even if a licence is issued "in respect of a vessel", it is still issued to the person who applies for it and signs the conditions attached to the licence.
[16] *Joys, supra* note 12, page 394.
[17] Beware that not all personal property security legislation in Canada has the same wording. For example, the British Columbia legislation has a restrictive definition of "licence" that arguably does not include licences.

A frequently quoted case involving disputes between private individuals is *British Columbia Packers Ltd. v. Sparrow* (1989), 35 B.C.L.R. (2d) 334 (B.C.C.A.). This case involved an agreement to hold the beneficial interest in a herring licence in trust for a purchaser in order to circumvent regulations preventing transfers. Upon the vendor breaching the agreement to hold the licence in trust and defending that breach on the grounds that the contract was illegal, the court enforced the trust agreement as follows:

> *The object of the agreement was the transfer of all beneficial interest in the herring licence to the respondent, Sparrow, who was to remain a bare trustee holding the legal title. It would be unprofitable elaboration to do more than say that one can search the statute and regulations and find no prohibition of transfer of beneficial interest in a herring licence. The restrictions apply only to dealing with the legal title.* (p. 340).

In at least one Federal Court case, the court was prepared to impose a constructive trust upon a fishing licence so as to do justice between private parties when there was no express trust in place.[19]

In disputes between private individuals, the court's view of the legal nature of a fishing licence may also be influence by whether or not third party interests are involved. In direct disputes between parties where no third party interests are at stake, they are more inclined to treat licences as property. [20]

III.Existence and Nature of Federal Court's Jurisdiction over Fisheries Matters

A. Introduction

Most fisheries cases heard in the Federal Court fall into one of the following categories:

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[18] See, for example, *Stout & Company LLP v. Chez Outdoors Ltd.,* 2009 ABQB 444 where an Outfitters licence issued under the *Wildlife Act,* R.S.A. 2000 was considered to be and exigible asset under the *Civil Enforcement Act,* R.S.A. 2000, c. C-15.

[19] *Jesionwoski v. Gorecki and the Ship "Wa Yas"* [1993] F.C.J. No. 909 (F.C.A.) affirming with a minor variation [1993] 1 F.C. 36 (Reed J.) (in *quantum meruit* action for value of labour and materials supplied to a licensed fishing vessel, the court imposed a constructive trust on fishing licence). For subsequent non Federal Court cases where courts have imposed constructive trusts on fishing licences see: *Flemming Estate v. Fleming,* 2008 NLTD 123; *Genge v. Dredge,2008 NLTD 172;* 280 Nfld. & P.E.I.R. 283; *Baines v. Deluney,* [2002] CanLII 54020 (Nfld. S.C.); *Cabot v. Hicks* (1989), 176 Nfld. & P.E.I.R. 48; 540 A.P.R. 48 (Nfld. S.C.).

[20] See *Saulnier, supra* note 1 at para. 21 and *Loder v. Citifinancial*, 2006 NLTD 8 (Nfld. S.C.) para 19 (trust agreement for holding of fishing licence enforced).

1. *In rem* actions, involving admiralty jurisdiction, pursuant to section 22 of the *Federal Courts Act.*[21]
2. Judicial review proceedings against the Crown pursuant to sections 18 and 18.1 of the *Federal Courts Act*;
3. Actions against the Crown pursuant to s. 17 of the *Federal Courts Act;* or
4. Forfeiture provisions of s. 72 of the *Fisheries Act.*[22]

These areas of jurisdiction will be examined separately.

B. In Rem Claims Pursuant to Section 22 of the Federal Courts Act

As was pointed out by the Federal Court of Appeal in the case of *Radil Bros. Fishing Co. Ltd. v. Her Majesty the Queen et al,*[23] laws relating to fisheries under section 91(12) of the *Constitution Act* (sea coast and inland fisheries) cannot be equated with navigation and shipping for the purposes of section 22 of the *Federal Courts Act.*[24] However since fishing vessels share characteristics in common with all ships, jurisdiction is often asserted over them under jurisdiction relating to navigation and shipping such as collisions[25], carriage of goods[26] and contracts arising out of construction or repairs to ships.[27]

The more difficult cases, however, tend to arise over disputes involving matters which are unique to fishing vessels, such as fishing licences, fishing gear, and the processing of fish at sea. Claims where Federal Court jurisdiction has been recognized in the past include the following:

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[21] Section 22(1) provides that: "The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specifically assigned." S. 22(2) enumerates 19 specific areas of jurisdiction.

[22] *Fisheries Act,* R.S.C. 1985, c. F-14.

[23] *Radil Bros. Fishing Co. Ltd. v. Her Majesty the Queen et al.* 2001 FCA 317; (2001) 207 D.L.R. (4th) 82 (F.C.A.) varying (2000) 197 F.T.R. 169 which varied (199) 175 F.T.R. 182.

[24] *Radil Bros, supra* note 23, para. 47.

[25] S. 22(2)(d) See for example the *Stein v. "Kathy K" (The)*, [1976] 2 S.C.R. 802; *Wilcox v. The Miss Megen (Ship),* 2008 FC 506 (loss of life after foundering); *Putjotik Fisheries Ltd. v. Mersey Viking (Ship),* 2006 FC 491.

[26] *Kiku Fisheries Ltd. v. Canadian North Pacific et al.* (1997) FCJ 1291 (Prothonotary Hargrave) This was a claim of failing to notify a fish processor as required by a bill of lading of the delivery of a cargo of frozen herring, issuing a second bill of lading for such cargo without recovering the first bill of lading and failing to inter plead when two parties were claiming the same cargo.

[27] S. 22((2)(n); See for example *"Grateful One"*2008 FC 923; *Fish Maker LLC v. Zodiak (Ship),* 2004 FC 670 and *"Tara M.J."* (1990) 38 F.T.R. 1 (Fed.Ct. T.D.).

1. A necessaries claim for the supply of bait and ice to a ship to enable it to carry on with fishing;[28]

2. A necessaries claim for the supply of fish by a fishing vessel on the high seas to a fish processing vessel on the high seas in a specified area for the purpose of processing those fish;[29]

3. A dispute involving a contract for the supply of funds to a vessel owner to be used for acquisition and processing of salmon and salmon roe at sea (with the assistance of on-board technicians supplied by the party supplying the funds);[30]

4. A dispute involving a contract for the use of a vessel for the purchase, but not processing, of fish at sea;[31]

Claims where Federal Court jurisdiction has not been recognized in the past include the following:

1. A claim of intentional cutting of ground line of a competing black cod vessel by non owner crew members and the use and subsequent disposal of the traps of the competing vessel;[32]

2. A claim of conspiracy to improperly transfer ground fish quota to a fishing vessel and use the vessel to fish the quota (framed as a maritime tort);[33]

3. A necessaries claim arising out of an agreement to supply a portion of a fishing quota to a vessel owner/charterer;[34]

4. A claim by a fishing vessel owner against its agent (a fish processing company) based on fraud, negligence and breach of fiduciary duty in failing to ensure a proper transfer of fishing licences (so as to preserve their catch history for the purpose of determining quota entitlement) by the Department of Fisheries and Oceans;[35]

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[28] *Western Nova Scotia Bait Freezers Ltd. v. the "Shamrock"*, [1939] 4 D.L.R. 283 as discussed in *Kuhr et al. v. the Ship "Friedrich Busse" et al*. (1982), 134 D.L.R. 9 (3d) 261 (Fed. Ct. T.D.) (Addy J).
[29] *Kuhr et al. v. the Ship "Freidrich Busse*, *supra,* note 28.
[30] *Shibamoto & Co. v. Western Fish Producers Inc.* (1989), 63 D.L.R. (4th) 549 (F.C.A.). At the trial level, jurisdiction was upheld by Rouleau J. as a necessaries claim under s. 22(2)(m) on the authority of *Kuhr et al. v. the Ship "Freiderich Busse.* However, without commenting on the validity of the finding of the motions judge, the Court of Appeal upheld the jurisdiction under s. 22(2)(i) as a claim "arising out of any agreement relating to . . . the use . . . of a ship . . .".
[31] *Shogun Seafoods (1985) Ltd. v. "Simon Fraser No. 1" (The)* [1990] F.C.J. No. 553; 36 F.T.R. 289 (Fed. Ct. T.D.) (MacKay J.). In this case, the court relied upon Kuhr et. Al v. the Ship "Freiderich Busse, but did not specify which subsection of s. 22(2) it was relying upon.
[32] *Westview Sable Fish Co. v. "Neekis" (The)* (1986) 31 D.L.R. (4th) 709 (Fed. Ct. T.D.) (Rouleau J.).
[33] *Bornstein Seafoods Canada Ltd. v. Hutcheon et al.* (1979), 140 F.T.R. 245 (Fed. Ct. T.D.) (Gibson J.).
[34] *Inter Atlantic Canada Ltd. v. The Rio Cuyaguatije*, [2001] F.C.J. No. 549 (Fed. Ct. T.D.) (MacKay J.).
[35] *Radil Bros, supra* note 23.

5. A necessaries type claim against a fish packer for gill net herring licences supplied to vessels that delivered fish to the packer;[36] and

6. A claim on a contract giving the plaintiff some role in management of certain ships and sale of fish caught by the ships.[37]

The most recent pronouncement of the Federal Court of Appeal on the issue is *Radil Bros. Fishing Co. Ltd. v. Her Majesty the Queen et al.* described above at item 4 (footnote 23) above. In this case the court rejected the argument that the supply of a fishing licence was either a necessary or "goods, materials or services supplied to a ship" as set out in s. 22(2)(m) of the *Federal Courts Act.* Given the ruling of the Supreme Court of Canada in *Saulnier*,[38] it is possible this case would be decided differently post *Saulnier*.[39]

C. Judicial Review

1. Introduction – Range of Applications and Impediments to Judicial Review

The Federal Court hears a wide range of applications for judicial review of governmental decisions involving the fishing industry. These include the review of decisions regarding the following:

1. Issuance of fishing licences;[40]

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[36] *Roberts v. Andrews,* 2003 BCSC 1002 (Lowry J.). Even though this was not a Federal Court case, the involved interpretation of Rule 55 of the British Columbia Supreme Court rules, which at Rule 55(2) incorporates by reference the *in rem* jurisdiction of the *Federal Court.*

[37] *Ocean Dimensions Fisheries Inc. v. Common Bros. Ltd. (1990), 1 W.D.C.P. (2d) 342 (Fed. T.D.)* as cited and described in Saunders, *Federal Court Practice.*

[38] *Saulnier, supra*, note 1.

[39] For example contrast paragraph 68 of *Radil, supra* note 23 where the court states that "[f]ishing licences are not issued on the credit of a ship . . .". with para. 14 of *Saulnier, supra* note 1 where the court says "the licence unlocks the value in the fishers' other marine assets". Post *Saulnier,* it is anticipated that licences will in fact be regularly issued on the credit of a ship. See for example the 2010 Report of the B.C. C.B.A. Saulnier Committee (available on the C.B.A. website), which discusses the post *Saulnier* policy of DFO of accepting notices re Bank security. See also the discussion of *Radil Bros.* in the previous version of this paper presented to the Federal Court on 12 April 2002.

[40] *Campbell v. Canada (Attorney General),* 2006 FC 510 (unsuccessful application challenging a decision of the Minister denying a request by nine applicants for access to the Nova Scotia snow crab fishery); *Benoit v. Canada (Attorney General),* 2006 FC 1076 (unsuccessful application challenging a decision of the Minister to deny CORE status to a fish harvester); *Fennelly v. Canada (Attorney General),* 2005 FC 1291 (unsuccessful application challenging decision of Minister to not re-issue an exploratory snow crab licence); *Decker v. Canada (Attorney General),* 2004 FC 1464 (successful application challenging the refusal by the Minister to issue a temporary shrimp permit); *Keeting v. Canada (Attorney General), 2002 FCT 1174* (partly successful application challenging decision of Minister to deny a request for re-instatement of a crab licence); *Durant v. Canada (Minister of Fisheries and Oceans* 2002 FCT 327 (unsuccessful application challenging a decision of the Minister to discontinue practise of allowing oyster

2. Allocation of fishing licences and rights to fish between user groups;[41]

3. Quota entitlements;[42]

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cleaners to go out on oyster boats clean oysters without license); *Antonsen v. Canada (Attorney General)* (1995), 91 F.T.R. 1 (Fed. Ct. T.D.) (Reed J.) (successful application for a declaration that Minister of Fisheries exceeded authority on refusing to licence fishing vessels of foreign country not co-operating with Canada's fisheries conservation objectives); *Re Halliday* (1994), 129 NSR (2d) 317); *Everett (1994),* 169 N.R. 101; *Delisle v. Canada,* [1991] F.C.J. No. 459 (T.D.) as quoted at para. 34 of *Comeau's Sea Foods, supra* note 9; *Davis Fishing Co. Ltd. v. The Minister of Fisheries and Oceans,* (6 Feb. 1985) No. T-2814-86 (Fed. Ct. T.D.)(Dube J.); *Joliffe v. The Queen,* [1986] 1 F.C. 511 (Fed. Ct. T.D.) (Stayer J) (unsuccessful attempt to obtain order requiring Minister to transfer licence to a new seine vessel); *Thomson v. Minister of Fisheries and Ocean* (29 Feb. 1984) No. T-113-84; (Fed. Ct. T.D.) (Dube J.) (unsuccessful application to challenge Minister's decision to no longer renew category "B" salmon licences) (A link to a pdf copy of this case in located in the Fisheries section of admiraltylaw.com in the digest of *Arsenault v. Canada)*; *Nickerson v. Minister of Fisheries and Oceans* (23 March 1984) No. T-312-84 (Fed.C.T. T.D) (Walsh J.) (unsuccessful attempt to obtain order to compel the Minister to transfer a halibut licence from one vessel to another); *R. & B. Fishing Company Ltd. v. Minister of Fisheries and Oceans* (28 March 1988) No. T - 503 – 88 (Fed. Ct. T.D.) (Collier J.) (unsuccessful attempt to obtain an order to compel the Minister to transfer a "K' licence from one vessel to another); *Hodgson v. Minister of Fisheries and Oceans* (3 April 1990) No. T-844-85 (Fed. Ct. T.D.) (Collier J.) (unsuccessful attempt to have a fishing licence issued).

[41] *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans),* [1987] 2 F.C. 93 (this case involved a challenge to fisheries regulations providing for closing times that favoured sports fishermen over commercial fishermen); *Nunavut Territory (Attorney General) v. Canada (Attorney General),* 2005 FC 342 (unsuccessful application challenging a decision of the Minister with respect to the allocation of a 29 per cent increase in the total allowable catch of shrimp); *Dobbin v. Department of Fisheries and Oceans Canada,* 2005 FC 1020 (unsuccessful challenge to a decision of a tribunal under the *Canadian Human Rights Act* declining to find that a Quebec resident only snow crab fishery was a prohibited ground of discrimination); *Kitkatla Indian Band v. Canada* (2000) 181 F.T.R. 172 (Fed. Ct. T.D.) (MacKay J.) (unsuccessful application by Band for injunction to prevent non-aboriginals from harvesting a particular species). *Nunavut Tunngavikt Inc. v. Canada (Minister of Fisheries and Oceans)* (1998), 229 N.R. 249 (F.C.A.) (unsuccessful application for review of Minister's decision regarding increasing allowable catch but successful challenge of decision regarding allocation of licences); *Cummins v. Canada (Minister of Fisheries and Oceans)* (1996), 117 F.T.R. 309; 1996 CANLII 4075 (Fed. Ct. TD.) (this case involved an unsuccessful application to limit, amongst other things, aboriginal harvest until certain escapement targets had been met; *Neskonlich Band v. Canada (Attorney General)* (22 Sept. 1997) No. T-1497-97) (Fed. Ct. T.D.) (MacKay J.) (unsuccessful application by an aboriginal group to suspend a D.F.O. variation order and substitute a court order providing for non-possession and non retention of coho salmon on the British Columbia sport fishery); *Johnson v. Ramsay Fishing Co. Ltd. et al.* ((1987), 47 D.L.R. (4th) 544 (Fed. Ct. T.D.) (Joyal J.) (dispute between company and shareholder regarding who D.F.O. should issue licence to); *Attorney General of Canada et al. v. Fishing Vessel Owners Association et al.,* [1985] 1 F.C. 791 (F.C.A.) (unsuccessful application to restrain D.F.O. from giving longer openings to gill net vessels than seine vessels).

[42] *Nunavut Wildlife Management Board v. Minister of Fisheries and Oceans et al.,* 2009 FC 16 (unsuccessful challenge of a decision of the Minister to approve a transfer of turbot quota); *Andrews v. Canada (A.G.),* 2009 NLCA 70 leave to appeal to SCC refused 316 D.L.R. (4th) vi. (decision by Newfoundland Superior Court that the Federal Court had exclusive jurisdiction over claim by a snow crab fishing group to damages arising out of failure of the Minister to honour an earlier commitment to maintain traditional catch levels); *Carpenter Fishing Corporation et al. v. the Queen et al.* [1998] 2 F.C. 548; 1997 CANLII 6391 (F.C.A.) (unsuccessful challenge of the method of allocating quota in the British Columbia ground fish fishery); *Jada Fishing Co. v. Canada (Minister of Fisheries and Oceans)* (22 March 2002) No. A-11-01 (F.C.A.) (unsuccessful challenge of a decision of the Minister of Fisheries regarding ground fish quota – decision based upon recommendation of Appeal Board); *Nunavut Tunngavikt Inc. v. Canada (Minister of Fisheries and Oceans)* (1998), *supra note 41*.

4. Review of management plans and challenges to fisheries management;[43]

5. Area restrictions;[44]

6. Cancellation or suspensions of licences for of contravention of the *Fisheries Act*;[45]

7. Orders for forfeiture of licences under the *Customs Act;*[46]

8. Determination of whether or not there has been proper forfeiture or relinquishment under the *Fisheries Act;*[47]

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[43] *Kimoto v. Canada (Attorney General),* 2011 F.C. 89 (appeal pending) (unsuccessful application to set a aside a decision of the Minister to use 30 million dollars to be received from the U.S. government to mitigate a 30 per cent reduction in Canadian catch for purposes of, amongst other things, a buy back of fishing licenses as opposed to giving money directly to fish harvesters impacted by the reduction of catch); *Association des Crabiers Acadiens Inc. c. Canada (Procureur general),* 2009 CF 418 (challenge re separate fishing seasons, allocation, and gear restrictions) (at press time the English version of the case was not available on the CanLII website, for related decision see 2009 FCA 357); *Arsenault v. Canada (A.G.),* 2009 FCA 300 (unsuccessful attempt for order of mandamus forcing Minister to implement management plan as announced);*Chiasson v. Canada (Attorney General),* 2008 FC 616 (successful application for a declaration that Minister illegally held the proceeds from illegal sale of snow crab licence); *Larocque v. Canada (Minister of Fisheries and Oceans),* 2006 FCA 237 (successful application for a declaration that the Minister did not have the power to issue a scientific fishing with a 50-ton allocation of snow crab in exchange for test fishing services; *Area Twenty Three Snow Crab Fisher's Association v. Canada (Attorney General),* 2005 FC 1190 (unsuccessful application challenging a decision of the Minister to reduce the total allowable catch of snow crab); *Ecology Action Centre Society v. Canada (Attorney General),* 2004 FC 1087 (unsuccessful challenge to variation order allowing dragging on Georges Bank – *Canadian Environmental Assessment Act* not applicable); *Williams v. Canada (Minister of Fisheries and Oceans),* 2003 FCA 484 (unsuccessful application challenging a decision of the Minister to issue a marine predator licence to a salmon farm to kill seals).

[44] *Tucker v. Canada (Minister of Fisheries and Oceans)* 2001 FCA 384 (F.C.A.) (unsuccessful action for damages against Minister for forcing vessel owner to use either an inshore licence or an offshore licence but not both. Although framed as a damage action, the court applied the patently unreasonable test, presumably because the plaintiff was alleging the tort of abuse of public office).

[45] *Mathews v. Canada (Attorney General)* (1999), 118 F.T.R. 81 affirming (1996), 242 N.R. 181(imposition of a penalty of deciding not to issue a fishing licence for the first three weeks of the season and reducing the quota by 50 per cent as a sanction for violating the terms and conditions of a licence is beyond the authority of the Minister) (see also related cases of *Kelly v. Canada (Attorney General)* [1997] F.C.J. No. 1202, *Duguay v. Canada (Department of Fisheries and Oceans) [1996]* F.C.J. No. 1275 (Fed. Ct. T.D.) (Dube J.) and *Thibeault v. Canada (Minister of Fisheries and Oceans* [1996] F.C.J. No. 1330 (Tremblay-Lamer J.)*; Donavan v. Canada (Attorney General),* 2008 NLCA 8 (Newfoundland Superior Court finding that the issue of whether the Minister properly refused to re-issue licences after fisher's found guilty of fisheries offence was exclusively within the jurisdiction of the Federal Court); *Lapointe et al. v. Minister of Fisheries and Oceans* (1984), 9 Admin. L.R. 1 (Fed. Ct. T.D.) (Joyal J.) (successful application for certiorari of Minister's decision to suspend fishing licence).

[46] *Joys Fishing, supra* note 12.

[47] *George Denton & Associates Ltd. v. Canada* (1994), 69 F.T.R. 270 (Fed. Ct. T.D.) (Nadon J.) (where fisheries officers did not make a reasonable attempt to ascertain ownership prior to seizure under s. 58(6) of the *Fisheres Act*, the proceeds of sale from such seizure must be returned to the owner of the vessel.; *Logan v. Canada* [1995] 89 F.T.R. 270 (Fed. Ct. T.D.) (Teitelbaum J.) (unsuccessful application by halibut

9. Aboriginal entitlement and consultation;[48]

10. Challenges to partnering agreements set up by the Minister of Fisheries without legislative authority;[49]

11. Aquaculture;[50]

12. Closure of a fishing area within a National Park under the provisions of the *National Parks Act;*[51] and

13. Challenges to DFO's management of the environment.[52]

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fisherman for return of proceeds of sale of fish voluntarily relinquished after quota exceeded). See also the previous discussion of *R. v. Ulybel Enterprises Ltd.* (2001), 203 D.L.R. (4th) 513 (SCC).

[48] *Nunavut Wildlife Management Board* (2009), *supra* note 42 (unsuccessful challenge of a decision of the Minister to approve a transfer of turbot quota with out consultation); *Native Council of Nova Scotia v. Canada (Attorney General),* 2008 FCA 113 (unsuccessful application for judicial review of a decision of the Minister to limit the permitted lobster catch under an aboriginal communal food, social and ceremonial licence); *Ahousaht Indian Band et al. v. Minister of Fisheries and* Oceans, 2008 FCA 212 (unsuccessful application challenging a three year pilot plan for individual transferable fishing quotas for rockfish, lingcod and dogfish); *Gwasslaam (George Phillip Daniels) v. Canada (Fisheries and Oceans),* 2008 FC 912 (successful application to admit supplemental evidence of oral history supporting a claimed aboriginal fishing right); *Nunavut Territory (Attorney General) v. Canada (Attorney General)* (2005); *Williams v. Canada supra* note 43 (unsuccessful application challenging a decision of the Minister to issue a marine predator licence to a salmon farm to kill seals); *Shubenacadie Indian Band v. Canada (Minister of Fisheries and Oceans)* [2000] F.C.J. No 1445 (Fed. Ct. T.D.) (Pelletier J.) (unsuccessful application for an injunction based upon the *Marshall* decision to enjoin D.F.O. from taking enforcement measures to prevent Band members from participating in a Band regulated lobster fishery); *Chippewas of Nawash Fisrst Nation v. Canada (Minister of Fisheries and Oceans)* (2000) 196 F.T.R. 249 (Fed. Ct. T.D.) (Dawson J.) (application by an inland aboriginal group for a remedy under s. 15(1) of the Canadian Charter of Rights because of a failure by D.F.O. to include it in its Aboriginal Fisheries Strategy); *Yale Indian Band v. Aitchelitz Indian Band* (24 June 1998) No. T-776-98 (competition between Indian bands over where they might catch their given allocation of salmon and entitlement to intervener status of interest group); *Neskonlich Band v. Canada (Attorney General)* (22 Sept. 1997) No. T-1497-97) (Fed. Ct. T.D.) (MacKay J.) (unsuccessful application by an aboriginal group to suspend a D.F.O. variation order and substitute a court order providing for non-possession and non retention of coho salmon on the British Columbia sport fishery); *The Queen in Right of Canada, Minister of Indian Affairs et al. v. Pacific Fisherman's Defence Alliance,* [1988] 1 F.C. 498 (F.C.A.) (unsuccessful application for a declaration that allocation of fishing rights through treaty process *ultra virus*);

[49] *Aucoin v. Canada* 2001 FCT 800 (Rouleau J.) (successful challenge to a partnering scheme which was an unemployment benefit scheme for shore workers).

[50] See *Morton v. British Columbia (Agriculture and Lands),* 2009 BCSC 136 where the B.C. Supreme Court declared that the province does not have jurisdiction to regulate finfish aquaculture. As a result, the Department of Fisheries and Oceans has now substantially taken over the regulation of this industry. See also *Williams v. Canada (Minister of Fisheries and Oceans), supra note 43* (unsuccessful application challenging a decision of the Minister to issue a marine predator licence to a salmon farm to kill seals); See also Federal Court File T-70-11. This is a pending application by a First Nation for judicial review of the issuance by DFO of fishfish aquaculture licences when it took over jurisdiction of aquaculture from the province on the basis of lack of consultation.

[51] *Burley v. Canada (Attorney General),* 2008 FC 588.

[52] *David Suzuki Foundation v. Canada (Minister of Fisheries and Oceans),* 2010 FC 1233 (successful challenge of DFO's failure to adequately protect Killer Whale habitat as required by the *Species At Risk*

In order to succeed in a judicial review of a fisheries decision, an applicant has to overcome a number of significant hurdles. These include the following:

1. Determination of the proper procedure for bringing the application;

2. The broad interpretation that the court have given to the powers of the federal Crown under section 91(12) of the *Constitution Act;*

3. The wide discretion given to the Minister of Fisheries under s. 7 of the *Fisheries Act* and the standard of review for discretionary decisions and grounds for review*;* and

4. Justiciability and the limited remedies available to an applicant for Judicial Review.

Each of these hurdles will be examined separately.

2. Proper Procedure for Judicial Review

An application for judicial review can only be made by an originating application under s. 18 and 18.1 to 18.4 of the *Federal Courts Act.* This can later be converted into an action with leave of the court.[53] Although there was some uncertainty, it has now been settled that one can add a damage claim to the action when converting it.[54] One can also commence both an originating application for judicial review and an action for damages, and then apply to have them heard at the same time.[55]

One must also be careful not to seek a declaration in an action against the Crown. Unlike the situation at the time *Johnson v. Ramsay Fishing Co.*[56] was decided, sections 18(3) and 18.1 of the *Federal Courts Act* now make it mandatory for declaratory relief against a federal board, commission or other tribunal to be commenced only through an application for judicial review.[57]

Act). Note: This case is listed as an example only. Environment type judicial review applications are beyond the scope of this paper.

[53] Rule 18.4(2). See: *Association des Crabiers Acadiens Inc. supra* note 43 at para. 39 where the court sets out the test for conversion.

[54] See *Hinton v. Canada (Minister of Citizenship and Immigration),* 2008 FCA 215 where the court adopted the approach suggested by the Hugessen J.A. in *Canada (Minister of Fisheries and Oceans) v. Shubenacadie Indian Band* 2002 FCA 255 of allowing a claim for damages to be added after conversion to an action (paras. 45-50). The Supreme Court of Canada in Canada (Attorney General) v. TeleZone Inc., 2010 SCC 62 at para. 37 cited this with approval. For a general discussion of these cases in the context of a recent fisheries case see *Kimoto supra* note 43 at paras. 55-68.

[55] This was done in *Jada Fishing supra* note 42, para. 77, but was more recently refused in *Association des Crabiers, supra note 43*.

[56] *Johnson v. Ramsay Fishing Co.* (1987)*,* supra, note 41, page 4.

[57] *Radil Bros. Fishing Co. Ltd.,* 2000 CanLII 16458 (F.C.) at para. 20 as affirmed without reasons on this point *supra* note 23, para 79.

3. Powers of the Federal Crown under s. 91(12) of the Constitution Act

Another hurdle to be overcome by an applicant for judicial review is the broad powers granted to the Federal Crown under section 91(12) of the *Constitution Act* (See Coast and Inland Fisheries). One of the most frequently quoted fisheries case is the decision of the Federal Court of Appeal in the case of *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans).*[58] This case involved a challenge to fisheries regulations providing for closing times that favoured sports fishermen over commercial fishermen. Although this was originally an application for *certiorari*, the administrative law issues had to a large extent become moot by the time the case came before the Court of Appeal. Despite this fact, the Court of Appeal decided to render a decision because the fundamental issue before the court was "whether Parliament, in the exercise of its legislative competence under subsection 91(12) of the *Constitution Act, 1867* can establish close and open times for catching fish not only for the purpose of conservation but also for the purpose of a socio-economic nature" (pp. 102-3). The court upheld the closure of the fishery to commercial fisherman and said the following in frequently quoted passage:

> *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 carry out social, cultural or economic goals and policies.* (p.106)

This passage was cited with apparent approval by the Supreme Court of Canada in the case of *Ward v. Canada (Attorney General).*[59] Although the Supreme Court appears to have fallen short of specifically adopting the words "social", it speaks of a very broad constitutional power as follows:

> *These cases put beyond doubt that the fisheries power includes not only conservation and protection, but also the general "regulation" of the fisheries, including their management and control. They recognize that "fisheries" under s. 91(12) of the Constitution Act, 1867 refers to the fisheries as a resource; "a source of national or provincial wealth" (Robertson, supra, at p. 121); "a common property resource" to be managed for the good of all Canadians (Comeau's Sea Foods, supra, at para. 37). The fisheries resource includes the animals that inhabit the seas. But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation* (para. 41).[60]

In the context of judicial review, the *Gulf Trollers* decision and the broad interpretation of the power of the federal government under s. 92(12) most often arises in the context of

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[58] *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans),* [1987] 2 F.C. 93.

[59] *Ward v. Canada (Attorney General)* 2002 SCC 17 involved a constitutional challenge to federal regulations which sought to stop the large-scale commercial hunt of whitecoat and blueback seals by way prohibiting the sale of their pelts.

[60] See also *Nunavut Tunngavik* (1998), (F.C.A.) *supra* note 41, para. 14; *Saulnier, supra* note 1, para. 14 and *Morton, supra* note 50.

whether or not the Minister as acted for an irrelevant or extraneous purpose.[61] In the past, it has also been relevant to the issue of what standard of review is to be applied to a decision of the Minister.[62]

4. The Wide Discretion Given to the Minister under s. 7 of the *Fisheries Act,* the Standard of Review of Discretionary Decisions and Grounds for Review

In addition to the wide constitutional power of the federal Crown, an applicant for judicial review often has to overcome the wide discretion given to the Minister of Fisheries under section 7 of the *Fisheries Act,* which gives the Minister the authority to issue licences in his or her "absolute discretion". Since a large number of the judicial review applications of fisheries cases involve licensing type decisions, the standard of review is often determined by the jurisprudence governing discretionary decisions.

In *Dunsmuir,* the court stated that questions of discretion would generally attract a standard of reasonableness.[63] It was also stated in *Dunsmuir* and confirmed in *Khosa* that the standard of review analysis need not be conducted in every instance. As between correctness and reasonableness, "existing jurisprudence may be helpful"[64] For example, in *Khosa,* since no authority was cited to suggest a correctness standard to the impugned decision, the court concluded "existing jurisprudence points to the adoption of a reasonableness standard".[65] In *Smith v. Alliance Pipeline Ltd.* [66] the Supreme Court of Canada noted that "reviewing judges can usefully begin their analysis be determining whether the subject matter of the decision before them falls within one of the non-exhaustive categories identified by *Dunsmuir.*[67]

With respect to existing jurisprudence regarding discretionary fisheries' decisions, in pre-*Dunsmuir* jurisprudence the bulk of the cases are either silent or apply a patent unreasonableness standard[68], with the exception of a few cases, which were generally

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[61] See for example, *Carpenter Fishing, supra* note 42, para. *34.*
[62] See *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 where it discusses the *Pushpanathan* test at paragraphs 30-1.
[63] *Dunsmuir v. New Brunswick,* 2008 SCC 9, para. 51.
[64] *Dunsmuir, supra* note 63 at para. 57 and *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12, para. 5.
[65] *Khosa, supra* note 64, para. 53. Notwithstanding this conclusion, the court also conducted the four-step standard of review analysis, which is to be applied when "jurisprudential categories are not conclusive (para. 54.).
[66] *Smith v. Alliance Pipeline Ltd.,* 2011 SCC 7.
[67] *Smith supra,* note 66, para. 25.
[68] For example see: *Benoit v. Canada (Attorney General),* 2006 FC 1076 (Snider, J.) (review of decision of Minister based upon recommendation of appeal board); *Chiasson, supra* note 43, para. 23 refers to the pre-*Dunsmuir* practise; *Nunavut* (2005), *supra* note 40 (review of decision of Minister regarding allocation of increase in total allowable catch of shrimp); *Fennelly, supra* note 41 (patent unreasonableness test applied to decision of Minister based on recommendation of appeal board); *Area Twenty Three Snow Crab Fisher's Association, supra* note 43 at para. 22 (obiter); *St. Anthony Seafoods Limited Partnerhship v. Nfld. & Labrador (Minister of Fisheries and Aquaculture),* (2004) 245 D.L.R. (4th) 597 (Nfld. & Lab. C.A.), leave

reviewed on a reasonableness *simpliciter* basis.[69] In post-*Dunsmuir* Federal Court fisheries cases reviewing discretionary decisions of the Minister of Fisheries, most of the cases have applied a reasonableness standard.[70]

In applying that standard to discretionary decisions, in a post-*Dunsmuir* journal article, Bastarache, J. (the co-author of the majority reasons in *Dunsmuir)* said as follows:

> *The manner in which reasonableness is to be assessed is by looking at whether or not the reasons are rational and coherent, and whether or not the result falls within the range of possible, acceptable outcomes. Where decisions are highly discretionary and political in nature, the range of acceptable outcomes will be wider.*[71]

As noted by the majority decision in *Khosa,* it is important to distinguish between grounds of review and the standard of review. The grounds for review that are most frequently applied to discretionary decisions of the Minister of fisheries is the following test as articulated in *Maple Lodge Farms Limited v. Government of Canada:*

> *It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the courts might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith* ***and****, where required, in accordance with the principles of natural justice,* ***and*** *where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere* [emphasis added]. [72]

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to appeal to SCC refused [2004' SCCA NO. 548; *Durant, supra* note 40 (review of decision of Minister discontinuing practice of allowing oyster cleaners to on onboard oyster boats to clean oysters).

[69] In *Jada Fishing, supra* note 42, the motions judge (Pelletier J.), reviewed a recommendation regarding quota allocation adjustment for an individual fisherman made by the Pacific Region Licence Appeal Board to the Minister of Fisheries. Using the *Pushpanathan* pragmatic and functional analysis as applied to an "expert tribunal," the motions judge applied a standard of review of reasonableness. Upon appeal, the Federal Court of Appeal held that the recommendations of the Appeal Board itself were not reviewable, but proceeded to review the decision of the Minister based in part upon the Appeal Board's recommendations. In doing so, the court applied the reasonableness standard of review. Since the decision of the Minister was upheld on the reasonableness standard, the court did not feel it necessary to consider whether or the patent unreasonableness test should be applied on the basis of the *Suresh* decision;

[70] *Kimoto, supra* note 43, paras. 32-3 (the court appears to have followed *Dunsmuir* and *Khosa* to dispense with a full standard of review analysis and conclude that the reasonableness standard applied to the application of law to the facts); *Ralph v. Canada (Attorney General),* 2009 FC 1274 (Heneghan J.) at para. 22 (since no issues of procedural fairness and natural justice, applied reasonableness standard to review of licence appeal decision); *Burley v. Canada (Attorney General),* 2008 FC 588 at paras. 33-40 (after conducting a standard of review analysis applied reasonableness standard to question of closure of fishery in National Park). But see, *Campbell, supra* note 40 at para. 23-46 where the court applies the correctness standard based upon the assumption that relying upon irrelevant considerations is a breach of natural justice. In this regard, see the discussion below regarding the unfortunate wording of the *Maple Lodge Farms* test in *Comeau's Sea Foods.*

[71] The Honourable Michel Bastarache, *Modernizing Judicial Review* (2009) 22 C.J.A.L.P. 227.

[72] *Maple Lodge Farms Limited v. Government of Canada,* [1982] 2 S.C.R. 2; 1982 CanLII 24 (pp. 7-8).

In the 2009 post *Dunsmuir,* but pre *Khosa* case of *Canada (Attorney General) v. Arsenault,*[73] the Federal Court of Appeal adopted the *Maple Lodge Farms* test as previously applied in the case of *Carpenter Fishing Corp. v. Canada.*[74] It is useful that in both this case and *Carpenter Fishing* the Federal Court of Appeal has quoted at length the test from *Maple Lodge Farms* because this test has been misunderstood by some courts as a result of an unfortunate choice of words by the Supreme Court of Canada at paragraph 36 of *Comeau's Sea Foods Ltd. v. Canada*[75]*,* which could be interpreted as meaning that reliance upon irrelevant and extraneous considerations, avoiding arbitrariness and acting in good faith is part of the natural justice analysis. However a review of *Thomson v. Minister of Fisheries*[76] referred to at paragraph 36 of *Comeau's Sea Foods* reveals that the court was in fact relying upon the test as set out in *Maple Lodge Farms*, which makes it clear that these matters are to be considered in addition to the question of natural justice.[77] Under the *Dunsmuir* analysis as elaborated in *Smith*[78]*,* this could lead one to apply the wrong standard of review.

The *Maple Lodge Farms* test, as incorporated into *Comeau's Sea Foods Ltd. v. Canada* was also applied in 2009 by Heneghan J. in *Ralph v. Canada.*[79]

Brown and Evans cite *Maple Lodge Farm* as an example of a traditional common law standard that typically has *combined* the standard for review of the merits together with that for procedural and decisional error.[80] With respect to decision-making error they say, "apart from errors of fact, law and mixed law and fact, there are three basis ways in which an administrative adjudicator can err in the *process* of exercising discretion. He or she can fail to take relevant considerations into account; can take irrelevant considerations into account; or can improperly fail to exercise discretion."[81]

The elements of the *Maple Lodge Farms* test warrant separate examination.

(1) Bad Faith

[73] *Arsenault, supra* note 11 (unsuccessful challenge involving the duty of the Minister to implement a fisheries management plan in the form announced); See also the following non fisheries cases where *Maple Lodge Farms* test has recently been quoted with approval: *Curtis v. Minister of Public Safety and Emergency Preparedness,* 2010 FC 943 (para. 27), *Dudas v. Canada (Public Safety and Emergency Preparedness),* 2010 FC 942.
[74] *Carpenter Fishing, supra* note 42.
[75] *Comeau's Sea Foods, supra* note 9.
[76] *Thomson v. Minister of Fisheries, supra* note 40. A link to a pdf copy of this case in located in the Fisheries section of admiraltylaw.com in the digest of *Arsenault v. Canada.*
[77] In particular see the use of the word "and" after the words "natural justice" in the second to the last paragraph. Judicial review based upon irrelevant considerations is better categorized as an error of jurisdiction in the broad sense of the word or a decisional error.
[78] *Smith, supra* note 66.
[79] *Ralph, supra* note 70, para. 24.
[80] Brown Donald J.M. and John M. Evans. *Judicial Review of Administrative Action in Canada.* Toronto: Canvasback, 1998 (loose-leaf updated to July 2010) para. 14:5430.
[81] Brown and Evans, *supra* note 80, para 14,5440 (July 2010 release).

Given the obvious evidentiary difficulties, bad faith is often difficult to prove. However, a finding of bad faith was made in the case of *Aucoin v. Canada* 2001 FCT 800 (Fed. Ct. T.D) (Rouleau J.). This case involved a challenge to a co-management agreement between D.F.O. and the East Coast (zone 12) snow crab fishermen. It is reported that as a result of changes to the *Unemployment Insurance Act* in 1995, it became apparent that numerous employees working in snow crab processing plants were not going to be able to work the minimum number of weeks required to qualify for unemployment insurance benefits. Consequently, D.F.O. initiated discussions with the zone 12 crab fishermen for the purpose of obtaining a contribution of funds from them to be used with other funds contributed by the Provincial Government for the purpose of creating make work projects for the shore workers. As a result of these discussions, the crab fisherman entered into a co-management or partnering type agreement to provide a percentage of their gross revenue to the shore workers.

Pursuant to this agreement, a procedure for collecting funds was set up as follows: Each year, D.F.O. withheld 20 per cent of the fishermen's quota and transferred it to a non-profit corporation. Upon payment by each fisherman to the non-profit corporation, the corporation would notify D.F.O. and then transfer the payment to a second non-profit corporation. Upon transfer of the money, the fishermen's share of the withheld quota would then be released.

Although legislation was tabled in Parliament to authorize this type of co-management or partnering agreement (Bill C-62), this legislation died on the order paper when Parliament was dissolved in April of 1997. Despite the failure to pass this legislation, the crab fishermen honoured this agreement and paid the levy for several years until they received an opinion from the Auditor General that the levy was of questionable legality. They then decided to challenge the levy imposed for the 2001 fishery by way of an application to the Federal Court for judicial review.

Upon reviewing the case, the Court looked at the question of whether the conditional licences issued to the non-profit corporation (presumably to hold the 20 per cent quota) could be authorized under s. 7 of the *Fisheries Act.* In rejecting the Minister's discretion to do so, the court said as follows:

> *There is evidence that the licences for snow crab fishing were issued to the 'Partenariat'* [the non profit corporation] *who owned no fishing vessel and were not engaged in the fishing industry. Though the Minister has absolute discretion, it is specified that he may issue licences for fisheries or fishing, not for the purpose of assisting in setting up an unemployment benefit scheme and collecting additional levies. The Minister's conduct in this regard is not supported by any authority nor is it justified for any statutory purpose. The Fisheries Act is to protect and regulate fisheries and this was undoubtedly beyond the scope of the Minister's discretion (para. 43)*
> *. . . I am satisfied that the Minister* ***did not act in good faith*** *(para. 45)*

> *A regime established for the purpose of offering financial aid to seasonal employees for area fish plants who no longer qualify for employment insurance benefits is wholly unrelated to the issuance of leases or licences for the proper management and control of fisheries and conservation and protection of fish (para. 46)* [emphasis added].

As a result of the court's conclusions, it issued an order prohibiting the implementation of the partnering agreement and setting aside the decision of the Minister transferring 20 per cent of the quota to the non-profit corporation.[82]

For an interesting argument related to the rule that a Minister cannot enter into a contract so as to fetter his or her discretion, see the dissenting judgement of Wells, J. in *Andrews*[83] where he refuses to strike a claim based upon the *Pacific National Investments* line of authorities because of the possibility of a successful argument that the Minister breached a duty of good faith by putting in place a set of circumstances by which his predecessor could renege on the Minister's undertaking without warning the Fish harvesters of the possibility.[84]

(2) Irrelevant or Extraneous Purpose

Given the broad interpretation of the power of the federal government under s. 92(12) of the *Constitution Act* and the broad discretion give to the Minister of Fisheries under section 7 of the *Fisheries Act*, it is very difficult to successfully challenge a decision of the Minister under this heading. For example, in the *Carpenter Fishing* appeal, after citing the *Gulf Trollers* decision[85], the *Comeau's Sea Foods* decision[86], and section 7 of the *Fisheries Act,* the court said as follow:

> *[W]hen 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*.[87]

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[82] Although not explicitly stated, the case of *Lapointe et al. v. Minister of Fisheries and Oceans* (1984), 9 Admin. L.R. 1 (Fed. Ct. T.D.) (Joyal J.) could also be considered a bad faith case, as one factor which was important to the court's decision was the fact that the licence suspension was not authorized by the *Fisheries Act.* For a general discussion of bad faith see Brown and Evans, *supra* note 80, section 15:2443 (July 2010 Release); See also *Carpenter Fishing, supra,* note 42, para. 30-1.

[83] *Andrews,* supra note 42.
[84] *Andrews, supra* note 42, para. 51.
[85] *Gulf Trollers, supra* note 41.
[86] *Comeau's Sea Foods, supra* note 9.
[87] *Carpenter Fishing, supra,* note 42, para. 37.

Despite this wide freedom to manoeuvre, the Minister of Fisheries does occasionally get caught going beyond the permissible purposes of the *Fisheries Act*. Examples include the following:

1. Paying a party contracted to do test fishing with the proceeds of the sale of snow crab that did not belong to him[88];

2. Creating a regime established for the purpose of offering financial aid to seasonal employees for area fish plants who no longer qualify for employment insurance;[89]

3. Refusing to issue a snow crab licence for the first three weeks of the fishing season and reducing the quota under the licence by 50 per cent for the entire season in order to penalize the licence holder for not complying with the conditions of his licence;[90]

4. Suspending a fishing licence for violating a Fisheries Regulation based upon the erroneous assumption that the licence holder would not suffer undue financial hardship;[91]

5. Failing to give special consideration to the principles of adjacency and economic dependence as required by a land claims agreement or misconstruing those principles when allocating an increased total allowable catch among competing fishing groups; and[92]

6. Refusing to issue a permit (pursuant to power delegated from the Governor in Council) to a U.S. fishing vessel to enter Canadian waters for the purpose of buttressing Canada's stance in international fisheries negotiations.[93]

7. Taking into account potential criticism from other licensed fish harvesters if a licence were issued pursuant to a licence appeal;[94]

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[88] *Laroque, supra* note 43; See also *Chiasson, supra* note 43.
[89] *Aucoin v. Canada, supra,* note 49.
[90] *Mathews, supra* note 45 (see also related cases of *Kelly v. Canada (Attorney General)* [1997] F.C.J. No. 1202, *Duguay v. Canda (Department of Fisheries and Oceans) [1996]* F.C.J. No. 1275 (Fed. Ct. T.D.) (Dube J.) and *Thibeault v. Canada (Minister of Fisheries and Oceans* [1996] F.C.J. No. 1330 (Tremblay-Lamer J.).
[91] *Lapointe* (1984), *supra* note 82.
[92] *Nunavut Tunngavik(1985)*, *supra,* note 41, para. 18 & 64.
[93] *Antonsen v. Canada (Attorney General)* [1995] 2 F.C. 272 (Fed. Ct. T.D.) (Reed J.); but see Nunavut Tunngavik (1998), *supra,* note 41 where the Court of Appeal suggests that "any international policies that Canada promotes or adheres to" are legitimate policy concerns of the Minister of Fisheries (para. 14).
[94] *Keating, supra* note 40, paras. 66-9. At paragraph 67 the court distinguished Comeau Sea Foods Ltd. v. Canada (1997) 1 S.C.R. 12. In this regard, see the court of appeal decision of Linden J. in Comeau at paragraph 33 and paragraph 50 of the Supreme Court of Canada decision where the court said, "[w]here a Minister of the Crown is required by statute to exercise his or her discretion in reaction to immediate and pressing policy concerns, the Legislature can usually be taken to have intended that he or she be ultimately responsible to political authority."

5. Justiciability

Another hurdle faced by an applicant for judicial review is the concept of justiciability. This is the principle that, the courts are not a suitable forum for determining matters of public policy.[95] This appears to be the concept the Federal Court of Appeal was applying in *Carpenter Fishing, supra* when it said as follows:

> *They rather argued that the Minister's decision to implement part of the policy--what they called the current owner restriction--was illegal and that the illegal part could be severed from the policy. They asked the Trial Judge, for all practical purposes,* ***to substitute their own formula to that of the Minister****, without any consultation with the industry and without any vote. In complying with their request, the Trial Judge* ***became the Minister for a day*** *and imposed a formula the effect of which on the halibut fishery is unknown and untested. This, clearly, the Trial Judge could not do, even if he had been right in finding the policy invalid;* ***the most he could have done would have been to remit the matter back to the Minister*** *for reconsideration and adoption of a different formula. It is only in the rare occasion where a component of a policy is so irrelevant and contrary to public policy--quota, for example, that would be allocated in part on the basis of the colour of the skin of the fisherman--that a courts could take upon itself to sever that component from the formula.* (para. 42) (emphasis added)

Another good example is *Cummins v. Canada (Minister of Fisheries and Oceans)* where an application was brought for an interim *quia timet* injunction to restrain the Minister from permitting fishing on the Fraser River until escapement levels had reached a certain level. In rejecting the application, the court said as follows:

> *In my opinion, what the applicants want to do is have this courts act as a regulatory authority exercising power paramount to that of the Minister.*
>
> *The relief requested on the notice of motion is wrapped up in the essential question of the number of fish which should reach the spawning ground this year. In my opinion, this question is not suitable for judicial solution. I agree with the respondents' argument that to attempt a decision of this sort is simply a "second guess" of the decisions that the Minister has already made on expert advice. I adopt the reasoning that Mr. Justice Nunn used in Palmer et al. v. Nova Scotia Forest Industries that objections of this sort should be raised directly with the*

[95] For a general discussion of this concept see: Brown and Evans, *supra,* note 88 at section 1:7310, 3:3400 and 7:2340 (July 2010 release); For an American example see *The Province of British Columbia et al. v. United States of America et al*. (30 January 1998) No. C-97-1464C (United States District Court Western District of Washington at Seattle) where the court refused to allow an action by the Province of British Columbia against the United States for refusing to implement the Pacific Salmon Treaty. In doing so, it applied the political questions doctrine to exclude from judicial review those controversies, which revolve around policy choices and value determinations reserved for Congress and the Executive Branch.

> *decision maker who, unlike the courts, functions in both the realms of science, politics, and social policy.*[96]

See also *Kimoto,*[97] *Nunnavut,*[98] and *Caissie v. Canada (Minister of Fisheries and Oceans)*[99]. For non-fisheries cases see: *Operation Dismantle v. The Queen;*[100] *Black v. Canada (Prime Minister);*[101] *Cantwell v. Canada;*[102] and *Ecology Action Centre v. Canada,* 2002 FCT 1309.

See also Brown and Evans, where the authors state that there is no bright line test for determining when a given discretionary power will be characterized as being of a general policy nature.[103] An example of this in the fisheries context is the contrast between *Keating v. Canada (Attorney General)* and *Comeau's Sea Food* as discussed at note 94.

D. Damage claims against the Crown

A somewhat less common source of jurisdiction for fisheries cases is the jurisdiction granted under section 17 of the *Federal Courts Act* for damage claims against the Crown. Although successful damage claims against the Minister of Fisheries are even more rare than successful judicial review applications, they are occasionally successful.

The decision of the Supreme Court of Canada in *Canada (Attorney General) v. TeleZone Inc.*[104] appears to have now abolished the "*Grenier"* requirement that damage claimants have the lawfulness of a government decision determined in the Federal Court under s. 18 before they can have their damage claim determined under the concurrent jurisdiction of the Federal Court and superior courts. The court based its decision primarily upon its view that the issue was "fundamentally about access to justice. People who claim to be injured by government should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity."[105] However, this remedy is only available if the claimant is prepared to "take its money (if successful) and walk away leaving the order standing."[106]

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[96] *Cummins, supra* note 41.
[97] *Kimoto, supra* note 43, paras. 33 & 47-52 (a right mentioned in an international treaty is not justiciable unless implemented by legislation).
[98] *Nunnavut* (1998)*, supra* note 41, para. 55 ("it is not the role of the court to second 'second-guess' the merits of the decision of the Minister.").
[99] *Caissie v. Canada (Minister of Fisheries and Oceans)*[2001] F.C.J. No. 625 (the court can order the Minister to make a decision regarding the issuance of a licence but cannot dictate the result (para. 15).
[100] *Operation Dismantle v. The Queen,* [1985] 1 S.C.R. 441.
[101] *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.).
[102] *Cantwell v. Canada,* (1991) 6 C.L.R. (NS) 16 at para. 31.
[103] Brown and Evans, *supra* note 80, section 7:2340 (July 2010 issue).
[104] *TeleZone Inc, supra* note 54; see also *Manuge v. Canada,* 2010 SCC 67.
[105] *TeleZone, supra* note 54 at para. 18. See also the courts comment regarding the 30-day limitation period for judicial review proceedings being unrealistic for damage claims (para. 54).
[106] *TeleZone, supra* note 54 at para. 75; See also the discussion under the "Negligence" heading regarding stage two of the *Annes v. Merton London Borough Council* test.

In January of 2011, *TeleZone* was considered in the fisheries context in *Kimota.*[107] This case involved a treaty between the governments of U.S.A. and Canada whereby U.S.A agreed to provide 30 million dollars to Canada to mitigate a 30 per cent reduction in Canadian catch of U.S. bound Pacific salmon. The applicants were a group of fish harvesters who had born the brunt of the 30 per cent reduction in catch. They challenged a decision of the Minister to use the money for, amongst other things, a buy back of fishing licenses as opposed to giving money directly to fish harvesters impacted by the catch reduction. At the time the application was brought, only $200,000 had been spent and the Minister had undertaken to not spend any of the money unless authorized by the court. The applicants sought an order quashing the Minister's relief along with a declaration of unjust enrichment. The applicants had also commenced a damage action and were content to first seek declaratory relief and then have the claim quantified in their damage action. Given both the *TeleZone* decision, and the fact that ultimately what the applicants were looking for was a money judgement, the Minister took the position that the proper vehicle for the applicant's case was the damage action. In what could be characterized as an *obiter decision,*[108]the court rejected the Minister's argument. In doing so, it stated as follows:

> *If I had to choose, I would have as the Applicants have, chosen the judicial review route. Nothwithstanding that statutory justification can be raised in defence of an action, given that the Applicants have knowledge of the decision, and that it has not been executed, it would be inappropriate for them to lie in the bushes until the US$30 million is spent and then claim financial compensation.*[109]

In terms of procedure, the court also noted that while it is very common in judicial review proceedings for the reviewing court to send that matter back to a tribunal for reconsideration, the court also has the discretion to just make the declaration without sending the matter back. The court also noted that one practical solution, in some cases, would be to bifurcate issues (presumably in a damage action) and first proceed with the legality of the government decision.

Damage actions in the fisheries context include claims based upon the following:

1. Misfeasance or abuse of public office;
2. Negligence;
3. Contract;
4. Conversion; and
5. Breach of the *Canadian Bill of Rights.*

[107] *Kimoto, supra* note 43, 53-68.
[108] *Kimoto, supra* note 43, para. 60.
[109] *Kimoto, supra* note 43 at para. 64.

1. Misfeasance or Abuse of Public Office

As noted by David J. Mullan, "the occasions for the invocation of this form of liability are very infrequent. Indeed were it not for Duplessis's frankness when testifying as to his conduct and the reasons for it, it is doubtful that Roncarelli's action would have succeeded."[110] From the plaintiff's perspective, one advantage of the tort of misfeasance or abuse of public office is that it can apply to policy decisions as well as operational decisions.[111]

The fisheries version of *Roncarelli v. Duplessis*[112] is the case of *Lapointe v. Canada (Minister of Fisheries and Oceans).*[113] This case involved a fisherman who had been convicted of catching herring in a closed area. In response to political pressure to take action against the fisherman, the Minister of Fisheries suspended the fisherman's licence despite receiving advice from a Department of Justice lawyer that he had no authority to do so and could be found liable in damages if the decision were challenged. As previously noted, in a separate proceeding Rouleau J. quashed the decision to suspend the licence and ordered its re-instatement.[114] In the subsequent action for damages, the court awarded damages for loss of income plus punitive damages. In granting the damage award, the court said as follows:

> *The facts reveal the defendants consciously elected to disregard the law in order to make an example of the plaintiff and to confirm the Department's commitment to preventing fishermen from fishing in closed areas. The cancellation of the plaintiffs' licences can only be characterized as an extraordinary action taken in a highly visible situation. By unlawfully ordering the cancellation, with full knowledge there was no legislative authority to do so, the defendants committed an unwarranted and illegal act for which they are subject to liability for the damages sustained by the plaintiffs.*

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[110] David J. Mullan, *Administrative Law* p. 507; for an comprehensive review of the tort of misfeasance see Harry Wruck, *The Continuing Evolution of the Tort of Misfeasance of Public Office* (2008) 41 U.B.C. Law Review 69.

[111] In most decisions it is not specifically referred to as the tort of abuse of public office, see, for example the dissenting reasons of Linden J. at para 91 of *Comeau* [1995] F.C. 467 (F.C.A.) (overturned on other grounds by the S.C.C., *supra* note 9) where he says, "In the event a court decides that conduct in question involves a policy decision and exempts the government agency from ordinary negligence principles, liability may still be imposed, but on another more complex and narrower basis. It is open to a claimant to prove that a policy decision was made in bad faith or that it was so irrational or unreasonable that it did not constitute a proper exercise of discretion." For cases specifically articulating the tort of abuse of process as a means for imposing liability for policy decisions see: *Voratich v. Law Society of Upper Canada (A.G.)* (1975), 20 O.R. (2d) 214 (H.C.) at 216 and the trial level of *Keeping v. Canada (A.G.),* [2002] N.J. NO. 9 at para. 56 as upheld on appeal at 2003 NLCA 21.

[112] *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

[113] *Lapointe v. Canada (Minister of Fisheries and Oceans)* (1992), 4 Admin. L.R. (2d) 29 (Fed. Ct. T.D.) (Collier J.).

[114] *Lapointe, supra,* note 113.

The leading non-fisheries case setting out the elements of the tort is *Odhavji Estate v. Woodhouse.*[115] For fisheries cases involving unsuccessful attempts to establish misfeasance, see the judgement of Robertson J.A. in C*omeau's Sea Foods v. Canada (Minister of Fisheries);*[116] *Oak Island International Group Limited v. Attorney General of Canada*;[117] *Keeping v. Canada (Attorney General);*[118] *Hache v. Canada (Minister of Fisheries and Oceans)*[119] and the trial division decision of *Radill Bros*.[120]

2. Negligence

Probably the best-known fisheries case on negligence is *Comeau's Seafoods Limited v. Canada (Minister of Fisheries and Oceans).*[121] In this case, the Minister of Fisheries sent the Plaintiff fishing company a telex advising that he had authorized the issuance of four offshore lobster licences to it. The Plaintiff then provided the Minister with details of its fishing plans, including the fact that it had spent $500,000 dollars in converting one vessel into a lobster fishing vessel and was anticipating spending additional funds on its other vessels. After the initial notification, the issuance of the licences became a political issue and after intense lobbying from the inshore lobster fleet, the Minister announced that the four licences would not be issued pending further study. A study was completed which recommended that no new offshore licences be issued, since that could "influence the distribution of income derived from the lobster fishery, the ability of new entrants to gain access to the fishery and the relationship between the inshore and offshore fisheries." The Licences were never issued.

At the trial level, the Strayer J. applied the *Anns v. Merton London Borough Council* test to hold the Minister of Fisheries liable in negligence. Based upon his finding that the Minister's revocation of his authorization to issue a licence was *ultra virus,* he did not apply the policy exception set out in *Anns.* At the appeal level, in a 2-1 decision, the Federal Court of Appeal set aside the trial decision. In the judgement of Stone J.A., he relied upon the *obiter* comments of Lord Keith in *Rowling v. Takaro Properties Ltd.*[122] to find that the availability of an administrative law remedy was a policy reason for barring the plaintiff from pursuing in action in negligence. Robertson J.A. allowed the appeal for different reasons. He applied the *Anns* test and held that duty of the Minister to issue the fishing licence was negated because it was a policy decision. Under the alternative duty requiring the Minister to act reasonably in ascertaining whether he had the legal authority to revoke the earlier authorization, he found that the Minister did not breach the requisite

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[115] *Odhavji Estate v. Woodhouse,* 2003 SCC 69/

[116] C*omeau's Sea Foods*, Court of Appeal level *supra* note 9 at paragraphs 116 to 123.

[117] *Oak Island International Group Limited v. Attorney General of Canada,* 2004 NSSC 179 (unsuccessful misfeasance claiming arising out of the management of the silver hake fishery).

[118] *Keeping, supra* note 111 (unsuccessful allegation of misfeasance with respect to the measuring of a fish boat, but successful in negligence).

[119] *Hache v. Canada (Minister of Fisheries and Oceans),* 2002 FCT 703, [2002] F.C.J. 952.

[120] *Radil Bros, supra* note 23 at para. 44. This portion of his decision was upheld by the Court of Appeal (para. 35).

[121] *Comeau's Sea Foods, supra* note 9.

[122] *Rowling v. Takaro Properties Ltd.,* [1988] 1 A.C. 473 (P.C.)

standard of care. In his dissent, Linden J.A. substantially agreed with the trial judge that once the policy decision to authorize the issuance of a licence had been made, no policy issues remained to be resolved. He also would have held the Minister liable for consequential economic loss. Accordingly, the Minister had no policy immunity. Linden J.A. was critical of the application of *Rowling v. Takaro Properties Ltd.* and any eclipsing of the needs of tort law by the needs of administrative law. In particular, he referred to the practical difficulty of fishermen relying upon an administrative remedy because of the difficulty of obtaining such a remedy prior to the fishing season.

Unfortunately, the Supreme Court of Canada missed the opportunity to clarify the law of negligence as it relates to crown liability by deciding the case on alternative grounds.[123] Mr. Justice Major writing for the court noted that section 7 of the *Fisheries Act* is silent on whether the Minister of Fisheries can revoke an authorization previously given. He then reviewed the authorities on the Ministers absolute discretion under section 7 and concluded as follows:

> *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.*[124]

He went on to conclude that the power to authorize the issuance of a licence under section 7 is a continuing power within the meaning of section 31(3) of the *Interpretation Act*, which can be revoked at any time prior to issuance of the licence. Since the Minister revoked his prior authorization for the purpose of invoking government policy, negligence was not established.[125]

With respect to the suggestion by Stone J.A. in the *Comeau's Sea Foods* decision that the existence of an administrative law remedy negates a duty of care, query whether this rule survives in light of *TeleZone?*[126]

For another decision where damages were awarded against the Department of Fisheries for negligence see *Canada (Attorney General) v. Keeping*[127]. This case involved a crab fisherman who relied upon a fisheries officer to measure the tonnage of his boat in order to qualify for a fishing licence. As a result of an error made by the fisheries officer, the

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[123] See Vern W. DaRe, *Case Comment on Government Actions: Tort Flaw: Comeau's Sea Foods* (1997) 76 Can. Bar. Rev. 253 where he argues that the Supreme Court of Canada missed an opportunity to clarify the law on the application of the *Anns* principal to negligence actions against the Crown.

[124] With respect to the apparent that natural justice includes the consideration of good faith, relevant considerations and avoiding arbitrariness, see the comments *supra* at note * with respect to the *Maple Lodge Farms* case.

[125] But see *Mount Sinai Hospital Center v. Quebec* 2001 SCC 41 where in a similar case, the Supreme Court of Canada, decided that once a minister had made up his mind to issue a licence, his discretion was exhausted.

[126] *TeleZone, supra* note 54.

[127] *Keeping, supra* note 111.

vessel failed to qualify for a supplementary snow crab licence. In holding the fisheries officer liable in negligence, the court found that measuring the depth of a vessel and telling the owner where to place the measuring tape was "not a policy decision but a decision required in the implementation of the policy"[128] Since the fisheries officer knew that the tonnage measurement was in connection with a licence that had been applied for, there was proximity or neighbourhood and harm was foreseeable. The appeal court also concluded there was sufficient proximity with the fisher harvester's adult son. With respect to the availability of an administrative remedy, the appeal courts concluded that this was not an impediment, as the available remedies "were not adequate to rectify the harm done . . ."[129]

For a case on negligent misrepresentation, see *Keleher et al. v. Canada (Minister of Fisheries and Ocean.*[130] In this case a group of fishermen were misled, by a letter from the Minister of Fisheries and by statements from D.F.O. officials, into thinking that they would not be able to obtain a fishing licence in the following year because of their employment as stevedores. These fishermen then detrimentally relied upon this advise by surrendering their licences to a government buy back program at an improvident price. As a result, the Minister was held liable for negligent misstatement.[131]

See also *Genge v. Canada (Attorney General).*[132] This case involved a negligent misrepresentation action against the Crown arising from a fisheries officer who mistakenly advised a seal fish harvester that a seal hunt had closed. The Crown brought an interlocutory application for an order striking out the claim on the grounds that the court lacked jurisdiction and an order that the claim could only take place after the applicant has made an application for judicial review. In refusing the Crown's application, the court followed *Keeping*[133] and said as follows*:*

I find that the "essence" of the Respondents' claim is that a fisheries officer made a "terrible mistake" which cost them financially. The mistake had nothing to do with the official capacity of the fisheries officer. It had nothing to do with the management of the seal fishery, the Fisheries Act, the Regulations, the Management Plans, Directives or Orders. The claim arises out of a federal employee that was not paying attention or was too distracted to properly inform himself of the true factual situation. It was a human failing and not an "official" failing (para. 9).

[128] Para. 61 of trial decision as upheld at para. 37 of appeal decision.
[129] *Keeping, supra* note 111, para. 58.
[130] *Keleher et al. v. Canada (Minister of Fisheries and Ocean* (1989) 26 F.T.R. 161 (Fed. Ct. T.D.) (Reed J.).
[131] See also *Genge v. Attorney General (Canada),* 2007 NLTD 36 where the courts refused an application to strike in a case involving a claim for negligent misrepresentation by a fisheries officer who mistakenly advised a seal fish harvester that a seal hunt had closed.
[132] *Genge, supra* note 131.
[133] *Keeping, supra* note 111.

With respect to the issue of proximity as it relates to crown liability, there do not appear to be any fisheries cases that have referred to *Cooper v. Hobart*[134] or *Fullowka v. Pinkertons's of Canada Ltd*[135].

3. Contract

Cases where the Minister of Fisheries has been held liable in contract are very rare.

One such case is *Puddister Trading Corporation Ltd. v Canada*[136] This case involved an application by a licence holder for compensation arising out of the closure of the offshore seal fishery of Newfoundland. While the plaintiff was not successful in its primary objective, of obtaining compensation for the closure of the fishery, it obtained limited success in obtaining damages against the Department of Fisheries and Oceans (D.F.O.) for the failure of bureaucrats to follow the instructions of Cabinet.

As a result of protests by Greenpeace and other environmental organizations in the 1970's and early 1980's, the European Economic Community banned the importation of whitecoat and blueback seal pelts into Europe in 1983. As a result of this ban, in 1984 and 1985 no offshore seal hunters participated in the fishery. However, they did continue to renew their licences in the hopes that market conditions would improve. In 1986, a Royal Commission on the seal fishery released a report that recommended permanent closure of the fishery for newborn seals and compensation for those persons affected by the closure. In 1987, prior to any action being taken to implement this report, the Plaintiff, who owned several licensed offshore sealing vessels, began fishing again. This renewed fishing caused more protests from animal rights groups along with a "thinly veiled threat" from one such group to release a video that would adversely affect the East Coast cod fishery. These renewed protests in turn caused the Minister of Fisheries, Thomas Siddon, to permanently close the offshore fishery in 1988. Shortly after the closure of the fishery, the Minister's delegate, John Crosbie, announced that the Government would appoint someone to look into the issue of compensation for persons displaced by the closure. At the time, the Minister and his delegate were both in favour of compensation, while the bureaucrats including the Deputy Minister and the Atlantic Seal co-ordinator were against it. Consequently, because of the difference of opinion between the Minister and his bureaucrats, Cabinet decided to order and fund an independent study by John Gover into the issues surrounding compensation. John Crosbie then encouraged the offshore licence holders to get together and retain a consultant to assist them in presenting a case for compensation to John Gover. The Plaintiff and several other licence holders then retained independent consultants at a cost to them of roughly $28,000 dollars. Unfortunately for the licence holders, the Minister did not occupy himself with the organization and implementation of the study. Instead, this task was left to the Atlantic Sealing Co-ordinator under the supervision of the Deputy Minister. Simpson J.'s critical comments in this regard are worth quoting at length:

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[134] *Cooper v. Hobart,* [2001] 3 S.C.R. 537.
[135] *Fullowka v. Pinkertons's of Canada Ltd.,* 2010 SCC 5.
[136] *Puddister Trading Corporation Ltd. v Canada, 1997 CanLII 5145* (Fed. Ct. T.D.) (Simpson J.).

> *In my opinion, the Minister erred when he trusted the implementation of the Study to his Department's officials without supervision by his personal staff when he knew that those officials opposed compensation. What happened was that Comeau and others did not ultimately arrange the broad independent study that the Minister and Crosbie had foreseen when the Study received Cabinet approval as part of the Sealing Policy, and which was reflected in the Draft Terms of Reference. Instead, the bureaucrats turned the Study into a narrow accounting exercise, compromised its independence and qualified it by introducing a requirement for ministerial or other undefined "official" approval prior to Phase Two.*

Ultimately, D.F.O. never ordered the second phase of the study and the holders of offshore licences were never compensated for their losses arising from the closure of the fishery. The Plaintiff, Puddister Trading Co., then commenced its action claiming damages for breach of contract. Although the reasons for judgement are not entirely clear, it appears that the Plaintiff argued that the Government had made a binding offer to pay reasonable compensation to any fishers who participated in its study. It was argued that by participating in the study the Plaintiff accepted this offer. It would also appear that the Plaintiff argued that the money it spent on consultants to provide the information for the study constituted the required consideration for the contract. The court rejected the Plaintiff's claim based upon the objective theory of contract law. Subjectively, the Plaintiff honestly believed that by providing funding for the study, D.F.O. had made a commitment to pay compensation, however, the court found that there was no contract because a reasonable person in the Plaintiff's position would not have believed D.F.O. had made such a commitment simply by agreeing to study the issue. The court noted that upon the closure of a fishery D.F.O. was under no legal obligation to pay compensation to displaced fishermen. Since the claim in contract failed, and since there was no legal obligation to compensate fishers for the closure, the Plaintiff's claim for compensation failed. All was not lost, however, for the court concluded that D.F.O. had breached an obligation to perform a full study and consequently was in breach of contract. Accordingly, damages were awarded to the Plaintiff to compensate it for the money it paid for consultants to participate in the study. In addition, the Plaintiff was awarded the costs of its action.

For a case where the Department of Fisheries and Oceans was unsuccessful in upholding a partnering agreement based upon the law of contract see: *Aucoin v. Canada (Minister of Fisheries and Oceans.*[137]

See also *Yale First Nation v. HMTQ In Right of Canada et al.*[138] This case involved an alleged agreement between the Yale First Nation and the Minister of Fisheries to allow a pilot sale fishery in the year 2000 pursuant to the *Aboriginal Communal Fishing Licence Regulations*. In an application for summary judgment under Rule 18A of the British Columbia Rules of Court, the Yale First Nation sought a declaration that a document

[137] *Aucoin, supra* note 49 at paras. 47-50.
[138] *Yale First Nation v. HMTQ In Right of Canada et al.,* 2001 BCSC 746.

purporting to record the agreement was an enforceable agreement. The Crown opposed the application for summary judgment and also sought a declaration under Rule 19(24) that the Plaintiff's claim be struck as disclosing no reasonable claim. With respect to the summary judgment portion of the application, the court admitted parole evidence to find that the written agreement contained a condition precedent to the effect that the agreement was contingent upon the Department of Fisheries obtaining a similar agreement from a neighbouring First Nations group. Since such an agreement was not obtained, the condition precedent was not satisfied and the agreement was not enforceable. In *obiter*, the court also said that given the decision of *Comeau's Sea Foods*[139] even if the condition precedent had been satisfied, the Minister could not have been forced to issue a fishing licence. With respect to the application to strike under Rule 19(24), the court was sympathetic to the Crown's argument that, at best, the agreement was only an agreement to authorize the issuance of a licence and since the Minister had the discretion under section 7 of the *Fisheries Act* to revoke that authorization at any time prior to the licence being issued, no damages could follow. However, since the Federal Court of Appeal in *Comeau's Seafoods* "did not state that such a claim [for damages] **could <u>never</u> be successful**" [emphasis added], the court did not strike the plaintiff's claim. In *obiter*, the court also suggested that under the circumstances, the plaintiff <u>may</u> not have been entitled to declaratory relief because the declaration only concerned a future right (the issuance of a fishing licence) as opposed to an existing right. Given the *Comeau* decision, the court suggested the plaintiff's rights did not ripen until a licence had actually been issued.

For non-fisheries cases imposing liability on the Crown for breach of contract see:

1. *Muntuck v. Canada;*[140]

2. *Grant v. Province of New Brunswick;*[141]

3. *Wells v. Newfoundland;*[142] *and*

4. *Queen v. CAE Industries* [1986] 1 F.C. 129 as referred to at paragraphs 47-8 of *Aucun v. Canada (Minister of Fisheries and Oceans).*

See also *Pacific National Investments v. Victoria (City)* 2000 SCC 64 where the majority decision of a deeply divided Supreme Court of Canada ruled that in the absence of express legislative authority, a municipality cannot contractually bind itself to fetter its future legislative powers. It further ruled that an agreement to compensate in the event of breach of the agreement was also *ultra virus.* This case has been applied in the fisheries

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[139] *Comeau, supra* note 9.
[140] *Muntuck v. Canada* [1986] 3 F.C. 249 (T.D.) (McNair J.) (referred to by Linden J. on the *Comeau Seafood's* decision).
[141] *Grant v. Province of New Brunswick* (1973), 6 N.B.R. (2d) 95 (C.A.) (referred to by Linden J. on the *Comeau's Sea Food's* decision).
[142] *Wells v. Newfoundland,* [1999] 3 S.C.R. 199.

context in *Andrews*[143] where Welsh J. stated that "[a]lthough the *Pacific National* decision deals with legislative powers exercised by a municipality, in my view, the executive power being exercised by the Minister in the case before this court engages the same considerations and principles."[144] He also concluded as follows:

> *To summarize, the above decisions support several conclusions. First, where, pursuant to legislation, a minister is authorized to exercise discretion in the public interest, that discretion may not be constrained for future use or fettered either directly or indirectly, unless the legislation otherwise provides. Indirect fettering includes exposing the minister or government to liability for damages or payment of compensation for failure to exercise the discretion in a particular way. Despite the apparent harshness of the result, an agreement, implied undertaking or representation having the effect of fettering the minister's authority is unenforceable and damages are not available. Nonetheless, the minister must act in good faith, not arbitrarily, and must not base his or her decision on considerations irrelevant or extraneous to the statutory purpose. Finally, while damages are not available, a claim for unjust enrichment may be permitted.*[145]

See also *Terra Vista Ltd. v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture).*[146]

There are numerous cases involving disputes between private individuals that involve contracts for leases of fishing licenses and/or trust agreements. However, these cases are generally dealt with by the superior courts.[147]

4. Unjust Enrichment

As discussed above under the heading "Damage Claims Against the Crown," in *Kimoto*[148] a group of fish harvesters brought a judicial review application seeking a declaration of unjust enrichment arising out of the 30 million dollars Canada was to receive under the terms of a treaty with the United States. Applying *Garland v. Consumer Gas Co.,*[149] this claim was denied by the court on the grounds that (a) the existence of the treaty and the requirements of the *Financial Administration Act* was a juristic reason for depriving the claimants of their catch, and (b) the Minister was not enriched because she

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[143] *Andrews, supra* note 42.
[144] *Andrews, supra* note 42 para. 77.
[145] *Andrews, supra* note 42 para. 88.
[146] *Terra Vista Ltd. v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture)* (2006), 260 Nfld. & P.E.I.R. 344 (NLCA) at para. 25.
[147] See for example: *Hurley v. Power,* 2008 NSSC 363; *Genge, supra* note 19; *Loder v. Citifinancial Canada Inc.,* 2007 NLCA 78; *Philpott and Hopkins v. Sullivan,* 2007 NLTD 111; *Shand v. Goreham,* 2004 NSSC 272; *Careen v. Few & Strathie Ltd.,* 2003 NLCA 33; *D.E. & Sons Fisheries Ltd. v. Goreham*, 2003 NSCA 31; *Baker v. Smith,* 2002 NSCA 98; *Baines v. Deluney, supra,* note 19. Digests of these cases are available on the Admiraltylaw.com/fisheries/Fcontracts.htm.
[148] *Kimoto, supra* note 43.
[149] *Garland v. Consumer Gas Co.,* 2004 SCC 629.

was under no obligation to mitigate the loss to the fisher harvesters caused by reduction in fishing.[150]

5. Conversion

For a successful conversion action against the Department of Fisheries see *Longmire v. Canada*[151]. This case involved a scallop fisherman who was charged with fishing in a prohibited area. When the fishing vessel returned to harbour approximately three hours after being boarded by fisheries officers, the fisherman was ordered to return a large portion of his catch to sea pursuant to section 73(4) of the *Fisheries Act.* After being acquitted of the fisheries charge, the fisherman sued the Crown on the grounds that the order to return the catch to sea was not authorized by the Act because it was not done "at the time of seizure" as required by s. 73(4). MacKay J. accepted this argument and awarded the fisherman damages for conversion.[152]

6. Breach of the *Canadian Bill of Rights* and Charter of Rights

For a somewhat dated case involving a claim for breach of the *Canadian Bill of Rights*, see, *Noel & Lewis Holdings Ltd. v. The Queen.*[153] This case involved a fisherman who wished to purchase a replacement licence from a 79 foot 5 inch fish boat to place upon his 95 foot fish boat. After consulting with D.F.O. about the proposed purchase, he was advised by D.F.O. that it would not allow the 79-foot licence to go onto his boat because of the difference in length. After later discovering that D.F.O. had allowed similar transfers for other fishermen, the fisherman commenced an action against D.F.O. After reviewing the evidence at length, Walsh J. concluded as follows:

> *I am satisfied that the various persons attempting to apply these policies were acting in good faith, they had no guidelines to follow and even the unwritten policies were varied from time to time. The results appear to have depended upon the person to whom the applications or appeals were made, the persistence of the person making these applications and the pressures which he could bring to bear at higher levels. (p. 312)*

After concluding that the "plaintiffs were not treated in the same manner a many other applicants in the vague application of the guidelines" (311-2), he concluded that the plaintiff was treated in a discriminatory fashion (p. 322) contrary to the *Canadian Bill of Rights* (p.311). However, since the plaintiff had not proved that he could have obtained the necessary financing to purchase the licence if the transfer had been approved, only nominal damages were awarded.

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[150] *Kimoto, supra* note 43 at para. 44.
[151] *Longmire v. Canada* [1993] F.C.J. No. 977 (Fed. Ct. T.D.) (MacKay J).
[152] See also *Rasmussen v. Canada (Minister of Fisheries and Oceans)* (1988), 24 F.T.R. 86 (Fed. Ct. T.D.) (Muldoon J.).
[153] *Noel & Lewis Holdings Ltd. v. The Queen* (1983), 1 Admin. L.R. 290 (Fed. Ct. T.D.) (Walsh J.).

It is also possible that damages could also be awarded against the Minister of Fisheries or DFO as a result of breach of the Charter of Rights. See: *Vancouver (City) v. Ward.*[154]

E. *Forfeiture Pursuant of s. 72 of the Fisheries Act.*

This issue was addressed by the Supreme Court of Canada in *R. v. Ulybel Enterprises Ltd*.[155]

This case involved the Canadian registered fishing vessel "Kristina Logos," which obtained a provisional registration in Panama without first obtaining a deletion certificate from the Canadian Registrar of Ships. It then fished in the NAFO fishing zone without a Canadian fishing licence, which it could do legally if it were a foreign fishing vessel but not as a Canadian fishing vessel. In order to garner international support for Canadian concerns over excessive fishing by foreign fishing vessels on the nose and tail of the Grand Banks, Canada had to demonstrate its ability to control its own fishing vessels. Accordingly, it seized the "Kristina Logos" under s. 51 of the *Fisheries Act* and charged the master.

While the vessel was under seizure, two claimants in two separate Federal Court admiralty proceedings also arrested it. One claimant was a bank suing for default under a marine mortgage and the second claim involved a claim to title by some shareholders of the vessel's owner. Both claimants arrested the vessel. The Crown intervened in one of the Federal Court proceedings and obtained an order that the vessel be released from arrest and sold pending litigation. The stated reason for the Crown's application was to avoid the heavy costs being incurred by the Crown for the preservation of the vessel. Subsequent to the sale of the vessel, the owner of the vessel was convicted of fishing without a license and sentenced with a term of the sentence providing for forfeiture of $50,000 from the proceeds of sale.

Upon appeal to the Newfoundland Court of Appeal, one of the issues raised was whether or not a sale of the vessel prior to the determination of the criminal proceedings, prevented the Crown from claiming forfeiture of the proceeds of sale of the vessel. The court analyzed sections 71 & 72 of the *Fisheries Act* and concluded that the legislation did not authorize the court to dispose of a seized vessel prior to trial and retain the proceeds of sale. The court concluded that by selling the vessel, the Crown had released it from detention, which terminated any forfeiture rights the Crown had in the criminal proceeding pursuant to the provisions of the *Fisheries Act.* Upon appeal to the Supreme Court of Canada, this decision was reversed and the court interpreted the s. 72 forfeiture

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[154] *Vancouver (City) v. Ward,* 2010 SCC 27.

[155] *R. v. Ulybel, supra* note 47. Section 72(1) of the *Fisheries Act* provides that "**72.** (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty."

powers more broadly so as to restore the $50,000 forfeiture order. In doing so, the court said as follows:

> ***The admiralty provisions of the Federal Courts Act and the provisions of the Fisheries Act can and should be read as a consistent, harmonious scheme for the regulation of maritime matters***. *Fishing vessels and their use are at the heart of the activities governed by each regime, and the law in one area will inevitably exert an influence on the law in the other. For example, it is a likely scenario that many fishing vessels are mortgaged and must be active and producing income in order to discharge the mortgage. A seizure of such a vessel under the Fisheries Act can result in a lengthy pre-trial detention. If an owner is unable to obtain the return of the vessel by posting security, by taking the vessel out of the working ocean, it is likely that a period of detention that curtailed the income producing activities of the vessel would precipitate a civil claim against the vessel in a court of admiralty jurisdiction such as the Federal Court of Canada.* ***Therefore, a reasonable and obvious explanation of the 1991 amendments to s. 72(1) is that the above scenario was anticipated by the legislators, who, in order to preserve the jurisdiction of the court to impose forfeiture as a penalty, broadened the power to make an order of forfeiture to include in its scope the proceeds of a disposition of a seized vessel realized under an authority other than the Fisheries Act****, thus giving effect to Parliament's intention to increase penalties for fisheries offences while also preserving the operation of the presumption of innocence vis-à-vis the quasi-criminal processes of the Fisheries Act* (para. 51) [emphasis added] .

It should be noted, however, that the court suggested that if the Crown had instituted Federal Court proceedings itself in order to obtain a sale *pendant lite*, rather than appearing as an intervener in an action already commenced by a third party, it may have viewed its actions as an "end run around the limitations in the *Fisheries Act*" and decided the case differently.[156]

In addition to allowing the Crown to seek forfeiture of funds paid into Federal Court *in rem* proceedings (after conviction), the court also suggested the following:

1. "[A] person charged with an offence under the *Fisheries Act* cannot rely on the presumption of innocence to prevent or delay a person with an *in rem* claim against his property from obtaining a remedy"[157]; and

2. Although section 74 and 75 of the *Fisheries Act* envision applications for relief from forfeiture by innocent parties to be made before superior courts, it "is open to an innocent party to assert its interest in the form of an *in rem* claim against the vessel in Federal Court, under its admiralty jurisdiction.[158]

[156] Para. 53. This was the approach taken by the Newfoundland Court of Appeal.
[157] *Ulybel, supra* note 47, para. 38.
[158] *Ulybel, supra* note 47, para. 49.

While the appeal to the Supreme Court of Canada was pending, the Federal Court adjudicated the issue of the priority of a forfeiture order under section 72 of the *Fisheries Act* in relation to a holder of a registered mortgage. At the initial priorities hearing, Prothonotary Morneau decided that the forfeited funds would be paid out in priority to the mortgage.[159] Subsequent to the release of the Supreme Court of Canada decision, the Federal Court of Appeal upheld the decision of Prothonotary Marneau to grant priority to the Crown forfeiture order.[160] In doing so, the court noted that s. 75 of the *Fisheries Act* permits any person who claims to be innocent of any complicity in the offence to apply for an order that his or her interest is not affected by the forfeiture. Accordingly, the priority granted to a mortgagee only applies when there has been no successful application for relief from forfeiture.

IV. Conclusion

As can been seen by this survey, the Federal Court hears a wide variety of fisheries cases, primarily under its jurisdiction over judicial review proceedings and to a lesser extent under its jurisdiction over admiralty actions and damage actions against the Crown. Section 72 *Fisheries Act* cases are rare. This paper should serve as a good starting point to familiarize oneself with the common issues that arise in these cases. For updates on fisheries cases and more detailed digests of the cases footnoted in this paper, see the fisheries page of admiraltylaw.com.

This paper was prepared and presented to the Federal Court and Federal Court of Appeal at a joint National Justice Institue/Canadian Maritime Law Association Seminar by **Brad M. Caldwell**, of Caldwell & Co. Law Corp. 401 – 815 Hornby Street, Vancouver, British Columbia, V6Z 2E6. Tele: 604 689 8894, e-mail: bcaldwell@admiraltylaw.com.

[159] *Neves v. Kristina Logos (The)* (1999), 173 F.T.R. 31.
[160] *Her Majesty the Queen v. Mario Neves et al.* 2002 FCA 502. See also the decision of MacKay J. at 2001 1 FCT 1034. The court also rejected a claim by the Crown for priority for the costs that it incurred while maintaining the vessel while under seizure pursuant to the *Fisheries Act.*