

Federal Court



Cour fédérale

Date: 20091204

Docket: T-890-08

Citation: 2009 FC 1239

Calgary, Alberta, December 4, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ALBERT RALPH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mr. Albert Ralph (the “Applicant”) seeks judicial review of the decision of the Minister of Fisheries and Oceans (the “Minister”) dated May 16, 2008. In that decision, the Applicant’s appeal for the reinstatement of his supplementary crab licence was dismissed.

[2] The Applicant is a fisherman residing in the town of Eastport, Newfoundland and Labrador. The Minister is responsible for the administration of the fisheries resources of Canada pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14 (the “Act”). The Minister is represented by the Attorney

General of Canada in this application for judicial review, pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”).

Background

[3] The following recitation of the facts is based upon the affidavits, together with the exhibits, that were filed on behalf of the Applicant and the Respondent in this application for judicial review. An affidavit was filed by the Applicant himself. Ms. Beverley Green, area licensing administrator for Eastern Newfoundland, with the Department of Fisheries and Oceans (“DFO” or the “Department”), Newfoundland Region, filed an affidavit on behalf of the Respondent.

[4] The Applicant obtained a supplementary crab licence in 1988. At that time, the Crab Management Plan for the Newfoundland Region, prepared by DFO set out three criteria for the issuance of this supplementary licence, as follows:

- a. are residents of the Management Area for which licences are available.
- b. own/operate a registered commercial fishing vessel that is not less than 35 feet LOA or 10 gross tons and does not exceed 64’11” LOA.
- c. possess a groundfish licence for 2+3KL or Sector 1.

[5] The Applicant applied for the supplementary crab licence in connection with the M.V. “Misty Dawn”, Commercial Fishing Vessel (“CFV”) 089937, described as being 35’ LOA.

[6] The Applicant reapplied for licences in 1989 and 1990 and obtained them.

[7] Then on April 18, 1990, the Applicant signed an “Application for Relinquishment of Rights” relative to the groundfish fixed gear (“GFFG”) licences associated with the M.V. “Misty Dawn”. He asked that these licences be reissued to his son Shawn Ralph. Mr. Shawn Ralph intended to combine the licences for the M.V. “Misty Dawn” with another licence that had been transferred to him, in order to obtain a licence for a larger vessel, that is a vessel 64’ 11” length. By letter dated April 30, 1990, from Beverley C. Green, then the District Licensing Administrator, Resource Management Division for DFO, the Department acknowledged the transfer of the GFFG licence from the Applicant to his son.

[8] In his affidavit filed in support of this application, the Applicant stated that he received the supplementary crab licence in 1989 and 1990. He applied for this licence again in 1991 but did not receive it. He stated that he went to a local DFO office to get an explanation as to why the supplementary crab licence was not approved for 1991 but no explanation was provided. He said that at one time he was informed by a DFO official that he had transferred his supplementary crab licence to his son Shawn. The Applicant says that this is a mistake, that he had only transferred the registration of the M.V. “Misty Dawn” to his son.

[9] The Applicant first wrote to DFO about the supplementary crab licence in 1993, asking that this licence be reinstated. He wrote again on January 22, 1994 and on March 10, 1994.

[10] The first correspondence in reply from DFO is dated April 8, 1994. In that letter, signed by Ms. Green, the Applicant was told that since the transfer of his 35' vessel to his son Shawn, he no longer met the criteria for vessel requirements to maintain the crab licence. Ms. Green further advised that the criteria for the issuance of supplementary crab licences were changed in 1989, restricting the grant of such licences to vessels 35' LOA and greater. Finally, according to the 1993 Crab Management Plan, a freeze was imposed on the issuance of new licences.

[11] The Applicant deposed in his affidavit that he was never informed of a change in policy and if he had been so informed, he would not have transferred his 35' vessel to his son Shawn.

[12] According to his affidavit, the Applicant wrote again to DFO on February 22, 1995, requesting the reinstatement of the supplementary crab licence. He says that he spoke again with a Mr. Bob Wiseman of DFO who told him that his licence had been cancelled in June 1990 and that he, that is the Applicant, should have received a letter of notification in that regard. The Applicant asked Mr. Wiseman to find the letter in his file at DFO but Mr. Wiseman was unable to do so.

[13] The Applicant deposed that Mr. Karl Sullivan, then Vice President of Seafreez Foods, wrote to DFO on April 4, 1997, again requesting an explanation for the non-issuance of the supplementary crab licence to the Applicant after 1990.

[14] In 2000, the Applicant wrote to the Minister, requesting his intervention in the matter.

[15] In 2007, the Applicant was granted a right of appeal to the Atlantic Fisheries Licensing Appeal Board (“AFLAB” or the “Board”). A hearing took place before the Board on December 11, 2007.

[16] The Applicant made representations to the Board, through his Counsel, at the hearing of the appeal on December 11, 2007. Representations were also made on behalf of DFO. A summary was prepared by the Board. At paragraphs 14 and 15 of that summary, the Board summarized the Applicant’s arguments as follows:

14. As a result of the negligence of the Department, and/or breach of duty owed by the Department, Mr. Ralph has suffered real economic loss, including but not limited to the value of lost landings for the crab fishing seasons 1990 through to present day, the present day value of the crab licence, and no further lost opportunities.

15. Mr. Ralph asks that the incorrect decisions of the Department, and in particular the decision to cancel the supplemental crab licence in 1990 and the decision to refuse to renew same since, be overturned by this Appeal Board, with a further recognition of the financial and economic losses suffered by Mr. Ralph as a result.

[17] The Board made the following recommendation to the Minister:

RECOMMENDATION: APPEAL DENIED

The Board reviewed all the information presented by the appellant, his representatives and the Department of Fisheries and Oceans. The Board recommends that the appeal be denied based on the fact that Mr. Ralph did have a groundfish licence for a vessel greater than 35’ in 1988 and his supplementary crab licence was issued on that criteria not on the criteria of less than 35’ and 10 gross tones. In 1990, the Department of Fisheries and Oceans policy for the issuance of new supplementary crab licences stated you had to hold a groundfish licence for a vessel greater than 35’. Since Mr. Ralph transferred his greater than 35’ groundfish fixed gear licence to his

son Shawn Ralph, he was not eligible to hold a supplementary crab licence after that date. The Board could find no extenuating circumstances in this case and the Department of Fisheries and Oceans policies and procedures were applied correctly.

[18] The Minister made his decision on the basis of the Board's recommendation. The decision is set out in a letter dated May 16, 2008 from the Minister as follows:

The Honourable Loyola Hearn has asked me to respond to your letter regarding your request for reinstatement of your supplementary crab licence. As you know, your request was referred to the Atlantic Fisheries Licence Appeal Board and was heard on December 11, 2007 at the Battery Hotel & Suites, St. John's, Newfoundland and Labrador.

The Minister has made a decision based on a thorough review of all available information and I regret to inform you that he has denied your appeal. The Minister concluded that the licensing policy was correctly interpreted and applied by the Department of Fisheries & Oceans in your case.

I regret, once again, that this decision could not be more favourable to you.

Submissions

i) Applicant's Submissions

[19] The Applicant argues that he was treated unfairly by DFO and the Minister because he was never told about the change in policy in 1989 regarding the conditions to be met in order to obtain a supplementary crab licence. He submits that he was not told that he would lose the crab licence if he transferred the 35' vessel.

[20] The Applicant argues that he initially qualified for the supplementary crab licence by owning both a 35' vessel and a vessel of 10 gross tons. He submits that since he initially qualified

for the supplementary crab licence by owning both a 35' vessel and a vessel of 10 gross tons, the licence should have been made available to him, even after he had transferred the 35' vessel. He argues that he was not looking for a "new" supplementary crab licence but the renewal of such a licence.

ii) Respondent's Submissions

[21] The Respondent takes the position that the Applicant had no vested right in the perpetual issuance of the supplementary crab licence. The conditions for holding that licence changed in 1989 so that when the Applicant applied for it in 1991, he was no longer eligible to hold it since at that time, he did not meet the criteria because he no longer owned and operated a 35' vessel with a GFFG licence. The Applicant had transferred his 35' vessel to his son Shawn in April 1990.

[22] The Respondent notes that the original issuance of the supplementary crab licence to the Applicant was on the basis that he owned and operated a 35' vessel, not on the basis that he owned and operated a smaller vessel of 10 gross tons. The licence was issued for the M.V. "Misty Dawn", CFV 089937. In any event, the Respondent says that the tonnage for the smaller vessel, CFV 098316, is not indicated on the application for the licence in 1988.

[23] The Respondent argues that the recommendations of the Board were reasonable, having regard to the regulatory scheme and the evidence that was submitted. Accordingly, he submits that the decision of the Minister was reasonable and withstands judicial scrutiny.

[24] As well, the Respondent points out that the Applicant's application for commercial licences and registrations in 1991 refers to only two vessels.

[25] The Respondent also submits that, pursuant to the regulatory scheme, the GFFG licence is attached to the 35' vessel. Once the vessel was transferred to his son, the Applicant no longer held a GFFG on a 35' vessel and he did not qualify after that transfer to hold a supplementary crab licence.

Discussion and Disposition

[26] The first issue to be addressed is the applicable standard of review. Since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of administrative decision-makers are reviewable on one of two standards, that is correctness and reasonableness. The standard of correctness will apply to questions of law. Generally, the standard of reasonableness will apply to questions of fact, mixed fact and law and the exercise of discretion. Questions of procedural fairness and natural justice are reviewable on the standard of correctness; see *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, at para. 65.

[27] The Minister is responsible for the management of fisheries. Pursuant to section 7 of the Act, the Minister holds absolute discretion over the issuance of licences, including the creation of terms and conditions. Section 10 of the *Fishery (General) Regulations*, SOR/93-53 (the

“Regulations”) describes the period during which a licence is valid:

Expiration of Documents	Date d’expiration des documents
<p>10. Unless otherwise specified in a document, a document expires</p> <p>(a) where it is issued for a calendar year, on December 31 of the year for which it is issued; or</p> <p>(b) where it is issued for a fiscal year, on March 31 of the year for which it is issued.</p>	<p>10. Sauf indication contraire dans le document, celui-ci expire à l’une des dates suivantes :</p> <p>a) le 31 décembre de l’année pour laquelle il a été délivré, s’il est délivré pour une année civile;</p> <p>b) le 31 mars de l’année pour laquelle il a été délivré, s’il est délivré pour un exercice.</p>

[28] The Minister, through DFO, is authorized to promulgate policies, including management plans. The Crab Management Plans that were developed for the Newfoundland Region in 1988 through 1991 are relevant.

[29] The policies relative to the management of the fisheries in the Newfoundland Region include the *Commercial Fisheries Licensing Policy for Eastern Canada* (Ottawa: Minister Supply and Services Canada, 1996) (the “Licensing Policy”). AFLAB is created pursuant to this policy. Chapter 7 of the Licensing Policy provides for an appeal process for those persons that are not satisfied with licensing decisions made by the employees of DFO. Section 35 of the Licensing Policy describes the mandate of the Board. Paragraphs 35(7)(a), (b) and (c) are relevant to the

present proceeding and provide as follows:

The *Atlantic Fisheries Licence Appeal Board* will only hear appeals requested by fishers who have had their appeals rejected following hearings by Regional Licensing Appeal Committees.

- (a) The Board will consider only those licensing appeals which deal with policies for vessels less than 19.7m (65') LOA.
- (b) The Board will only hear appeal requests made within three years from the date of a licensing decision or a change in policy.
- (c) The Board will make recommendations to the Minister on licensing appeals rejected through the Regional Licensing Appeal Structure by:
 - (i) determining if the appellant was treated fairly in accordance with the Department's licensing policies, practices and procedures;
 - (ii) determining if extenuating circumstances exist for deviation from established policies, practices, or procedures;

[30] Paragraph 35(7)(c) of the Licensing Policy describes the role of the Board, that is to hear appeals of licensing decisions and to make recommendations to the Minister, having regard to whether an appellant had been treated fairly and whether "extenuating circumstances" exist that would justify deviation from "established policies, practices or procedures" (underlining added).

[31] In *Jada Fishing Co. et al. v. Canada (Minister of Fisheries and Oceans) et al.* (2002), 288 N.R. 237 (F.C.A.), the Federal Court of Appeal commented on the relationship between the

recommendations of the Board and the decision of the Minister at paras. 12 and 13 as follows:

It is clear that the Minister is empowered under section 7 of the *Fisheries Act*, R.S.C. 1985, c. F-14, with absolute discretion to make decisions with regard to fishing licences. The Panel, on the other hand, was without statutory authority and merely made recommendations which the Minister was entitled to accept or reject. Accordingly, the Panel's recommendations are not in themselves prima facie reviewable. In this case, due to the breadth of the Notice of Application for Judicial Review before Pelletier, J. I am well satisfied that this Court can review a discretionary decision of the Minister based, in part, upon the Panel's recommendation.

The present appeal seeks to set aside the Reviewing Judge's order, and refers only to the "decision" of the Panel and its conduct, without reference to the Minister. However, the Minister's decision of April 3, 1998, still stands, and, in any event, the decision or recommendation of the Panel is inexorably connected to his decision, being without legal effect unless "adopted" by the Minister as one of the basis for his decision. In my analysis, this appeal can only continue as a review of the Minister's decision, albeit under the guise of an attack on the Panel's recommendation, based on paragraph 18.1(4) of the Act as a review of the exercise of Ministerial discretion.

[32] This means that the recommendation of the Board is to be considered as a factor that was taken into account by the Minister when he made the decision that is under review.

[33] The Applicant claims that he was unfairly treated, on two grounds. First, he alleges that he was not informed about the change in policy. Next, he says he was unfairly treated because he qualified under the initial conditions for the issuance of a supplementary licence on two grounds: he owned and operated two qualifying vessels, one being 35' LOA, CFV 089937 and the second, CFV 098316. The Applicant asserts that, on the basis of those facts, he was eligible to receive the supplementary crab licence in 1991.

[34] Admittedly, the record shows a lack of communication between the parties about the non-renewal of the supplementary crab licence. The Applicant did not receive this supplementary licence in 1991 but he did not approach DFO about it until 1993 when, in his letter of April 25, 1993 he said that it “was dropped” without any reason.

[35] No written response came from DFO until the letter dated April 8, 1994 from Ms. Green. At that time, the Department advised that the criteria for the issuance of the supplementary crab licence had changed and that since the reissuance of the GFFG licence for the 35’ vessel to his son in 1990, the Applicant no longer met the criteria to maintain that licence.

[36] The fact that the Applicant did not receive an earlier reply to his letter of April 25, 1993 and January 22, 1994 is unfortunate but it does not establish a course of unfair or improper treatment by the Department. There was no breach of natural justice or procedural fairness in this case. The Applicant himself had some responsibility to inquire about the lack of the licence and he admitted that he was engaged in caring for his ill wife who died in 1993. However, the real issue is that the policy for the conditions of issuing the supplementary crab licence had changed.

[37] According to Ms. Green, the policy had changed in 1989. In that year, the following criteria were established:

Supplementary Fishery

Licences to fish 150 traps are available to full-time fishermen who meet the following criteria:

(a) are residents of the Management Area for which licences are available.

(b) operate a registered commercial fishing vessel that is not less than 35 feet LOA and does not exceed 64' 11" LOA.

(c) possess a groundfish licence for 2+3KL or Sector I.

[38] These criteria were published in the 1989 Crab Management Plan for Newfoundland. The difference between these criteria and those in effect in 1988, when the Applicant acquired the supplementary crab licence, is found in paragraph (b). According to the 1988 Crab Management Plan for the Newfoundland Region, the applicant for such licence was required to:

(b) own/operate a registered commercial fishing vessel that is not less than 35 feet LOA or 10 gross tons and does not exceed 64' 11" LOA.

[39] Once the Applicant had relinquished his GFFG licence that attached to the M.V. "Misty Dawn", CFV 089937, he was unable to meet the new regulatory policy for holding a supplementary crab licence.

[40] As noted above, the granting of fishing licences is governed by Section 7 of the Act. This statutory provision accords broad discretion to the Minister in the matter of issuing licences under the Act. The breadth of that discretion was discussed by the Supreme Court of Canada, in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 at para. 36 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. The result is an administrative scheme based primarily on the discretion of the Minister: see *Thomson v. Minister of Fisheries and Oceans*, F.C.T.D., No. T-113-84, February 29, 1984.

[41] The Minister is entitled to change policies as required in order to manage the fishery. The only question to be answered is ‘was the decision to refuse to issue the Applicant a supplementary crab licence reasonable?’

[42] In my opinion, the Minister’s decision is reasonable and properly took into consideration the new policy with respect to the issuance of supplementary crab licences. Fishing licences are re-issued annually by the Minister in accordance with the prevailing policies. The policy in question required a vessel of a minimum length with a GFFG. As the Applicant did not possess the requirements, he was not eligible to have a supplementary crab licence. I note that in signing the relinquishment of rights on April 18, 1990, the Applicant acknowledged that his future ability to re-enter the crab fishery was dependent upon any change in policy. That document includes the following statements:

I understand that any future requests to re-enter this fishery will be subject to any Licencing Policy or Management Plan criteria in place at the time of the request.

I acknowledge and accept these conditions of relinquishment and agree that the licence(s) be re-issued.

[43] In the result, this application for judicial review is dismissed. In the exercise of my discretion pursuant to the Rules, I make no order as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed, no order as to costs.

“E. Heneghan”

Judge

SOLICITORS OF RECORD

DOCKET: T-890-08

STYLE OF CAUSE: ALBERT RALPH v.
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: St. John's, NL

DATE OF HEARING: June 3, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** HENEGHAN J.

DATED: December 4, 2009

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