Lobster Fishery Licensing: Injustice and Muddling Through

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Lobster means different things to different people: for some it is the ultimate in gourmet dining; for the lobster fisherman it is the object of his labour and investment and the key to his lifestyle.

There are over 20,000 lobster fishermen in Atlantic Canada who land approximately 36 million pounds of lobster at an annual landed value of about $40 million. Lobster is Atlantic Canada's single most valuable fishery, more valuable than cod or herring.

Management of the lobster fishery is entrusted to the Fisheries and Marine Service of Environment Canada. A central aspect of their management programme has been an extensive licensing system.

This article is intended to provide an overview of that system with the avowed object of encouraging a reconsideration of the present legislation. It is also written in the hope that some of the legal loopholes found presently in the legislation will encourage test litigation by lawyers acting for lobster fishermen should these loopholes remain open.

Structurally, the article is divided into five sections. Firstly, the article will detail briefly the state of the lobster industry in Atlantic Canada. Secondly, an outline will be presented of the regulatory framework governing the lobster industry. Thirdly, consideration will be addressed to the statutory framework of the licensing system. Fourthly, the objectives of the licensing system will be analysed in detail with particular emphasis being given to present regulatory efforts to eliminate part-time fishermen or "moonlighters" from the industry. Finally, the powers granted by statute and

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1. Lobster Fishery Task Force, Final Report, March 1975, Table 1, at 124
2. Environment Canada, Fisheries and Marine Service, Summary of Canadian Fisheries Statistics, 1973 (Ottawa: Information Canada, 1975) Table 4
regulations and particularly, the procedures that have to be followed in the exercise of those powers, will be considered.

As a final introductory note, it should also be stated that if this article has a particular perspective in analysing the present licensing system, it is that of the lobster fisherman in dealing with the federal regulatory authorities. However, no apology need be made for that fact; for it is the thrust of the article that the present regulatory regime is inequitable towards the lobster fisherman in a number of respects. Not only is there a lack of clearly articulated legislative standards for administrative intervention and a lack of well-defined procedures governing such intervention; but at times there is a high degree of arbitrariness employed by authorities which stems from the failure of the regulatory regime to resolve vital policy issues relating to the economics of the industry.

II. The Fishery as an Industry

The object of the fishery is the American Lobster, biologically known as Homarus americanus, which belongs to a group known as crustaceans — so-called because of their hard but jointed "crust", or shell. Close relatives are the European Lobster (Homarus gammarus) and the Norway Lobster (Nephrops norvegicus).3

The lobster has two main body regions: the combined head and thorax, known as the "body" and the abdomen, known as the "tail". The combined head and thorax is covered by a one piece shell known as the "carapace".4

The lobster’s habitat is a rocky ocean floor rather than a sandy or muddy bottom.5 Generally, they are more prevalent in shoal waters than in deeper areas and fishermen find that catches are best on sea-bed ridges and humps. Lobsters, at the adult stage, appear to be nonmigratory. Tagging experiments have shown that lobsters travel an average of only two or three miles in a period of one year.6 Fishermen claim that a difference of a few hundred yards in trap location may make a difference in catch because the trap is outside the area of a particularly abundant lobster population.

3. Id.
4. D. W. McLeese and D. G. Wilder, Lobster Storage and Shipment (1964), Bulletin Fisheries Research Board Can., No. 147 at 3
5. Id. at 6
Lobsters are known to be subject to two diseases, both of which may be fatal but neither of which is harmful to humans. But by far the greatest cause of mortality of lobsters of legal size is fishing.\(^7\)

Lobsters are caught by means of wooden, half-cylinder shaped traps of two and a half to four feet in length which are set on the ocean floor and attached by a rope to a buoy at the surface. Lobsters are attracted to the trap by bait-herring, gaspereau, mackerel or cod — placed on a “spindle” in the trap. The lobster has access to the trap through either of two funnel-shaped mesh nets on the side of the trap. Because the lobster travels “tail-first” it can force its way into the trap and then once inside the trap, it can enter the “parlour” compartment by forcing open yet another mesh funnel. But once in the “parlour”, escape is prevented by a flap which closes over the small end of the funnel and entraps the lobster in the “parlour”.

At the primary level, the lobster industry is composed largely of two-man operations. Generally, one man owns the lobster fishing vessel — usually of Cape Island style — and the gear. He is the captain of the boat and employs a hired man or helper, sometimes for a wage but more often for a share. Partnerships do exist but they are exceptions to the rule. In some areas of Atlantic Canada, companies own the boats and hire captains to run their lobster fleets — this is particularly the case in parts of Northern New Brunswick.

The Atlantic lobster fishery is predominantly an inshore fishery with traps being set anywhere from a few hundred yards to twenty-five to thirty miles from shore. In 1971, a small offshore lobster fishery was introduced to provide employment for fishermen who were displaced due to the closing of the swordfishing industry on account of mercury poisoning. At present, six or seven boats harvest about one million pounds of lobster each year from the Georges Browns and Baccaro Banks area south of Nova Scotia on a year-round basis.\(^8\)

Because the fishery is predominantly an inshore fishery, lobster fishermen tend to leave the wharf in the morning and return home at night with their catches. The lobsters are sold live; either as “market” when they are shipped to live lobster markets in the eastern United States and central Canada, or as “canners” when they are canned for shipment to more distant markets. In recent

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8. *Supra*, note 1 at 98
years, more lobsters have been channeled into frozen foods markets. "Market" lobsters traditionally have attracted a better price, but the ability of the fisherman to sell his catch as "markets" has been somewhat dependent upon the fisherman's proximity to consuming areas. Consequently, fishermen in southwestern Nova Scotia have been able to sell lobsters as "markets" much more successfully than those in Newfoundland.

Another salient characteristic of the east coast lobster fishery is its extreme diversity. For example, the average landed value per fisherman in 1973 in the area from Burn's Point to Baccaro in Southwestern Nova Scotia was $5,370; while, in the same year, the average landed value per fisherman in all the Quebec and Newfoundland districts was $477. To some extent, management programmes have been sensitive to these differences.

III. The Regulatory Framework

The statutory authority to manage the lobster fishery is found in the Fisheries Act. Section 34 of the Act empowers the Governor-in-Council to make regulations for, inter alia, "the proper management and control of the seacoast and inland fisheries". The Lobster Fishery Regulations issued under the authority of section 34 provide the framework for management of the lobster fishery.

In order to understand the lobster fishery licensing system, it is necessary to appreciate the management framework in which lobster licensing is conducted.

Regulation of the lobster fishery and licensing of lobstering are not recent developments. The initial attempts at regulation were made as early as 1873 with conservation as a goal; and licences were first required in 1918 following the recommendation of the Dominion Shell-Fish Fishery Commission.

Today's lobster regulations and licensing system are the successors of these first government interventions in the field.

Schedule I of the Regulations provides for twenty different inshore lobster fishing districts and an offshore district. It also provides the dates of the closed season in each district and the

9. Id., Table 2 at 126
11. S.O.R./74-77
12. Supra, note 7 at 17
13. Id. at 22
14. S.O.R./74-77, Schedule I
minimum carapace length of lobsters. Lobsters with a smaller carapace length are to be returned to the water immediately.\textsuperscript{15} It is an offence under the Regulations for anyone to land "berried" (egg-bearing) lobsters.\textsuperscript{16} For a person engaged in the lobster fishery, possession of lobster claws or tails detached from the main body region constitutes an offence.\textsuperscript{17} Schedule II sets trap limits for each district and Regulation 12(1) (b) requires that all traps fished in the Maritime Provinces have tags affixed to the sill. The fisherman can thus use a limited number of traps to catch lobsters of a certain size during a specified part of the year in one particular district. It is against this background of regulation, introduced largely for conservation purposes,\textsuperscript{18} that the lobster fishery licensing system operates.

IV. The Licensing System — Statutory Framework

Section 91(12) of the \textit{British North America Act}\textsuperscript{19} confers exclusive legislative authority on the Parliament of Canada to legislate in relation to "Sea-Coast and Inland Fisheries". A series of cases\textsuperscript{20} at the end of the nineteenth and early twentieth century made it clear that the federal legislature has the power under Section 91(12) to require fishing licences.

It is useful to examine the position at common law with respect to participation in ocean fisheries, owing to the fact that a regime of lobster fishery licences acts as a statutory restriction upon the right of a specific sector of the public to participate in the fishery industry. It is in this regard that the early constitutional cases are pertinent.

In \textit{Attorney-general (British Columbia) v. Attorney-general (Canada)}\textsuperscript{21}, Viscount Haldane examined aspects of the common law relating to fisheries. He said:

\begin{itemize}
  \item \textsuperscript{15} \textit{Id.}, reg. 3(2)
  \item \textsuperscript{16} \textit{Id.}, reg. 3(3) (a)
  \item \textsuperscript{17} \textit{Id.}, reg. 13
  \item \textsuperscript{18} The exception is the regulation on trap limitation which was introduced to restore the net economic yield.
  \item \textsuperscript{19} 30 & 31 Vict., c.3 (U.K.)
  \item \textsuperscript{20} \textit{Attorney-General (Canada) v. Attorney-General (Ontario)}, [1898] A.C. 700; 67 L.J.P.C. 90 (P.C.); \textit{Attorney-General (British Columbia) v. Attorney-General (Canada)}, [1914] A.C. 153; 15 D.L.R. 308 (P.C.); \textit{Attorney-General (Canada) v. Attorney-General (British Columbia)}, [1930] A.C. 111; [1930] 1 D.L.R. 194 (P.C.)
  \item \textsuperscript{21} [1914] A.C. 153; 15 D.L.R. 308
\end{itemize}
The subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if indeed, it did not in fact first take rise in them.\textsuperscript{22}

In concluding he stated further: "So far as the waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament [emphasis added]."\textsuperscript{23}

It is in the regulation of this public right of fishing that lobster fishery licences are granted. Regulations 9, 10, 11 and 16 of the Lobster Fishery Regulations\textsuperscript{24} provide the statutory framework for the licences.

There are two types of "licences"\textsuperscript{25} which a fisherman must obtain: (1) a lobster fishing vessel operator's licence, and (2) a lobster fishing vessel certificate of registration. Regulation 9 deals with the former and Regulation 10 deals with the latter. Both regulations are framed negatively, \textit{i.e.} they prohibit fishing without a licence but they do not authorize the issuance of a licence. Authority to issue licences is found in Section 7 of the \textit{Fisheries Act}:

The Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued, leases and licences for fisheries or fishing, wherever situated or carried on; but except as hereinafter provided, leases or licences for any time exceeding nine years shall be issued only under authority of the Governor General in Council.\textsuperscript{26}

Clearly, this authorizes the issue of the operator's licence but a question can be raised as to whether this provides legislative authority for the certificate of registration. A lobster fishing

\textsuperscript{22} Id. at 169; 15 D.L.R. at 315
\textsuperscript{23} Id. at 173; 15 D.L.R. at 318
\textsuperscript{24} S.O.R./74-77
\textsuperscript{25} At first glance, one might think a third type of licence has been added by the Atlantic Fishing Registration and Licensing Regulations, S.O.R./76-211. Regulation 10(1) requires "an entry permit" for limited fisheries. However, the Fisheries and Marine Service reports that at present it considers the lobster fishing vessel certificate of registration issued under the Lobster Fishery Regulations as sufficient to satisfy this requirement.
\textsuperscript{26} R.S.C. 1970, c.F-14, s.7
certificate of registration is certainly not a lease and the question then arises as to whether it is a licence in terms of the law.

According to Black J. in *Russel v. Ministry of Commerce for Northern Ireland*:

The word licence has a well recognized signification in English law. According to our law a licence properly so-called is merely a permission granted to a person to do some act which but for such permission it would be unlawful for him to do . . . . When one finds the word 'licence' used in a statute the presumption is that it is intended to designate a purely personal privilege, a privilege not capable of being assigned or transferred by the licensee to anyone else and which comes to an end on the death of the licensee.27

To decide whether a lobster fishing vessel certificate of registration is a licence, it is necessary to know precisely what rights and obligations are associated with such certification.

All lobster fishing boats fall into one of two categories — A or B — depending on the number of traps that were fished from that boat prior to January 20, 1969. This number varies from fifty to a hundred traps depending on the district.28 Vessels with less than that number are in Category B and, when ownership changes,29 or when the vessel is retired from the lobster fishery,30 the certificate ends. Other vessels are Category A vessels and their certificate can be transferred when ownership of the vessel changes.31

Certificates of registration, insofar as they are transferable, will conceivably not fall within Black J.'s definition of a licence. Arguably, such certificates are not personal privileges to use a certain vessel in the lobster fishery; but rather they authorize the use of a particular vessel in the fishery, whosoever the owner is.

Consequently, it appears that Section 7 of the *Fisheries Act* may not authorize the Minister to issue lobster fishing vessel certificates of registration. Moreover, a survey of other provisions in the *Fisheries Act* reveals no section any more likely to provide the required statutory authority than Section 7.

Authority for the issuance of vessel certificates might be found in

27. [1945]N.I. 184 at 188 and 193
28. S.O.R./74-77, reg. 2
29. *Id.*, reg. 10(8)
30. *Id.*, reg. 10(10)
31. A temporary freeze on licence transfers existed from December 30, 1975 to mid-March, 1976. Transfers are now permitted from one *bona fide* fisherman to another.
Regulation 10(11) of the Lobster Fishery Regulations which provides as follows:

The Minister may issue a lobster fishing vessel certificate of registration to any lobster fishing vessel where in his opinion special circumstances warrant the issuance of a lobster fishing vessel certificate of registration to that person.

However, it would be straining the language of the subsection to assert that special circumstances existed in each of the thousands of cases where vessel certificates have been issued. Presumably, this provision was intended to give the Minister discretion to grant a certificate to a new vessel which was not replacing a Category A vessel being removed from the fishery, but which the Minister thought should be participating in the fishery.

If, as suggested, there is no statutory authority permitting the Minister to issue certificates, then it is submitted that any regulations requiring certificates are presently unenforceable.

Further investigation reveals another apparent inconsistency between the Fisheries Act and the Lobster Fishery Regulations. This centres on the question of who, at law, is the “Minister”. Section 2 of the Fisheries Act, as amended, defines “Minister” as the Minister of the Environment. His duties and powers under the Fisheries Act have now been transferred to the Honourable Romeo LeBlanc, a Minister of State. He has authority under the Act to issue a licence. Regulation 2(1) defines “Minister” as “The Minister of Fisheries for Canada”. Strictly speaking, there is no Minister with precisely this designation. Consequently, it is open to argument that Regulations 9 and 10, requiring an operator’s licence and vessel certificate issued “by the Minister” have no legal effect. However, a court reviewing the matter might take a different view completely, and give meaning to the phrase ‘The Minister of Fisheries’ for Canada, on the basis that it would frustrate the intention of the legislature to treat this language as ineffective.

The lobster fishing vessel operator’s licence is issued by the Minister to a fisherman personally and is valid only in the district for which it is issued. This prevents fishermen from fishing in more than one district in one year, because only one licence can be issued to a person in one year. Indeed, if a fisherman wishes to be

32. S.I./74-104
33. S.O.R./74-77, reg. 9(5)
34. Id., reg. 9(6)
licensed to fish in a district outside the one where he resides, there are special procedures that have to be followed.\textsuperscript{35}

Both the vessel certificate and the operator's licence are issued annually and are available from fishery officers, acting as the \textit{alter ego} of the Minister, at local offices in the district where the fisherman resides.

Regardless of any decision which a court might render if faced with either or both of these technical legal arguments, one thing is clear: there is a need to improve the drafting of the Act and the Regulations. Mistakes in the Regulations are inexcusable. With respect to the Act, it can only be said that it is an outdated piece of legislation, badly in need of a careful overhaul so as to provide the Fisheries and Marine Service with a modern and effective statutory framework under which it can conduct the important function of managing Canada's fisheries.

In view of Canada's declared intention to exercise management jurisdiction over a two hundred mile fishing zone as of January 1, 1977, the time would seem ripe to undertake such a complete review and updating of the \textit{Fisheries Act} and of (subordinate) regulations made in terms of the Act. If the Lobster Fishery Regulations are any indication of the benefits associated with such an undertaking, the exercise could yield returns well worth the effort.

\section*{V. The Licensing System — Objectives and Recent Developments}

In recent years the focus of government involvement in the lobster fishery has changed from one of conservation to one of management. The licensing system in the fishery provides the key to the implementation of this change.

Throughout the 1960s and the first half of the 1970s, the total landed value of lobsters did increase in the Atlantic area. Nevertheless, the general trend, with only minor exceptions,\textsuperscript{36} was toward a decline in the return on investment as fishermen were faced with ever-increasing costs.

Sensing this trend, the Fisheries and Marine Service has increasingly perceived its role as being one of managing the fishery to improve the economic yield of participating fishermen rather than

\textsuperscript{35} \textit{Id.}, reg. 9(7)
\textsuperscript{36} The harvest has remained relatively stable and even improved in parts of District Number 4.
achieving conservation *per se*. The licensing system was therefore introduced to further this objective of increased returns.

The first aim of the licensing system was to provide an accurate inventory of all the fishermen and vessels participating in the fishery.\(^{37}\) From this list, it was possible to determine the amount of effort involved in the fishery. After this information was available, it was thought possible to take steps to maximize the returns to the fisherman.

The rationale for the licensing system is rooted in economic theory. Economists reason that there is a level of harvest below the biologist's maximum sustainable yield, that level of effort at which the fishery may be harvested without depleting the stock over time, and which will provide the best return on investment for the fisherman.\(^{38}\) This level constitutes the net economic yield, also referred to as optimum utilization,\(^{39}\) or that level of effort "which maximizes the net economic yield; the difference between total cost, on the one hand, and total receipts (or total value product), on the other."\(^{40}\)

The point of maximum sustainable yield is shown in Figure 1. Landings are shown on the vertical axis and effort per year on the horizontal axis. It is when effort is at \(Ob\) that the sustained yield is at a maximum.

![Figure 1. Landings Function of a Lobster Fishery. The following inferences appear from the diagram.](image)

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37. Press release, Department of Fisheries, Information Branch, February 6, 1968. Copies of this and other releases are available from Information Branch, Fisheries and Marine Service.

38. *Supra*, note 7 at 32-34

39. This was the terminology used in Article 51 of Part II of the International Single Negotiating Text produced after the Geneva session of the Third United Nations Conference on the Law of the Sea.

If demand is perfectly elastic (i.e., the amount of lobsters landed does not affect price and a price for the lobsters landed is introduced then the landings curve can be translated into a revenue curve. With the introduction of a cost function into the graph, it is possible to plot the point of optimum utilization. This is done in Figure 2. The point of optimum utilization of the lobster resource is at Od, where the difference between revenue and costs is the greatest. As can be seen from Figure 2, the level of effort which produces optimum utilization of the lobster resource is somewhat less than the level of effort which will provide the maximum sustainable yield.

The object of the licensing programme in the lobster fishery has been to reduce the amount of effort, from a level which had in the past been yielding a harvest beyond that which was sustainable, to a level close to the optimum utilization of the lobster stocks.

Since effort is comprised of a labour and capital investment, the approach taken was to limit both forms of investment. Consequently, in 1968 lobstering became a restricted or limited entry fishery. Through the licensing system, an inventory of effort was established and maintained. By retiring Category “B” vessels from the fishery, an attempt was made to reduce directly the amount of capital and to reduce the amount of labour indirectly. Paradoxically, it seems that the licensing system had exactly the opposite effect, at least to a limited degree, instead of reducing capitalization, it encouraged it. Some lobster fishermen who would have retired their vessels from the fishery when they had an opportunity to leave the fishery, made an effort to keep vessels licensed to participate in the fishery as security against economic misfortune that might impede their alternative employment.41

41. Statement by Dick Stewart, Executive Director, Atlantic Fishermen’s Association, to the Coastal Law class at Dalhousie Law School, March 3, 1976.
Another consequence of the limited entry licensing programme in which vessel ownership was the key to entry, was that the licence giving permission to fish lobsters, acquired a property value of its own. A lobster boat sold with a licence attracted a far greater price than one sold without a licence: the difference represented the value of the licence. Licences have been sold "at $1,500 to $2,000 depending on the appetite of the buyer".42

As might be expected, this licensing system has been the subject of some debate. With lobster licences selling at such an inflated value on the open market, yet another obstacle to those wanting to enter lobstering was added. For those fishermen with a licence, the lobster licence has served as a retirement bonus when they leave the fishery. Some of the lobster fishermen approve of the present system and disapprove of a system where the licence would be granted to the licensee only and would revert to the government when the fisherman retired. A spokesman for the Atlantic Fishermen's Association argued:

The drawbacks of having the licence on the man... are that if a man works all his life to build up a sixty or seventy thousand dollar lobster rig, he should be able to leave this business to his son or his wife should have the opportunity, in case of his death, to sell the business in its entirety. If this were not the case, the value of the boat and/or business would probably drop by two-thirds in value.43

In its preliminary report, the Lobster Fishery Task Force took the opposite view:

Although selling lobster fishing privileges is economically sound and does provide retiring fishermen with a higher payment for their boat and gear than they would normally receive, the practice is not popular with fishermen. The Task Force is of the opinion that the lobster fishing privilege should be removed from the boat and attached to the fisherman, recognizing that it is persons not objects which fish. Such a move should also remove distortion from the boat market.44

The debate continues unabated.

42. Romeo LeBlanc M.P. (as he then was), Can. H. of C. Standing Committee on Fisheries and Forestry, Proceedings, No. 4 (March 28, 1974) at 9
43. Dick Stewart, Executive Director, Atlantic Fishermen's Association, correspondence dated October 30, 1975
44. Lobster Fishery Task Force, Preliminary Report, February 1975 at 61. The extract quoted provides an interesting insight into the policy-making process in the lobster fishery. When the Task Force presented its final report the excerpt had been replaced by the following, at p. 71 of the Final Report, supra, note 1:
Recently, steps have been taken to move the level of effort in the lobster fishery still closer to optimum utilization. The focus of attack upon the licensing programme has been the over-capitalization in the fishery and the method of attack has assumed the form of the controversial “moonlighters” policy.\(^4\) The attacks raised the ire of politicians, was front-page news\(^4\) and was criticized severely by editorial writers.\(^4\)

The “moonlighters” policy has consisted of legislation by press release. Newspaper reports which referred to “regulations”\(^4\) were inaccurate. There were no new regulations or amendments — merely ministerial policy statements.

In announcing the policy on December 30, 1975, the Honourable Romeo LeBlanc, Minister of State for Fisheries, said the policy “will give us a smaller fleet catching more lobsters per fisherman”. He explained:

> We have no intent to disturb the part-time fisherman with a real dependence on the lobster fishery or a man using his boat in more than one fishery. We want only to honour the demands of these legitimate fishermen by excluding a minority with no real stake in the lobster industry.\(^4\)

Coupled with this was a temporary freeze on vessel certificate transfers.

Against this background, registered letters were sent in January, 1976 to approximately fifteen hundred persons who held vessel certificates in 1975. They were informed that “persons with full-time jobs would not be able to participate in the lobster fishery”. The letter continued, “Information on hand suggests that

Although selling lobster fishing privileges does provide retiring fishermen with a higher payment for their boat and gear than they would normally receive, the practice is not popular with fishermen. It did, however, receive support, with a few exceptions, at the meeting with fishermen, packers, and provincial government officials, held in Halifax in March, 1975.

From the language used, one suspects that the Task Force was forced to change its position, albeit only slightly, by the industry spokesmen. One wonders how grudgingly the changes were made.


47. Halifax *Chronicle-Herald*, February 2, 1976


49. *Supra*, note 45
under the above criteria your lobster fishing licence [sic] will not be renewed in 1976". It concluded by indicating that an appeal could be launched by completing and returning an enclosed Statutory Declaration. A subsequent letter was sent to clarify the confusion created by the first letter. The decision as to who should receive these letters was made on the basis of a survey conducted by local fishery officers.\textsuperscript{50} Among those who received letters were doctors, lawyers and chartered accountants.\textsuperscript{51} Others were less clearly moonlighters: these included \textit{inter alia} Laurence Chandler of Chester, Nova Scotia, who has fished lobsters for close to forty years and at the time worked seventeen hours a week as a janitor in the Chester Federal Building,\textsuperscript{52} and an anonymous fisherman on Nova Scotia's South Shore who has fished lobsters for thirty-four years, supplementing his income during the closed season as a self-employed painting contractor.\textsuperscript{53}

The ostensible object of the "moonlighters" policy, that of increasing net economic yield by reducing effort to the level of optimum utilization, commends itself. However, the number of fishermen required to harvest the resource at this level has never been adequately stated. Indeed, optimum utilization is nowhere described clearly as an objective.\textsuperscript{54} In effect, it appears from these facts that the fishermen are being used as "guinea pigs" on which to test the economic theories on optiminium utilization. Indeed, it is remarkable that there is no specified goal in terms of the number of people who will be permitted ultimately to fish lobsters.

There is also a question of considerable moral significance involved. Specifically, in a world hungry for protein, should we in Canada who own some of the world’s most valuable fisheries, decide against using those available fisheries so as to obtain the maximum amount of protein. In fact, it is with Canada’s insistence, that the nations of the world, through the vehicle of the Law of the Sea Conference, have begun to progress in this direction.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{50} Statement by Bernie Vaughn, District Protection Officer, Fisheries and Marine Service, reported in \textit{The Pictou Advocate}, January 28, 1976 at 1
\item \textsuperscript{51} Halifax \textit{Chronicle-Herald}, February 3, 1976
\item \textsuperscript{52} Lunenburg \textit{Progress Enterprise}, January 28, 1976 at 1
\item \textsuperscript{53} Information contained in a letter from a South Shore barrister handling the fisherman’s appeal.
\item \textsuperscript{54} Although the December 30 statement did say that measures will reduce the number of lobster licences "until there is a better balance between resource and effort". \textit{Supra}, note 45 at 2
\item \textsuperscript{55} \textit{Supra}, note 39
\end{itemize}
Finally, there is the question of whether the new licensing controls should be accompanied by a buy-back programme. Several arguments support such a repurchase facility. Those persons with investment in a lobster boat and gear who have lost their vessel certificate under the new measures, would find there is no ready market for their boat and gear. No new fishermen would want to buy such equipment because the new owner would not be able to use the boat and gear for lobstering. If the lobster fisherman should sell his rig "piece-meal" to non-fishermen or other fishermen then he will receive far less than he would otherwise have received had he sold his rig as a going concern. In an accounting sense, the announcement of the "moonlighter" policy reduces substantially the owners's equity in the business venture. The crucial policy question is whether there should be some measures to compensate the "moonlighter" for his loss in equity.

In British Columbia, when limited entry was very successfully introduced into the Pacific salmon fishery, it was accompanied by a buy-back programme. The government purchased the vessel of fishermen leaving the fishery instead of letting them sell to other persons who would keep the vessels active in the fishery. Consequently, the selling fishermen realized the equity in their investment when they left the fishery. The vessels were independently appraised on the basis of estimated market value by two appraisers. Their appraisals were averaged and a 5% bonus added as an inducement to sell to the government. The vessels purchased in this fashion were then sold at public auction yielding 46% of their value as fishing vessels.\textsuperscript{56} It is to be noted that this programme was applied to vessels retired voluntarily.

In the lobster fishery, retirement under the "moonlighter" policy will be compulsory and without compensation. This can be contrasted with government expropriation where compensation is paid to an owner deprived of his property.\textsuperscript{57} The British Columbia system is more closely comparable to an ordinary offer of purchase where the vendor either accepts or rejects the purchaser's offer but has no legal right to fair market value. Indeed, if the British Columbia experience proves true in Atlantic Canada, the effect would be the same as if the government had expropriated one-half of a lobster fisherman's rig without any compensation.

\textsuperscript{56} B.A. Campbell, \textit{Licence Limitation Regulations: Canada's Experience} (1973), 30 J. Fisheries Research Board Can. 2070 at 2074
\textsuperscript{57} E.g. Expropriation Act, 1973, S.N.S. 1973, c.7, s.24
The Lobster Fishery Task Force rejected the idea of a buy-back programme, citing the following reasons: (1) without extremely large expenditures only marginal fishermen would be eliminated thereby resulting in no substantial reduction in effort; (2) there is no basis on which to value the fishing privilege being purchased; (3) questions would arise as to whether public funds should be used to purchase a privilege in order to protect persons from competition; (4) no settlement would ever be accepted or understood.\(^{58}\)

A proper resolution of this aspect of the licensing problem may depend on whether participation in the fishery is seen as a right or a privilege. Yet, whatever the decision reached, political factors will have a considerable impact upon the results.

Further critical questions arise as regards the functioning of the appeals procedures available to fishermen who had lost their lobster licences.

The fifteen hundred fishermen who received the January letters indicating that their vessel certificate would not be received in 1976 were given the right to appeal to local licence Appeal Committees constituted for this purpose. Although the Committees have now finished the bulk of their work, they have not been disbanded.

Each committee is composed of five persons — a representative of the Fisheries and Marine Service, two lobster fishermen, an industry representative, and an independent member. The chairman and government representative on each Committee is the District Protection Officer (DPO). At his request, the fishermen representatives were selected by a fishermen’s organization in each district. The independent member was nominated by the DPO. The District Protection Officer had jurisdiction over all appeals in his Protection District while the other Committee members only heard those appeals coming from their own lobster district or county.

The role played by the DPO in choosing the Committee members and as chairman ruling on procedure, coupled with his larger geographical jurisdiction, would logically tend to make him the most influential Committee member. However, he is only one member of a committee of five which is otherwise heavily weighted with fishermen. In the past, there have often been disagreements between Atlantic fishermen and government. Fishermen have served as strong critics and have often resisted government policy initiatives. One suspects that, if the DPO began to wield too much

\(^{58}\) Supra, note 1 at 77
influence, the fishermen on the Committee would resist.

The most serious problem with the Appeal Committees is the one with the most potential for abuse. Without commenting on the honesty and integrity of the lobster fishermen on the Committees, it must be noted that they, as *bona fide* fishermen, stand to gain with the elimination of "moonlighters" from the fishery. That elimination goal is the declared purpose of the policy. Such pecuniary interest on the part of fishermen as Appeal Committees in the outcome of a case is one which has disqualified decision-makers many times on the ground of bias.

At a time when the Fisheries and Marine Service has begun to win back a respectable reputation in the industry, such threats to the integrity of the legal procedures used are most damaging. The structure and operation of the Appeal Committees should rather have been developed differently so that the "moonlighter" could not accuse the government and the prosperous fishermen of a conspiracy to help the "rich get richer" at the expense of the "moonlighter".

Nevertheless, there were reasons for the structures adopted. It was contended that the smaller jurisdictions in which fishermen and the independent member served on Appeal Committees enables these people to bring local knowledge and expertise to bear on the appeal. The District Protection Officer was purposefully given a larger jurisdiction so that he might be able to bring uniformity to the proceedings — at least within his district. However, this rationalization still fails to override the objection to interested fishermen actually "deciding" appeals.

Regarding the procedures employed on appeal, the Appeal Committees heard the appeals of the individuals affected and made recommendations to the Regional Headquarters of the Fisheries and Marine Service. The Regional Headquarters reserved the right to review the cases before a final decision was made.

The fishermen were given a right to appeal this decision to the Minister. Because of the large number of appeals, implementation of this policy was postponed until 1977 in those areas where a spring and summer fishery occurs. Since the vast majority of persons whose licences were challenged fished during a spring or summer season, this action has had the effect of introducing a year's

postponement. At the date of writing many lobster fishermen apparently stand in limbo awaiting the outcome of their appeal. Those whose appeals have failed, have now begun to contemplate ways to make up for this loss in income.

Since the statutory authority to issue licences is vested in the Minister, the decisions of the Appeal Committees are, of legal necessity, only recommendations. Any alternative arrangement would introduce the undesirable effects connoted by the Latin maxim *delegatus non potest delegare*, *i.e.* a delegate may not re-delegate.\(^\text{60}\)

In regard to the actual Appeal procedures used, the Appeal Committee conducted two-stage enquiries in each case.\(^\text{61}\) The first question each considered was one of fact; namely, whether the appellant was:

(a) a person who was fully employed outside of primary industry employment; or

(b) a person who had full time seasonal employment.\(^\text{62}\)

If the fisherman was such a person, then unless there were extenuating circumstances of an economic nature, as, for example, where the person and his family would face extreme economic hardships unless he could continue lobster fishing, his vessel certificate was not recommended for renewal. The Appeal Committee decided the employment question and recommended on extenuating circumstances.

The key terms in the employment question are defined as follows:

"fully employed" means employed or self-employed on an annually recurring basis for a full twelve months including any leave, vacation or time off for which the employee received remuneration.

"full time seasonal employment" means employed or self-employed on an annually recurring basis a minimum of thirty-five hours per week in employment that is totally concurrent with the open lobster fishing season for the district in which the employee resides.

\(^{60}\) For a discussion of the problem see John Willis, *Delegatus Non Potest Delegare* (1943), 21 Can. B. Rev. 257

\(^{61}\) The information about the structure, composition and functioning of the Appeal Committees was obtained from Harry W. Scarth, Fisheries and Marine Service, Halifax, Nova Scotia during a personal interview on March 5, 1976.

\(^{62}\) Proposed criteria for functioning of the Appeal Committees. These criteria are in the process of being presented as amendments to the Lobster Fishery Regulations.
"primary industry employment" means self-employment in logging, farming or fishing.\textsuperscript{63}

This information was not made public prior to the commencement of the first Appeal Committee hearings. Nevertheless, these were the criteria on which an appellant's case was to be judged. This silence created an appalling situation of judgement according to "criteria unknown" and should have been treated as impermissible in law.

The only substantial reason for failure to make this information available generally was the fear that it would restrict unduly the ability of the Appeal Committees and the Minister to be flexible in individual cases. As a further procedural justification, it was stated that the provisions had not yet been fully approved. In view of this procedural argument the appeals should instead not have been permitted to proceed. In order that justice be both done, and be seen to be done, it is paramount that all measures, whether they be in the form of statute, regulations, or ministerial policy, be made known to the individual concerned prior to the time when he might be adversely affected by them. He should not be denied the opportunity of knowing beforehand what "law" governing his behaviour actually prevailed.

Owing to the manner in which the Appeal Committees operated, it is unlikely that any of the traditional administrative law remedies could be involved to remedy this abuse of jurisdiction. For, the Appeal Committees only make recommendations to the Minister and have no power to decide any question affecting the appellant. Their function is purely administrative.\textsuperscript{64} Accordingly, the traditional prerogative writs and remedies under the Federal Court Act\textsuperscript{65} will not extend to their decisions.

In concluding this part of the article it is important to make a comparison between the Alaska Fisheries controls and the controls discussed above. In 1972, after obtaining the necessary constitutional amendment, Alaska enacted a limited entry law affecting fisheries.\textsuperscript{66} The legislation dealt with all of Alaska's fisheries. It established the Alaska Commercial Fisheries Entry Commission with three members, who were to have no direct or indirect

\textsuperscript{63} Id.
\textsuperscript{64} Guay v. Lafleur, [1965] S.C.R. 12; 47 D.L.R. (2d) 226
\textsuperscript{65} R.S.C. 1970 (2nd Supp.), c.10
\textsuperscript{66} Alaska's Limited Entry Law, Alaska Seas and Coasts, June 15, 1973. The comparative analysis contained in this paper is based on this article.
relationship with the fishing industry. Among other things, the Commission was charged with the task of establishing the optimum number of entry permits and the qualifications for entry permits for each fishery, as well as administering a buy-back scheme. The procedures established were as follows: after the optimum number of entry permits were established, fishermen were ranked into priority classifications based on (1) their "degree of economic dependence on the fishery" and (2) their "past participation in the fishery".\(^6\) If the number of issued permits was greater than the amount considered optimum, then the Commission reduced the number of permits through a buy-back system, purchasing permits, vessels, and gear from a fund created through an assessment of the fishermen in the fishery.

The noteworthy features of the Alaskan system were the independence of the authority administering the programme and the functional certainty of the programme. Under the Alaskan system, the law was defined clearly and not left to the discretion of a politically sensitive authority. Indeed, this would seem to be a clear instance in which Canada could learn much from the American legislative experience.

VI. Licence Suspensions

Faced with the responsibility of managing a scarce, but valuable, common property resource, the Fisheries and Marine Service has responded in a variety of ways to the needs of the industry. A host of regulations were formulated to regulate short and berried lobster fishing, closed seasons and trap limits. Violations of these regulations have lead to fines averaging $145.68\(^6\). However, by far the most important and effective Ministerial sanction has been the threat of suspension of licence and vessel certification.

The licence and vessel certificate suspension — and the word "suspension" should be used with caution — poses various problems for the fisherman and a lawyer attempting to advise him. The following discussion will analyze some of these problems which have periodically been drawn to the attention of the public.\(^7\)

67. Id. at 7
68. Supra, note 1 at 89
69. Information provided by the Fisheries and Marine Service, Halifax, Nova Scotia, shows that the number of suspensions has dropped from 208 in 1970, the last year before the present suspension policy, to 130 in 1974.
70. E.g., Ombudsman, CBC-TV, November 9, 1975; Yarmouth Vanguard, October 29, 1975
Despite the fact that during the period from 1971 to 1975 inclusive, 251 lobster licences were suspended, none of the suspensions has ever been challenged in court. As a result, there is no precedent to serve as a guide.

Section 34 of the *Fisheries Act*, under which the Lobster Fishery Regulations are issued, empowers the Governor-in-Council to make regulations:

(f) respecting the issue, suspension and cancellation of licences and leases;

(g) prescribing the terms and conditions under which a licence or lease is to be issued.

This power was exercised in the making of the following Regulation:

16. The Minister may cancel or suspend the licence of any person, or the lobster fishing vessel certificate of registration of a lobster fishing vessel owned or operated by that person, or both, if that person is convicted of a violation of these Regulations.

On the first reading, it appears that the Minister has found the statutory authority for suspending a licence and vessel certificate. Indeed he has. However, this apparent clarity dissolves into a muddle of ambiguity when the actual suspension is more closely scrutinized particularly in the context of the entire fisheries management legislative framework.

An appreciation of the legal ambiguity requires an understanding of the mechanics of the licence suspension procedure and its effect on the fisherman involved. The scenario that follows is the story of Jerry Cottreau of Wedgeport, Nova Scotia, and is typical of the problems encountered in the suspension process.

On April 12, 1975, Jerry Cottreau was returning to the wharf with his day’s catch of lobsters. When he reached the wharf, his boat was met by a fishery officer who found a number of undersized lobsters segregated from the day’s catch. Cottreau admitted that he had intended to take these lobsters home to eat but denied any involvement in commercial poaching.

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71. Supra, note 69
72. R.S.C. 1970, c.F-14
73. S.O.R./74-77
74. Id., reg. 16
75. The facts of the Cottreau case are drawn from a story in the Yarmouth *Vanguard*, October 28, 1975 and a personal conversation with him.
Cottreau was charged with a violation of the Lobster Fishery Regulations and convicted before a magistrate. Prior to the trial, however, it was brought to his attention that, if convicted, his licence might be suspended and he was asked to sign a form acknowledging that he had been so notified.

Months later, on July 28, 1975, Cottreau received a registered letter from J. E. Creeper, Assistant Director General, Fisheries Management, Maritime Region, which read in part as follows:

This letter will serve as notice that your Personal Lobster Fishing Licence and the Registration of your Lobster Fishing Vessel will not be renewed for the first fourteen (14) days of the 1975 season, beginning on the official opening day of the fishing season in Lobster Fishing District No. 4.76

This is a standard sentence in suspension letters.

Prior to this letter, Cottreau was not notified that the Minister was considering his case, nor was he familiar with the policy being applied in his case since it was made public only in press releases on February 24 and November 12, 1971.77

During this period when he was totally ignorant of the process of law, his case was nevertheless being decided. In nearby Yarmouth, a fishery officer reviewed his case and recommended that the Minister’s policy be followed. This recommendation was made after surveying a remarkable piece of internal “legislation” which determined that Cottreau’s case fell under Schedule A. This legislation consists of a Tentative Policy on Suspension of Lobster Fishing Licences78 which the Fisheries and Marine Service will not even disclose on request.

Following this internal recommendation the “findings” then travelled to Ottawa where the Minister made the final decision. Thereafter, the decision was sent back to Halifax where Mr. Creeper prepared and sent the controversial suspension letter described above.

The licence suspension was a severe blow for Jerry Cottreau. He was a young man with a family to support and had a substantial investment in his boat and gear. Like many small businessmen he had relied considerably on debt financing. This was his first violation.

76. Registered letter, July 28, 1975
77. Press releases, Lobster Violators Face Stiff Penalties, February 24, 1971; Policy on Suspension of Lobster Fishing Licences, November 12, 1971
78. Obtained from a reluctant fishery officer, November 10, 1975
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Based on the preceding three years' average, Cottreau would earn $4,000 - $5,000 less in 1975-76 than he would have if he had fished during the first two weeks of the same season. A further $10,000 loss was caused by the suspension, consisting of money which he had to pay to his helpers to retain their seasonal services rather than lose them to other fishermen. The total loss in a typical suspension case will amount to 25%-50% of the fisherman's gross receipts from lobstering.

This outline of the administrative procedure used to suspend a licence and vessel certificate raises questions in regard to the applicability of the *audi alteram partem* principle, namely, the right of the fisherman to a hearing. However, answers are particularly complex and it is beyond the scope of this article to attempt to resolve finally the conflicting lines of authority that exist in this regard. Rather I will simply raise the arguments both for and against the application of the principle. This will be followed by a tentative prediction of the likely resolution of this issue.

The best known statement of the *audi alteram partem* principle was supplied by Lord Loreburn L.C., early in the century:

Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of the State the duty of deciding on determining questions of various kinds... In such cases... they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their views.\(^7\)

In the normal case of a lobster licence and vessel suspension, it is clear from the example of Cottreau that the Minister, in making his decision to suspend, does not listen fairly to the arguments of the fisherman as to why the licence should not be suspended. Failure to listen, does not determine the question finally. It merely leads to the next question, which is: does the principle apply to the Minister's action in this context? This question can only be resolved by considering the *Federal Court Act*.\(^8\) Section 28 gives power to the

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\(^7\) *Board of Education v. Rice*, [1911] A.C. 179 at 182; 80 L.J.K.B. 796 at 798 (H.L.(E.))

\(^8\) R.S.C. 1970 (2nd Supp.), c.10
Federal Court of Appeal to "review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". Grounds for review include the failure to observe a principle of natural justice which embraces the *audi alteram partem* principle. Section 2 of the Act, by definition, extends this power of review to ministerial decisions.

This means that the Minister, even though he may be acting in an administrative capacity in suspending a licence, may nevertheless be required to adhere to the rules of natural justice when suspending the licence if the decision is one which must be made on a quasi-judicial or judicial basis.

Because the *Federal Court Act* is a relatively new piece of legislation, there is little case law explaining what kind of an administrative decision must be made in a judicial or quasi-judicial manner.

The opportunity to deal with the question arose in *Howarth v. National Parole Board*, a parole revocation case. In the Federal Court of Appeal, Jackett C.J. said:

A decision-making basis is not required to be quasi-judicial in my view unless it, of necessity, involves, first, communicating to the person affected, in some manner, the facts upon which action against him is contemplated, and, second, giving him a fair opportunity to answer those facts.81

This reasoning begs the fundamental question: in what situations must a person be given the right to state his version of the facts?

When the case was appealed to the Supreme Court of Canada,82 Pigeon J., delivering the majority judgment, based his decision on an earlier case dealing with the nature of parole revocation. He declined, however, to enter into any discussion of a general nature of the different kinds of decisions to which section 28 might be applied.

In dissent, Dickson J. was willing to evaluate the different forms of decision-making embodied within the *Federal Court Act*. He decided that parole revocation was a judicial act because the order of the Board: (1) had a conclusive effect,83 (2) was adjudicative, in the sense that there could be a conflict between the parolee and the Board as to whether conditions of parole have been violated and, if

83. *Id.* at 465; 50 D.L.R. (3d) at 361
so, as to whether the violation deserved revocation, had a serious adverse effect upon the parolee’s rights. In meeting arguments that parole was merely a privilege, Dickson J. said:

Parole is a right . . . ; when granted the paroled inmate is entitled to expect that if he observes the terms and conditions of his parole and is otherwise of good behaviour, he will remain at large.

This dissent is the only clear pronouncement by any members of the Supreme Court in regard to the effect of section 28.

If all that was involved in dealing with a lobster licence and vessel certificate suspension case was to apply Dickson J.’s test to the facts of a case, the lawyer’s job of predicting the law for his fisherman client would have been simple. At present, administrative discretion has prevented any such certainty.

A careful reading of the standard letter to a lobster fisherman who is about to lose his licence, reveals merely that his operator’s licence and vessel certificate of registration “will not be renewed”. As noted earlier, the Minister has power to issue fishing licences “in his absolute discretion”. Because the licence and certificate are issued annually, non-renewal for the first two weeks of the season serves as a suspension of two weeks. The same end is reached if the Minister exercises his discretion and decides not to issue the licence and vessel certificate of the fisherman only after two weeks of the season have expired.

Consequently, the matter resolves itself into two issues: (1) whether the procedure whereby a lobster fisherman is actually deprived of his licence and vessel certificate is properly construed as a suspension or as a mere failure to confer a benefit on the fisherman and (2) whether either, or both, of the alternative constructions above, is required by law to be performed in a judicial or quasi-judicial manner. These are questions which yield no easy answer.

It is to be noted that the licence and vessel certificate are issued for a period of one year and not renewed automatically. However, in the industry, the renewal is taken for granted. The fisherman has made a substantial investment in his boat and gear and is operating on the assumption that he will be able to fish for a number of years so that his capital investment may be amortized over that period.

84. Id.
85. Id. at 468; 50 D.L.R. (3d) at 363
86. Supra, note 76
87. R.S.C. 1970, c.F-14, s.7
Indeed, he is encouraged to make that investment by the Minister’s Cabinet colleague, the Minister of Finance, who will guarantee loans under the *Fisheries Improvement Loans Act*. In short, the common expectation is that once issued, the licence and vessel certificate will be renewed annually thereafter.

In substance, then, the Minister’s denial of a licence renewal amounts to an effective suspension of the operator’s licence and vessel certificate. The Lobster Fishery Regulations empower the Minister to do so. In effect, the result is more than a mere failure to issue a new licence and vessel certificate. It is a denial of the right to fish.

Even in regard to form, the Minister’s power is confusing and ambiguous. The language of the *Fisheries Act* refers to “issue”. The Regulations use the word “suspend”, while the letter depriving the fisherman of the opportunity to fish states that the licence and vessel certificate “will not be renewed”.

In *Blais v. Basford*, where the jurisdiction of the Federal Court of Appeal to hear a matter was at issue, a similar set of circumstances was considered. Under the Bankruptcy Act, one section gave the Minister power to renew a licence and another section granted him power to suspend or cancel the licence. Instead of cancelling the licence, the Minister renewed it with a limitation, which, with the passage of time, would prevent effectively the licensee from continuing to engage in licensed activities. The three man Court agreed that it was entitled to exercise its jurisdiction under section 28. In the course of his judgment, Noel A.C.J. made it clear that he disapproved of the Minister’s decision to renew the licence with a limitation “instead of suspending or cancelling it as he ought to have done. ..”.

*Blais v. Basford* is authority for the proposition that, regardless of the form used to effect the “suspension”, the Minister’s decision will still be reviewable on a section 28 application. The decision also suggests strongly that where the court has the option of choosing between “suspending” or “failing to reissue”, the court will hopefully opt for the former.

89. S.O.R./74-77, reg.16
90. R.S.C. 1970, c.F-14, s.7
91. S.O.R./74-77, reg.16
92. *Supra*, note 76
93. [1972]F.C. 151 (C.A.)
94. *Id.* at 154
A determination that the suspension has been made under Regulation 16, is easier for the fisherman to attack and harder for the Minister to defend than a finding that there has been a mere failure to issue under section 7 of the Act.

Under Regulation 16, the Minister must ascertain whether a person has been convicted of a violation of the Regulations before he can exercise his discretion to suspend the licence. That is a question which requires an objective determination of certain facts before the discretion can be exercised.

The suspension of an operator's licence and vessel certificate can have serious economic consequences. If a lobster fisherman cannot fish for two weeks of the season he may be deprived of $5,000-$10,000 in revenue.\(^9\)

There is authority holding that the duty to act judicially arises by virtue of the impact of an act or decision on individual interests.\(^9^6\) This line of authority has been used to prevent interference with property interests\(^9^7\) and statutory offices\(^9^8\) where the right to be heard was denied. It was also surfaced in licence cancellation and suspension cases.\(^9^9\) The interest affected adversely in these cases is the economic interest of the licensee in maintaining his licence. This was illustrated in *Klymchuk v. Cowan* where the activities of the Registrar of Motor Vehicles were held to be *quasi*-judicial. Smith J. said:

In the case of a driver, cancellation deprives him of his right to drive a motor vehicle, which may or may not seriously affect his economic position. In the case of a dealer in used cars, cancellation effectively prevents him from carrying on his business and serious economic consequences usually may be presumed to ensue.\(^1^0^0\)

Because of the fact that the Minister must make a determination of fact and base his decision on the evidence of the case, and because of the impact on the individual affected, there are strong arguments for holding that the Minister must make his decision in a judicial or *quasi*-judicial manner.

95. *Supra*, note 1 at 89
97. *Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180; 143 E.R. 414; 32 L.J.C.P. 185 (Exch. Ch.)
100. (1964), 45 D.L.R. (2d) 587 at 598; 47 W.W.R. 467 at 478-79 (Man. Q.B.)
In addition, a licence and vessel certificate suspension meets the three elements of the Dickson test. The decision is (1) conclusive; (2) adjudicative in the sense that it pits the Minister against the fisherman on the question of what the facts are and whether they warrant a suspension; (3) the decision is adverse to the fisherman’s rights. The Minister has maintained in response that it is not a right but a privilege to participate in the lobster fishery. However, at common law, fishing was a right vested in all the subjects of the realm, and it can be argued that this is a right which it would take the clearest statutory language to abrogate. In addition, it could be said that a licence is a right like parole which the licensee is entitled to expect will continue if he observes its terms and conditions.

If the Court construes the Minister’s decision not to renew the licence and vessel certificate as the exercise of discretion not to issue under section 7 of the Act, the case for the Minister is formidable. At common law, a hearing is generally not required in cases where a licence is granted or a licence is reinstated as opposed to a revocation or of a licence suspension. This is because the process of the grantor, as outlined in the statute, is dissimilar to that of a court.

It is also to the Minister’s advantage that he is a Minister of the Crown; for courts seem reluctant to require a Minister (whose normal functions are administrative in nature and policy-oriented) to give a hearing. This proposition was borne out in Calgary Power Ltd. v. Copithorne which is frequently cited in discussions of the right to be heard. Martland J. said:

In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially.

Further authority has also held against the Minister’s denial of a right of hearing. In Lazarov v. Secretary of Canada, an alien, on a section 28 application was held entitled to a hearing because the

101. Supra, notes 83, 84 and 85
102. Ombudsman, CBC-TV, November 9, 1975
103. [1914] A.C. 153 at 173; 15 D.L.R. 308 at 318
Minister had refused a citizenship application on the basis of information which the applicant had not been given an opportunity to controvert. It is true that this case could be distinguished on its special facts. Yet, the Minister would still have to meet the policy argument which lies at the heart of the fisherman’s case and is stated as follows by de Smith:

There are many situations where, in the course of arriving at a discretionary decision, it may be desirable or expedient to afford interested persons notice and an opportunity to be heard but where the type of function involved is not one that manifestly calls for any procedure akin to adjudication . . . . The discretionary allocation of scarce resources (e.g. licenses, permits, etc.) among competing claimants is perhaps the best example of this kind of situation.\(^{109}\)

It seems, therefore, that the Minister’s decision to deprive a fisherman of his operator’s licence and vessel certificate is reviewable by the Federal Court of Appeal on the ground that it is a decision which must be made on a quasi-judicial basis. If reviewable, such a decision would most surely be set aside because it amounts to a denial of natural justice.

Another possible ground for setting aside the Minister’s decision would be refusal by the Minister to exercise his jurisdiction. It is rather through press releases,\(^{110}\) which have found their way into the Tentative Policy on Suspension of Lobster Fishing Licences,\(^{111}\) that the Minister has made public his intended manner of exercising his discretion under Regulation 16.

There is a possibility that, in issuing such a policy statement and in following it, the Minister is failing to address himself to the question which he is authorized to decide; namely, should this particular licence and vessel certificate be suspended? If he asks himself whether the offence in question calls for suspension under the Ministerial Lobster Fishing Suspension Policy,\(^{112}\) then he may well be acting without jurisdiction in suspending a fishing licence.

At issue is the right of a deciding authority to prejudge a case by stating a policy which it thereafter follows.\(^{113}\) The oft-quoted words

\(^{109}\) Supra, note 96 at 158-59
\(^{110}\) Supra, note 77
\(^{111}\) Supra, note 78
\(^{112}\) The term is one used by Mr. Creeper in a letter to John Biron, dated July 28, 1975. Mr. Biron’s vessel certificate was suspended because at the time ownership was transferred to him, it was subject to the conditions of the policy.
\(^{113}\) See, generally, H. Molot, The Self Created Rule of Policy and Other Ways of Exercising Administrative Discretion (1972), 18 McGill L.J. 310
of Bankes L.J. outline the principles involved:

There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.114

Because the Minister does not give the fisherman an opportunity to explain why the suspension policy should not apply to him, the suspension may be made without jurisdiction. This principle has been applied in Canada115 and in cases involving Ministers of the Crown.116

The application of this principle is especially important in cases where licences and vessel certificates are suspended in the lobster fishery because many of the offences under the Regulations do not require the proof of mens rea;117 although some do require proof.118 As the law now stands, it would be possible for a fisherman to lose his licence and vessel certificate for a violation of the Regulations to which he was not party. It is possible that a fishing offence could be committed when the fisherman was not even present on the vessel. Although such a case might well not merit suspension of the licence and vessel certificate, the fact that the Minister need not afford the fisherman an opportunity to be heard, renders the suspension, in the words of a senior official of the Fisheries and Marine Service, to be "automatic or almost automatic".119

In the end the fishermen's many arguments may fail to persuade a court that the court can and should set aside the Minister's decision.

114. R. v. Port of London Authority, ex parte Kynoch Ltd., [1919] 1 K.B. 176 at 184; 88 L.J.K.B. 553 at 559
119. Statement by Reg Collie, Fisheries and Marine Service, Halifax, Nova Scotia in a telephone interview on October 30, 1975
However, that does not mean that they, the fishermen’s contentions, are without merit.

The Minister has no inherent power to do what he thinks is right at his mere whim. His powers are created by statute and limited by the common law. Fundamental to Anglo-Canadian common law are the right of access to the law and the right to be heard.

The Cottreau case illustrates violation of both these basic principles. There was no hearing. Consequently, the Minister risked the possibility that his understanding of the case would be incomplete and that his decision would inflict unnecessary hardship on the fisherman. Moreover, when an officer of a local fishermen’s association requested a copy of the policy statement used by the Fishery and Marine Service his request was refused. Practically speaking, that policy statement was the “law” and there was no access to it.

Making a decision in these circumstances seems unjust. It remains to be seen whether a decision made in these circumstances is legal.

120. Supra, note 77
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