

Federal Court



Cour fédérale

Date: 20190917

Docket: T-1718-16

Citation: 2019 FC 1183

Ottawa, Ontario, September 17, 2019

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SHAWN KINGHORNE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Shawn Kinghorne seeks judicial review of a decision of the Grand Manan Harbour Authority [Harbour Authority] to restrict access to White Head Harbour on the first day of the 2016 lobster fishing season [Access Policy]. The Harbour Authority made the decision pursuant to its power delegated by the Minister of Fisheries and Oceans [Minister] under the *Fishing and Recreational Harbours Act*, RSC 1985, c F-24.

[2] The parties agree that the decision under review was made by the Board of Directors of the Harbour Authority [Board] on September 6, 2016. However, the parties disagree on the scope of that decision. Mr. Kinghorne characterizes it as “the application of the [Access Policy] to Mr. Kinghorne”. The Attorney General says it was a “decision to renew the [Access Policy].”

[3] I agree with the Attorney General. There is nothing in the communications between Mr. Kinghorne and the Board immediately preceding the decision to indicate that the Board was asked to consider, or did consider, whether Mr. Kinghorne fell within the Access Policy or should be exempt from it. The decision under review is the Harbour Authority’s determination that the Access Policy should be renewed for 2016 [Decision].

[4] The Access Policy is in the nature of a discretionary policy or legislative action. There was no breach of any duty of procedural fairness that may have been owed to Mr. Kinghorne. The Harbour Authority cannot be faulted for failing to consider evidence and arguments that were not presented at the time the Decision was made. The Decision to renew the Access Policy was a valid exercise of the Harbour Authority’s discretion to adopt policies in furtherance of public safety and was reasonable.

[5] The application for judicial review is therefore dismissed.

II. Background

A. *Overcrowding at White Head Harbour*

[6] White Head Island is in the Bay of Fundy beside the larger Grand Manan Island.

Together they are a part of Lobster Fishing Area 38 [LFA 38].

[7] Lobster fishing is a competitive industry. Some areas of the seabed in LFA 38 are more lucrative than others. Seasons often begin with a race to the most lucrative areas. Lobster fishermen stake out areas of the seabed at the start of the season on a first-come, first-served basis. According to Mr. Kinghorne, arriving at a preferred location mere minutes before a competitor may mean a difference in income of \$100,000 or more.

[8] Every year, the second Tuesday in November marks the start of lobster season in LFA 38. This day is referred to locally as “setting day” [Setting Day]. Lobster fishermen may not leave port to set their traps until 7:00 am on Setting Day.

[9] White Head Harbour is close to two of the most lucrative expanses of seabed in LFA 38. It also hosts the MV William Frankland, a ferry that connects White Head Island to Grand Manan Island and, by extension, to the mainland.

[10] The Harbour Authority operates White Head Harbour, among other harbours on White Head and Grand Manan Islands, in accordance with a lease negotiated with the Minister in 1997

[Lease]. Due to White Head Harbour's small size and popularity with lobster fishermen on Setting Day, the Board and the Department of Fisheries and Oceans [DFO] have long been concerned about overcrowding of fishing vessels.

[11] In the early 2000s, as many as 20 vessels that did not usually operate from White Head Harbour left from there on Setting Day. In 2008, the DFO introduced a trap transfer policy requiring those who wish to depart from White Head Harbour on Setting Day to load their lobster traps onto their vessels from White Head Island. This prevents them from loading their vessels with traps elsewhere, and then sailing into and berthing at White Head Harbour. Instead, the fishermen must bring their traps to White Head Island by ferry and store them there. Following the implementation of this policy, the number of additional vessels at White Head Harbour on Setting Day decreased significantly.

[12] In March 2014, Mr. Kinghorne purchased a shed on White Head Island near White Head Harbour. He uses the shed to store equipment, including his traps for the lobster season.

B. *2015 Access Policy*

[13] In the summer of 2015, many fishermen enquired about the availability of berths at White Head Harbour on Setting Day. Concerned about the potential for overcrowding and the effect this might have on the ferry's operations, the Board met several times in the fall of 2015. The Board also communicated its concerns to officials with DFO's Small Craft Harbours Program.

During a meeting on October 19, 2015, the Board decided to adopt the Access Policy to restrict access to White Head Harbour on Setting Day.

[14] On October 21, 2015, the Harbour Authority issued a notice to “all lobster vessel owners that **do not normally operate** from White Head harbour, but plan to set lobster traps from there [emphasis original]”. The Access Policy reads as follows:

After considerable discussion with Small Craft Harbours regarding the safety and capacity issues on White Head that have been raised, the Harbour Authority Board of Directors have made a decision that only White Head vessels that home port from White Head 12 months of the year will be given permission to start from the White Head harbour with their first load of traps at 0700, November 10, 2015 (or if weather delays that date). All other vessels will be considered trespassers and will be prosecuted to the fullest extent of the law. Attached is a list of home port vessels and an operational plan for the White Head harbour.

[15] Mr. Kinghorne’s vessel, the FV Hustler 05, was not among the 10 vessels included in the list of “home port” vessels at White Head Harbour.

[16] After receiving the notice, Mr. Kinghorne requested a meeting with the Harbour Authority to discuss the application of the Access Policy to his circumstances. The Harbour Authority agreed and the meeting took place on October 29, 2015. Mr. Kinghorne argued that the FV Hustler 05 should be considered to “home port” at White Head harbour for 12 months of the year. He provided the following ten-point list in support of his position:

1. The Home Port listed on ALL of the licences I own is **25012 White Head.**

2. I am the owner of a shed and shore lot (PID 15012222) property, which I purchased in 2013, for the purpose of landing, storing and setting my lobster traps and associated gear.
3. I am assigned a lobster trap berth on the White Head Fisherman's Wharf.
4. In 2013 I purchased FV Andrew and Sisters from Barry Russell, which I sold from the port of White Head, to be replaced with FV Hustler 05, using the same berth.
5. In the time I first started fishing out of White Head in 1997, around 15 licences and their vessels have left the island. Edison Outhouse (1), Kevin Urquhart (1), Burton Frankland (1), Philip Colwell (2), Darren Carrol (1), Sharon Cossaboom (2), HR Cossaboom (1), Barry Russell (1), Teddy Fletcher (2), Edward Knight (1), Ralston Small (1), Cory Cossaboom (1). So I don't think space is an issue.
6. I personally purchased one of the licences from White Head and have not only kept it fishing from that port, but have brought another licence with it.
7. I currently (and have in past years) employed White Head residents, thus putting income into the Island and the community.
8. Putting restrictions on who can set from the White Head port could possibly harm the future sales of licences of fishermen who will be retiring. If you purchase a licence, boat, shed and wharf, and you receive the trap berth on the White Head wharf associated with that licence, there should be no question as to whether you can set from that port or not.
9. I have made landings to the port of White Head (gill netting).
10. My final point is, if Harold Cossaboom was still with us today, we wouldn't be having this meeting. The board would have been properly informed prior to any decisions that were made regarding the list of White Head Home Port users [emphasis original].

[17] Mr. Kinghorne also provided the Harbour Authority with a petition signed by nine other fishermen from White Head Harbour who supported his inclusion in the list of "home port" vessels.

[18] Despite Mr. Kinghorne's arguments, the Harbour Authority decided to maintain the Access Policy. The Harbour Authority asserted that its decision was authorized by the public access provisions of the Lease:

- 7(1) The Harbour Authority shall, at all times, ensure access by the public to the Harbour without any discrimination against any person, in any manner.
- (2) Notwithstanding subsection 7(1) in this Lease, the Harbour Authority may refuse the access or the use of the Harbour to any person, vehicle or vessel where such access or use would be contrary to the interest of the public frequenting the Harbour and, without limiting the generality of the foregoing, would render the use of Harbour unsafe to persons or property thereon [sic] or would impede, interfere with or render difficult or dangerous the use of the Harbour or obstruct the maintenance of order thereon.

[19] The Harbour Authority's decision was provided to Mr. Kinghorne in writing. On Setting Day in November 2015, the FV Hustler 05 departed from White Head Harbour in violation of the Access Policy. The Harbour Authority fined Mr. Kinghorne \$5,000.00, which he paid.

C. *2016 Access Policy*

[20] In July 2016, Mr. Kinghorne's counsel sent the Harbour Authority two letters enquiring whether it intended to impose a similar access policy for the 2016 Setting Day. On July 27, 2016, the Harbour Authority's Project Manager, Melanie Sonnenberg, replied that Mr. Kinghorne's request would be reviewed at an upcoming Board meeting.

[21] Hearing nothing further, Mr. Kinghorne's counsel wrote to Ms. Sonnenberg twice in August 2016 to ask when the meeting to discuss the access policy for the 2016 Setting Day would occur. Mr. Kinghorne's counsel wrote again on September 12, 2016.

[22] On September 14, 2016, the Board's counsel informed Mr. Kinghorne's counsel that the Board had met on September 6, 2016, and decided to renew the Access Policy.

[23] On September 26, 2016, Mr. Kinghorne wrote to Ms. Sonnenberg and requested an opportunity to explain why he should be exempted from the Access Policy:

I am requesting a meeting/hearing to further explain my position and to request that I be permitted to set my lobster gear from the Port of White Head Island.

In particular, I would like the opportunity to explain my circumstances and to address any safety concerns raised by the Harbour Authority. I have retained the services of a private Marine Engineer to prepare an assessment of their safety concerns. I am attaching a copy of the report of Captain Kevin F. Quinn dated the 11th day of July, 2016 for the consideration of the Harbour Authority.

Since the 2016/2017 Lobster Fishing Season is scheduled to commence on the 18th day of November, 2016, I am requesting that a meeting/hearing be held at the earliest possible date in order that I may address the September 14, 2016 decision and the 2016 policy for White Head Harbour.

[24] Ms. Sonnenberg replied on September 28, 2016, asking Mr. Kinghorne to provide an agenda for the proposed meeting.

[25] Mr. Kinghorne filed this application for judicial review on October 13, 2016.

[26] On October 19, 2016, Mr. Kinghorne's counsel wrote to Ms. Sonnenberg to reiterate the purpose of the proposed meeting. The Harbour Authority's counsel replied on October 21, 2016, stating that they were in the process of collecting documents for the judicial review application and it would be inappropriate to meet given the ongoing legal proceedings.

[27] On October 28, 2016, Mr. Kinghorne's counsel complained to the Harbour Authority that Mr. Kinghorne had not been provided with reasons for the implementation of the Access Policy in 2015 and its renewal in 2016. The Harbour Authority's counsel replied on November 1, 2016, and invited Mr. Kinghorne to meet with the Harbour Authority on November 4, 2016. Mr. Kinghorne declined the invitation. That same day, the Harbour Authority gave notice of the Access Policy to other affected persons.

[28] On the 2016 Setting Day, Mr. Kinghorne again departed from White Head Harbour in violation of the Access Policy. The Harbour Authority has continued to renew the Access Policy in subsequent years, and Mr. Kinghorne has continued to violate it. The Harbour Authority has not pursued disciplinary action against Mr. Kinghorne due to this application for judicial review.

III. Preliminary Issue: What is the Decision under Review?

[29] The parties agree that the Decision under review was made by the Board on September 6, 2016. However, the parties disagree on the scope of the Decision. The Attorney General says it was a "decision to renew the [Access Policy]."

[30] Mr. Kinghorne characterizes the decision as the Harbour Authority's refusal to allow him to depart from White Head Harbour on the 2016 Setting Day pursuant to the Access Policy. He insists that he is not challenging the Harbour Authority's decision to adopt the Access Policy, although he says that if he were given an opportunity to address the Board then he would dispute the basis for the policy.

[31] Mr. Kinghorne's Notice of Application states:

This is an application for judicial review of a decision first communicated to the Applicant by letter dated September 14, 2016 regarding a decision made by the Respondent on September 6, 2016 pursuant to the authority delegated to it by the Minister of Fisheries and Oceans. The said decision was that Mr. Kinghorne would be denied access to White Head Harbour for the commencement of the 2016 lobster fishing season pursuant to an access policy enacted by the Respondent pursuant to authority delegated to it by a lease of the harbour lands from the Minister of Fisheries and Oceans.

[32] The relevant portion of the minutes of the Board's meeting on September 6, 2016 read as follows:

Correspondence from Cox and Palmer Law firm regarding a request by S. Kinghorne requesting clarification whether the White Head Policy for Setting Day is still in effect was provided to the group present. It was unanimously agreed that the policy presented to users last year in regards to the access policy related to setting day at the White Head Harbour will remain in effect.
Mr. Kinghorne will be notified in writing.

[33] On September 14, 2016, the Harbour Authority's counsel wrote to Mr. Kinghorne's counsel. In the opening paragraph, she said the following:

It is my understanding that the purpose of your enquiry is to determine whether the Access Policy will remain in effect this coming season.

[34] This characterization of Mr. Kinghorne's enquiry was consistent with the correspondence that Mr. Kinghorne's counsel sent to the Board in July and August 2016, all of which enquired whether the Access Policy would be renewed for 2016. None of the correspondence addressed whether Mr. Kinghorne would meet the requirements of the Access Policy if it were renewed, or whether he ought to be exempt from it. As Mr. Kinghorne's counsel stated during the hearing, if the Access Policy were not renewed, then it would be unnecessary to address these points.

[35] The letter of September 14, 2016 from counsel for the Harbour Authority continued:

I have been informed that the Board of Directors met on September 6th and reviewed your question as to whether the White Head Access Policy would be enforced in 2016. After careful consideration and a review of the impact of the Policy on Mr. Kinghorne and other similarly affected vessel owners and operators, the Board determined that the Policy would remain in effect for the 2016 season.

[36] The remainder of the letter reiterated the origins of the policy and the efforts of the Board to manage safe access to the harbour. Neither the minutes of the Board's meeting during which the Decision was made, nor the letter from the Harbour Authority's counsel communicating the Decision to Mr. Kinghorne, mentioned the considerations contained in the ten-point list he submitted in 2015. The Board did not prepare reasons addressing any of these points. Nevertheless, the Harbour Authority's letter of September 14, 2016, concluded with the following statement:

The Board is of the view that adequate reasons were provided to Mr. Kinghorne in 2015 however if you have any outstanding questions or concerns related to this matter I would be happy to address these directly.

[37] Mr. Kinghorne says the clear implication of the letter from the Board's counsel is that the Decision was not limited to whether the Access Policy should be adopted, but also encompassed the application of the policy to his personal circumstances. The Attorney General responds that the operative decision is that of the Board, not of counsel who communicated the Decision to Mr. Kinghorne.

[38] The Attorney General's position is consistent with the events that occurred after the Decision. The correspondence from Mr. Kinghorne's counsel dated October 19, 2016 was the first indication he was seeking a rationale for the implementation of the 2016 Access Policy or its application to Mr. Kinghorne. Mr. Kinghorne was invited to meet with the Harbour Authority to discuss the matter on November 4, 2016, but he declined.

[39] The sole decision made by the Board on September 6, 2016 was the determination that the Access Policy should be renewed for 2016. The relevant portion of the minutes from that meeting states only that "[i]t was unanimously agreed that the policy presented to users last year in regards to the access policy related to setting day at the White Head Harbour will remain in effect." There is nothing in the record, including the submissions made on behalf of Mr. Kinghorne, to indicate that the Board was asked to consider, or did consider, the application of the Access Policy to Mr. Kinghorne in light of the various justifications he had presented in the past.

[40] The letter from the Board's counsel dated September 14, 2016 created some ambiguity regarding the scope of the Decision. It referred to the Board considering "the impact of the Policy on Mr. Kinghorne" and to "adequate reasons [being] provided to Mr. Kinghorne in 2015". Given the lengthy history of the parties' communications regarding Mr. Kinghorne's desire to leave from White Head Harbour on Setting Day, he may be forgiven for thinking that the Decision encompassed the arguments he had previously advanced for his right to do so. But the record is clear that the only question considered by the Board on September 6, 2016 was whether to renew the Access Policy, not whether Mr. Kinghorne fell within the policy or should be exempt from it.

[41] Despite the commencement of Mr. Kinghorne's application for judicial review, the Harbour Authority offered him an opportunity to discuss the Access Policy and its application to his personal circumstances on November 4, 2016. If this meeting had occurred, and if the Board had issued a decision supported by reasons addressing Mr. Kinghorne's arguments and the expert report of Captain Quinn, then this could have served as the basis for an application for judicial review of that decision. But the decision was never made. It is axiomatic that the Court cannot engage in judicial review of a decision that was not made.

[42] I therefore conclude that the Decision under review is the Board's determination that the Access Policy should be renewed for 2016. The Decision was communicated to Mr. Kinghorne on September 14, 2016.

IV. Issues

[43] The remaining issues raised by this application for judicial review are:

- A. What is the standard of review?
- B. Was the Decision procedurally fair?
- C. Was the Decision reasonable?

V. Analysis

A. *What is the standard of review?*

[44] Procedural fairness is a matter for the Court to determine. The standard for determining whether the decision-maker complied with the duty of procedural fairness is correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[45] The Harbour Authority's Decision to adopt the Access Policy is subject to review against the standard of reasonableness (*Archer v Canada (Attorney General)*, 2012 FC 1175 at paras 48-49). Reasonableness is a deferential standard, and is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. The Court will intervene only if the decision falls outside a range of possible, acceptable outcomes which are

defensible in respect of the facts and law (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

B. *Was the Decision procedurally fair?*

[46] Mr. Kinghorne says he was owed a high degree of procedural fairness by the Harbour Authority (citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 20 [*Baker*]). *Baker* prescribes a non-exhaustive list of five factors to determine the content of the duty of fairness (at paras 23-27):

- (a) the nature of the decision being made and the process followed in making it;
- (b) the nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates;
- (c) the importance of the decision to the individual(s) affected;
- (d) the legitimate expectations of the person challenging the decision; and
- (e) the choices of procedure made by the decision-maker.

[47] Mr. Kinghorne says he was denied even the minimum level of procedural fairness, *i.e.*, notice of the decision and a reasonable opportunity to respond (citing *Nicholson v Haldimand-*

Norfolk Regional Police Commissioners, [1979] 1 SCR 311 at para 27; *Baker* at para 28; *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 75). He complains that he was only given notice of the decision on September 14, 2016, despite making enquiries about the policy from July 11, 2016 onward. The Harbour Authority did not invite him to make submissions or provide him with a rationale for its decision to renew the Access Policy.

[48] The Attorney General responds that, properly applied, the *Baker* factors demonstrate that the principles of natural justice respecting the right to notice and the right to be heard were not applicable in this case. The Attorney General acknowledges that the requirement for procedural protections increases the closer the decision-making process is to judicial decision-making (citing *Baker* at para 23). However, if the decision was in the nature of a discretionary policy or legislative action, then the rules of procedural fairness do not apply (citing *Canadian Assn of Regulated Importers v Canada (Attorney General)*, [1994] 2 FC 247, [1994] FCJ No 1 at para 18).

[49] I agree with the Attorney General that the Harbour Authority's Decision to renew the Access Policy in 2016 approaches the legislative end of the spectrum (see, e.g., *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 at paras 31-35; *Carpenter Fishing Corp v Canada*, [1998] 2 FC 548, [1997] FCJ No 1811 at paras 28-29). Neither the statutory scheme nor the Lease offered the public a process to challenge decisions limiting public access in aid of public safety. Nor did Mr. Kinghorne have a legitimate expectation that he would be consulted respecting the decision to adopt or renew the Access Policy. All of his submissions were directed to finding out whether the Access Policy would be renewed in 2016, not whether it should be

renewed or the potential impact on Mr. Kinghorne if it was. Finally, while not determinative, the procedural choices of the Board must be taken into account (*Baker* at para 27).

[50] The Harbour Authority was free to adopt public safety policies at its discretion (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, [1994] SCJ No 14 at 228; *Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at paras 5 & 12). There was no breach of any duty of procedural fairness that may have been owed to Mr. Kinghorne.

C. *Was the Decision reasonable?*

[51] Mr. Kinghorne argues that the Harbour Authority unreasonably applied the Access Policy to his personal circumstances, and failed to properly consider the evidence that the FV Hustler 05 “home ports” at White Head Harbour (citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35 at para 17). He also argues that the Access Policy did not in fact decrease overcrowding or improve the safety of the ferry. He relies on the report of Captain Quinn, who concluded that the FV Hustler 05 had never interfered with the operation of the ferry and would not do so in the future.

[52] Mr. Kinghorne’s position presupposes that the Harbour Authority was asked to consider the application of the Access Policy to his personal circumstances, and then failed to consider the evidence and arguments he advanced. However, as previously discussed, the Decision made by the Harbour Authority on September 6, 2016 was only whether the Access Policy would be

renewed. In his correspondence to the Harbour Authority in July and August 2016, Mr. Kinghorne made no submissions regarding the application of the Access Policy to his personal circumstances in light of the numerous considerations he now advances in this application for judicial review. Captain Quinn's report was provided to the Harbour Authority on September 26, 2016, well after the Decision had been made. The Harbour Authority cannot be faulted for failing to consider evidence and arguments that were not presented at the time of its Decision (*Diarra v Canada (Citizenship and Immigration)*, 2006 FC 1515 at para 12).

[53] I therefore conclude that the Harbour Authority's Decision to renew the Access Policy in 2016 was a valid exercise of its discretion to adopt policies in furtherance of public safety, and was reasonable.

VI. Conclusion

[54] The application for judicial review is dismissed.

[55] Given the ambiguity created by the letter from the Harbour Authority's counsel that communicated the Board's Decision to Mr. Kinghorne, I exercise my discretion not to award costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1718-16

STYLE OF CAUSE: SHAWN KINGHORNE v THE ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: AUGUST 13, 2019

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

DATED: SEPTEMBER 17, 2019

APPEARANCES:

Patrick E. Hurley, Q.C.
Ryan Baxter

FOR THE APPLICANT

Patricia McPhee

FOR THE RESPONDENT

SOLICITORS OF RECORD:

McInnes Cooper
Barristers and Solicitors
Fredericton, New Brunswick

FOR THE APPLICANT

Attorney General of Canada
Halifax, Nova Scotia

FOR THE RESPONDENT