Federal Court  Cour fédérale

Date: 20140205

Docket: T-412-13

Citation: 2014 FC 129

Ottawa, Ontario, February 5, 2014

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

CHERYL MALONEY

Applicant

and

COUNCIL OF THE SHUBENACADIE INDIAN BAND AND KAISER MARINE INC.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Cheryl Maloney, is a member of the respondent Shubenacadie Indian Band (also known as the Indian Brook First Nation), a Mi'kmaq community in Nova Scotia. In 2005, the Band entered into an agreement with the Department of Fisheries and Oceans [DFO] in which the Minister agreed to issue the Band several fishing licences under section 4 of the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332 [the *Regulations*]. In these licences the Band is allocated quota for the fisheries to which the licences apply and is given the authority to designate the vessels and individuals who may fish under the authority of the licences.

[2] In 2009, Ms. Maloney decided that she wished to enter the snow crab fishery to supplement her own income and to give her son an opportunity to learn a valuable trade. She sought financing to purchase a boat, and the bank agreed to lend her funds on condition she obtain assurances from the Band Council confirming her right to fish under one of the Band's communal fishing licences. While Ms. Maloney originally sought a ten year commitment, the Band Council found this period too long, so Ms. Maloney and the Council eventually agreed on a six year term, which matches the period over which Ms. Maloney's bank loan is repayable. To facilitate the loan, the then Chief of the Indian Brook First Nation provided Ms. Maloney a letter dated February 23, 2009, which contained the following statements:

> In accordance with the Band's objective to advance the community fishery, any Band member who secures a financial loan for the purchase of the boat and possesses the necessary training and fishing experience will be allocated a Band license for a minimum period of ten years or the life of the loan, whichever is less, to [facilitate] repayment of the boat loan.
>
> By way of this letter the Shubenacadie Band confirms that Cheryl Maloney meets the terms and conditions of access and subject to the approval of a fishery loan for the purchase of a fishing vessel will be granted access to the Band's fishery.

[3] On the strength of this letter, the bank granted Ms. Maloney a loan repayable over six years, and Ms. Maloney purchased a boat. The Band designated Ms. Maloney's vessel and captain to fish the entire quota granted to the Band under the communal licence for the snow crab fishery in 2009, 2010 and 2012. Although the Band designated a business run by one of the Band's former councillors to fish the snow crab licence in 2011, Ms. Maloney and the councillor entered into an agreement under which Ms. Maloney's boat and crew fished the Band's snow crab quota in 2011 in exchange for payments similar to those paid to Ms. Maloney by the Band in other years.

[4] On December 19, 2012, the Band Council assigned the respondent, Kaiser Marine Inc. [Kaiser], a non-aboriginal commercial fishing enterprise, the right to fish the Band's snow crab quota for 2013 and 2014 and afforded Kaiser the right to sell all the crab caught under the quota. In exchange, Kaiser agreed to pay the Band the shore price, less an "adjustment for fishing costs", which are not quantified in the agreement the Band executed with Kaiser.

[5] In this application for judicial review, Ms. Maloney seeks to have the Band Council's December 19, 2012 decision set aside. She also requests an injunction prohibiting the Band from allocating the 2014 snow crab licence and the associated quota to anyone other than herself without providing that she will fish the quota on terms that are reasonably consistent with past practice. She further requests a declaration that the Band exceeded its jurisdiction in allocating the 2013 snow crab licence and associated quota to Kaiser.

[6] Ms. Maloney claims that the Band Council made two reviewable errors in deciding to allocate the 2013 and 2014 snow crab quota and the right to fish the quota to Kaiser, which she argues entitle her to the remedies she seeks. She first submits in this regard that she had a right to receive notice that the Council was considering authorizing someone other than herself to fish the 2013 and 2014 snow crab quota, that she ought to have been afforded the opportunity to make her own proposal and should also have been given the opportunity to address concerns that the Council might have had concerning her proposal. She claims that this did not occur and therefore asserts that the Band Council violated her rights to procedural fairness in making the decision. Secondly, she argues that the decision to allocate the quota to Kaiser was unreasonable as the Council ought not have granted authority to harvest fish under the Band's communal licence to a non-aboriginal

enterprise and moreover based its decision to grant the quota to Kaiser on erroneous information. She claims this resulted in the Band's making a poor financial decision and exposing the Band to unnecessary litigation, which she asserts highlights the unreasonable nature of the Council's decision.

[7] The respondents, on the other hand, argue that the Council's decision regarding the allocation of quota under a communal fishing licence is not amenable to judicial review as in making such a decision the Band Council is not acting as a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Courts Act*, RSC 1985, c F-7 [the FCA]. The respondents accordingly submit that this application is not justiciable. In the alternative, the respondents assert that the Band Council was not under a duty to afford Ms. Maloney procedural fairness in allocating the 2013 and 2014 snow crab quota and that, even if it were, any procedural fairness rights Ms. Maloney might have possessed were respected because she knew the Council was considering granting the 2013 and 2014 quotas to Kaiser and chose not to submit her own proposal. The respondents also argue that if the decision to grant Kaiser the authority to fish the snow crab quota is amenable to review, the decision is a reasonable one and, indeed, resulted in much more profit for the Band than previous arrangements. The respondents therefore request that this application be dismissed, with costs.

[8] For the reasons set out below, I have determined that in making the decision to authorise Kaiser to fish the snow crab quota in 2013 and 2014, the Band Council *was* operating as a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the FCA. Its December 19, 2012 decision may therefore be the subject of a judicial review application to this

Court. I have also determined that in the particular circumstances of this case, which arises against the backdrop of the assurances previously given to Ms. Maloney and the history of her boats and crew having been authorized to fish the Band's snow crab quota, she was entitled to notice that the Council might not designate her to fish the quota in 2013 and 2014. She was also entitled to an opportunity to make a proposal to the Band Council to continue to fish the quota until the six year term of her loan lapsed. I have further found that Ms. Maloney was not provided a meaningful opportunity to make such a proposal and, therefore, have concluded that the Council did not respect Ms. Maloney's rights to procedural fairness. I have accordingly determined that the Council's decision with respect to the 2014 quota will be set aside and the matter remitted to the Council for re-determination. I do not find it appropriate to award the other remedies Ms. Maloney seeks.

The Indian Brook First Nation Communal Fishery

[9] Prior to addressing the issues that arise in this case, it is necessary to review the basis under which Ms. Maloney and Kaiser were afforded access to fish snow crab by the Band Council. The starting point for this examination is the decision of the Supreme Court of Canada in *R v Marshall*, [1999] 3 SCR 456 [*Marshall*], where the Supreme Court recognised the treaty right of the Mi'kmaq people to earn a moderate livelihood through hunting and fishing, and thus set aside convictions of Mr. Marshall for violating regulations under the *Fisheries Act*, RSC 1985, c F-14 [the *Fisheries Act*].

[10] The Record before me reveals that subsequent to the decision in *Marshall*, the Indian Brook First Nation attempted to regulate the aboriginal fishery without the involvement of the DFO. This led to negotiations and, eventually, the DFO offered an interim fisheries arrangement to the Indian

Brook First Nation in a letter to the Chief and Council of the First Nation from the Chief Federal Negotiator and the Assistant Deputy Minster, Fisheries and Aquaculture Management of DFO [the Interim Fisheries Agreement]. The Indian Brook First Nation accepted the Interim Fisheries Agreement by Band Council Resolution in August, 2005.

[11] The Interim Fisheries Agreement provides in relevant part that:

- A number of communal commercial fishing licences would be issued to the Indian Brook First Nation, including a snow crab licence;
- The licences are intended to provide members of the Indian Brook First Nation opportunities to conduct fishing and related activities;
- The Government of Canada would provide the Indian Brook First Nation (and two other First Nations) funding to build capacity in the fishery;
- The licences are issued "without prejudice" to the positions of the First Nation and the Crown in Right of Canada with respect to aboriginal and treaty rights; and
- In accepting the licences, the Indian Brook First Nation "agrees to conduct its commercial fishery in accordance with the terms and conditions of [the Interim Fisheries Agreement] and of the licences".

[12] Pursuant to the Interim Fisheries Agreement, the Minster of Fisheries and Oceans [the Minster] has each year issued a number of communal fishing licences to the Indian Brook First Nation, including a snow crab licence. The authority of the Minister to do so is enshrined in section 43 of the *Fisheries Act* and the *Regulations*.

[13] Subsection 4(1) of the *Regulations* provides the Minster discretion to issue a communal licence to an "aboriginal organization to carry on fishing and related activities". Under subsections 4(2) to 4(4) of the *Regulations*, the Minster may either designate the persons and vessels that will be allowed to fish under the communal licence or may decline to do so, in which event the *Regulations* provide the aboriginal organization the authority to make the designations. Section 2 of the *Regulations* defines an "aboriginal organization" as including Indian bands and band councils.

[14] In the case of the Indian Brook First Nation, at all times relevant to this application, the Minster issued the snow crab licences in the name of the Shubenacadie Band and left it to the Band to designate the individuals and vessels that would be authorized to fish under them.

[15] Subsection 5(1) of the *Regulations* provides the Minister broad authority to manage the fishery through the conditions that may be contained in an aboriginal communal fishing licence, providing in this regard:

5. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition respecting any of the matters set out in paragraphs 22(1)(*b*) to (*z.1*) of the *Fishery (General) Regulations* and any condition respecting any of the following matters, without restricting the generality of the foregoing:	**5.** (1) Afin d'assurer une gestion et une surveillance judicieuses des pêches et de voir à la conservation et à la protection du poisson, le ministre peut, sur un permis, indiquer notamment toute condition relative aux points visés aux alinéas 22(1)*b*) à *z.1*) du *Règlement de pêche (dispositions générales)* et toute condition concernant ce qui suit :
(*a*) the species and quantities of fish that are permitted to be taken or transported;	*a*) les espèces et quantités de poissons qui peuvent être prises ou transportées;
b) the method by which and	*b*) par quel moyen et à quel

when the licence holder is to notify the Minister of designations, the documents that constitute proof of designation, when, under what circumstances and to whom proof of designation must be produced, the documents or information that designated persons and vessels must carry when carrying on fishing and related activities, and when, under what circumstances and to whom the documents or information must be produced;

moment le titulaire du permis avise le ministre des désignations, les documents attestant la désignation, à quel moment, dans quelles circonstances et à qui les attestations de désignation doivent être produites, les documents ou les renseignements que les personnes ou les bateaux désignés doivent respectivement avoir sur elles ou à bord lorsqu'ils pratiquent la pêche et toute activité connexe et à quel moment, dans quelles circonstances et à qui les documents ou les renseignements doivent être produits;

(*c*) the method to be used to mark and identify vessels and fishing gear;

c) la méthode de marquage et d'identification des bateaux et des engins de pêche;

(*d*) the locations and times at which landing of fish is permitted;

d) les endroits et les moments où le poisson peut être débarqué ou amené à terre;

(*e*) the method to be used for the landing of fish and the methods by which the quantity of the fish is to be determined;

e) la méthode à utiliser pour débarquer le poisson et les méthodes pour en déterminer la quantité;

(*f*) the information that a designated person or the master of a designated vessel is to report to the Minister or a person specified by the licence holder, prior to commencement of fishing, with respect to where and when fishing will be carried on, including the method by which, the times at which and the person to whom the report

f) les renseignements que la personne désignée ou le capitaine du bateau désigné doit, avant le début de la pêche, transmettre au ministre ou à la personne indiquée par le titulaire du permis quant aux endroits et aux moments où la pêche sera pratiquée, ainsi que le mode et les moments de transmission et

is to be made;	leur destinataire;
(*g*) the locations and times of inspections of the contents of the hold and the procedure to be used in conducting those inspections;	*g*) les endroits et les moments des inspections du contenu de la cale et la procédure à suivre lors de celles-ci;
(*h*) the maximum number of persons or vessels that may be designated to carry on fishing and related activities;	*h*) le nombre maximal de personnes ou de bateaux qui peuvent être désignés pour pratiquer la pêche et toute activité connexe;
(*i*) the maximum number of designated persons who may fish at any one time;	*i*) le nombre maximal de personnes désignées qui peuvent pêcher en même temps;
(*j*) the type, size and quantity of fishing gear that may be used by a designated person;	*j*) le type, la grosseur et la quantité des engins de pêche que toute personne désignée peut utiliser;
(*k*) the circumstances under which fish are to be marked for scientific or administrative purposes; and	*k*) les circonstances dans lesquelles le poisson peut être marqué à des fins scientifiques ou administratives;
(*l*) the disposition of fish caught under the authority of the licence.	*l*) l'aliénation du poisson pris en vertu du permis.

[16] The licences issued by the Minster to the Shubenacadie Band for the snow crab fishery contain several of these sorts of restrictions in them.

[17] Section 7 of the *Regulations* requires those who carry on fishing or related activities under the authority of a communal licence to comply with the conditions of the licence, and section 8 of

the *Regulations* provides that only designated persons may fish under the authority of an aboriginal communal fishing licence.

[18] Over the years, the Band Council has adopted one of two different commercial arrangements in respect of the designations to fish under its communal licences.

[19] On one hand, the Council has sometimes paid the designate and required that the catch be landed and delivered to someone designated by the Band Council. This is the type of arrangement the Council offered Ms. Maloney in those years that her vessel was designated under the snow crab licence. Under this type of arrangement, the boat owner and crew were paid an agreed-upon number of cents per pound of crab landed, and profit beyond that point was presumably intended to inure to the Band.

[20] On the other hand, the Band Council has sometimes entered into an arrangement whereby it "sells" or assigns the entire quota for a season under a communal licence to the designate, who is then free to land and sell the catch to whomever the designate chooses at whatever price that can be negotiated. This is the sort of arrangement that the Band Council made with Kaiser; the Council agreed to sell Kaiser its entire 2013 and 2014 snow crab quota in exchange for which Kaiser agreed to pay the Band "shore price subject to an adjustment for fishing costs". While the agreement with Kaiser is for two years, the actual designation on the snow crab licences must be done on a yearly basis as the communal licences are issued each year. Thus, at the point this case was argued (and as of the date of this decision), the 2013 communal licence had been issued to Shubenacadie Band; the licence had been endorsed with the Kaiser vessel and captain; and the 2013 quota had been fished

and sold. However, the 2014 communal snow crab licence has not yet been issued, and the 2014 snow crab season is not likely to open until spring or early summer of 2014. Thus, the remedy sought by Ms. Maloney with respect to the 2014 season is not illusory.

Is the Band Council's decision amenable to judicial review?

[21] Bearing this background in mind, I turn now to consideration of the first issue that must be addressed, namely, whether the Band Council's December 19, 2011 decision is amenable to judicial review.

[22] An application for judicial review under the FCA may only be brought against a "federal board, commission or other tribunal". As Justice Stratas noted in *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 45, 426 NR 131 [*Toronto Port Authority*], this is made clear by various provisions in the FCA:

> Subsection 18(1) of the [FCA] vests the Federal Court with exclusive original jurisdiction over certain matters where relief is sought against any "federal board, commission or other tribunal." In exercising that jurisdiction, the Federal Court can grant relief in many ways, but only against a "federal board, commission or other tribunal": subsection 18.1(3) of the [FCA]. It is entitled to grant that relief where it is satisfied that certain errors have been committed by the "federal board, commission or other tribunal": subsection 18.1(4) of the [FCA].

[23] Subsection 2(1) of the FCA defines a "federal board, commission or other tribunal" as follows:

2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]

"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867* ;	*« office fédéral »* Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

[24] The case law recognizes that the foregoing definition requires determination of two issues: first, "what jurisdiction or power the body or person seeks to exercise", and, second, the source of that jurisdiction or power (*Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at para 29, 400 NR 137; see also, *Toronto Port Authority* at para 47; and *Archer v Canada (Attorney General)*, 2012 FC 1175 at para 12, 419 FTR 290). As Justice Stratas observed in *Toronto Port Authority* at para 48, many cases turn on the second issue and involve the search for a federal statute or regulation under which the entity is empowered to act. Where there is no such federal law or regulation, and the issue is not one of royal prerogative, the entity does not meet the definition of a "federal board, commission or other tribunal".

[25] However, finding a legislative or regulatory grant of authority to the body does not end the inquiry; the nature of the decision made by the entity must also be examined. In this regard, the case law recognizes that only those decisions that are of a public as opposed to a private nature are

amenable to judicial review. Thus, by way of example, a tribunal's decision to hire an employee or to purchase supplies cannot be judicially reviewed, as these are purely private contractual decisions. However, the decisions made by the same tribunal in furtherance of its statutory mandate may be the subject of a judicial review application, if the decision has public dimensions to it. This is so because judicial review is a public law remedy, concerned with maintenance of the rule of law and adherence to the Constitution (*Canada (Attorney General) v Telezone Inc*, 2010 SCC 62 at para 24, [2010] 3 SCR 585; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 27-31, [2008] 1 SCCR 190; and *Canada (Attorney General) v Mavi*, 2011 SCC 30 at paras 38-39, [2011] 2 SCR 504).

[26] There is no bright line test to discern when a creature of statute acts in a public as opposed to a private fashion; the decided cases do, however, delineate several indicia which may point to whether a decision is a public or a private one. Justice Stratas usefully summarised them at para 60 of *Toronto Port Authority* in the following terms:

> - *The character of the matter for which review is sought.* Is it a private, commercial matter, or is it of broader import to members of the public? …
>
> - *The nature of the decision-maker and its responsibilities.* Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?
>
> - *The extent to which a decision is founded in and shaped by law as opposed to private discretion*. If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more willing to find that the matter is public: … This is all the more the case if that public source of law supplies the criteria upon which the decision is made: … Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review: …

> - *The body's relationship to other statutory schemes or other parts of government*. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter: …
>
> - *The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity*. For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature: … A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant: …
>
> - *The suitability of public law remedies*. If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature: …
>
> - *The existence of compulsory power*. The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction. …
>
> - *An "exceptional" category of cases where the conduct has attained a serious public dimension*. Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable: … This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment: …

[27] Turning, more specifically, to decisions made by Indian band councils, the jurisprudence indicates that some – but not all – of their decisions may be the subject of judicial review.

[28] Indian bands and band councils are foreseen by the *Indian Act*, RSC 1985, c I-5, s 2. Band councils are provided authority to make several types of decisions under that Act or under regulations enacted pursuant to the *Indian Act*. For example, bands may be given control of their

band lists pursuant to section 10 of the *Indian Act* and, when this occurs, band councils may make decisions on band membership. Similarly, Bands may conduct elections pursuant to a custom code if the Minister does not determine to conduct elections under section 74 of the *Indian Act*. Likewise, sections 81 and 83 of the *Indian Act* authorize band councils to pass by-laws on a variety of subjects.

[29] It is well-settled that when Indian band councils are acting pursuant to these sorts of statutory provisions, their decisions may be judicially reviewed before this Court. Thus, decisions made by a band council regarding membership in the band are amenable to judicial review (see e.g. *Ermineskin v Ermineskin Band Council*, [1995] FCJ No 821 (QL) at paras 10-14, 96 FTR 181 [*Ermineskin*]; *Diabo v Whitesand First Nation*, 2009 FC 1250, 358 FTR 149, aff'd on other grounds 2011 FCA 96, 420 NR 7 [*Diabo*]; and *Okemow-Clark v Lucky Man Cree Nation*, 2008 FC 888, 331 FTR 225 [*Okemow-Clark*] as are decisions regarding band elections (see e.g. *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 at paras 11-18, [2003] 4 FC 1133 [*Francis*]; *Ratt v Matchewan*, 2010 FC 160 at paras 96-106, 362 FTR 285; and *Grand Rapids First Nation v Nasikapow*, [2000] FCJ No 1896 (QL) at paras 5-6, 197 FTR 184). Decisions to enact or repeal by-laws may also be judicially reviewed (see e.g. *Laforme v Band Council of the Mississaugas of the New Credit First Union*, [2000] FCJ No 629 (QL), 257 NR 78 (CA) [*Laforme*]).

[30] On the other hand, where band councils make commercial decisions, like deciding to lease land, to repay loans or to settle claims, their decisions have been found to not be amenable to judicial review, even though these sorts of decisions are made by band council resolution (see e.g. *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B (Wauzhushk Onigum Nation)*, 2008

FC 812 at para 64, 331 FTR 87; *Peace Hills Trust Co v Saulteaux First Nation*, 2005 FC 1364 at para 61, 281 FTR 201; and *Ballantyne v Bighetty*, 2011 FC 994 at paras 31-40, 395 FTR 141).

[31] Here, the decision made by the Band Council of the Indian Brook First Nation was not made under a specific grant of authority under the *Indian Act*, but, rather, under a grant of authority delegated to the Band under the *Regulations* enacted under the *Fisheries Act*. While the forgoing case law regarding Indian band decisions, therefore, is not directly applicable, it may be applied by analogy. This results in a determination that the Band Council's decision to allocate the quota to Kaiser is reviewable because it was made under regulatory grant of authority delegated by the Minster to the Band to decide who is authorized to fish the quotas allocated by the communal licences. In other words, in this case, like the others where band council decisions have been found to be amenable to judicial review, the Council was exercising a power specifically afforded to it by regulation. The case is therefore on all fours with *Ermineskin*, *Diabo*, *Okemow-Clark*, *Francis* and *Laforme*.

[32] Application of the various factors listed in the *Toronto Port Authority* case likewise points to the result that the Band Council's decision to allocate the snow crab quota to Kaiser has significant public aspects and is not a purely private matter. Each of the various factors from the *Toronto Port Authority* case is discussed, below.

[33] Concerning, first, the character of the matter, contrary to what the respondents assert, the decision to grant the quota to Kaiser is *not* a purely commercial or private matter. Rather, there are significant public aspects to the decision as the Interim Fishery Agreement recognizes that the

communal licences are granted to the Indian Brook First Nation in order to provide members of the First Nation opportunities to conduct fishing and related activities, thereby building capacity in the community. Thus, the decision regarding who will be licensed does have a significant public aspect as it is a matter of concern for all members of the Band, and most especially for those who wish to learn how to fish (like Ms. Maloney's son). Similarly, the decision at issue involves the issuance of a licence or grant under delegated legislative authority of a monopoly right to harvest a community resource. In *Jackson v Canada (Attorney General)*, [1997] FCJ No 1603 (QL), 141 FTR 1, Justice Rothstein, in discussing the reviewable nature of decisions to grant licenses made by the Canadian Wheat Board, held at para 11 that:

> A regulatory power such as the granting of licenses is by nature public. There can be no doubt that when the Board is carrying out the licensing power, it is not exercising the general management powers of an ordinary corporation. No ordinary corporation has the power to regulate. Regulatory power is one of the hallmarks of public, as opposed to private commercial activity.

Thus, the first of the factors listed in the *Toronto Port Authority* case points strongly to the conclusion that the Band Council's decision in this case is reviewable under section 18.1 of the FCA.

[34] The second factor, concerning the nature of the decision-maker and its responsibilities, is neutral as band councils' decisions may or may not be subject to review, depending on the nature of the decision made, as noted above.

[35] The third factor, which concerns the extent to which the decision is founded on or shaped by law as opposed to private discretion, would point to the private nature of the decision if one had regard only to the *Regulations*, as it provides no guidelines to band councils regarding the selection

of those to be provided authority to fish under a communal license. The Interim Fisheries Agreement, on the other hand, provides direction and indicates that the licenses are intended to be granted so as to provide members of the Indian Brook First Nation opportunities to conduct fishing and related activities. The communal licences are granted by the Minster to the Band under the terms of the Interim Fisheries Agreement, and the Indian Brook First Nation has agreed in the Interim Fisheries Agreement to conduct its commercial fishery in accordance with the terms and conditions of the Agreement. Its decisions regarding who will be authorized to fish under a communal licence are therefore not purely discretionary but, rather, ought to be shaped by consideration of whether the authorization will provide members of the Indian Brook First Nation opportunities to conduct fishing and related activities. Thus, on balance, I believe this factor, likewise, points to the decision in question being of a public nature.

[36] The fourth factor from the *Toronto Port Authority* case concerns the relationship between the Band Council and other statutory schemes or other parts of government and involves asking whether, in making this decision, the Council is "woven into the network of government and is exercising a power as part of that network". The Band Council is entirely interwoven into the scheme established under the *Fisheries Act* and the *Regulations*, and is exercising a licensing power akin to that exercised by the Minister under section 7 of the *Fisheries Act*, under authority delegated to the Council by the Minister. This factor therefore strongly points to the conclusion that the decision at issue in this case is a public one and therefore amenable to judicial review.

[37] In this regard, the present case is somewhat akin to the situation in *Onuschak v Canadian Society of Immigration Consultants*, 2009 FC 1135, 357 FTR 22. There, my colleague, Justice Harrington, determined that decisions made by the Society of Immigration Consultants regarding licensing and practice standards were reviewable because they were made pursuant to authority afforded the Society under the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[38] Likewise, the fifth factor listed in the *Toronto Port Authority* case, which involves the extent to which the decision-maker is an agent of government, points to a similar conclusion as, in authorizing individuals to fish the quota, the Band Council of the Indian Brook First Nation is exercising authority delegated to it by the Minister.

[39] The respondents argue that the next factor, which involves consideration of the extent to which public law remedies are appropriate, points strongly to the conclusion that this is a private contractual matter. With respect, I disagree. As already noted, multiple interests, beyond those of Kaiser and Ms. Maloney, are involved in decisions of this nature because allocation of quota and designation of those allowed to fish it impact all members of the Indian Brook First Nation since the resource is a public one. The matter is therefore not purely contractual.

[40] Finally, the decision to designate an individual under a communal license involves the exercise of a compulsory power as the *Regulations* provide that only those who are designated under a license may fish the quota to which the license pertains. The licence also contains multiple conditions. While members of the Indian Brook First Nation may well have treaty or aboriginal rights that would allow them to fish snow crab outside the licensing system established under the

Fisheries Act as the Supreme Court held in *Marshall*, the Indian Brook First Nation agreed in the Interim Fisheries Agreement to operate within the licensing system established under the *Fisheries Act*. Thus, there is a compulsory aspect to the decision made in this case due to the prohibitions contained in section 8 of the *Regulations* and to the requirements of the licence.

[41] Therefore, the majority of the factors from the *Toronto Port Authority* case support the conclusion that the Band Council's decision of December 19, 2012 is reviewable under section 18.1 of the FCA, as, indeed, are similar licensing decisions when made by the Minister under section 7 of the *Fisheries Act* (see eg *Ralph v Canada (Attorney General)*, 2010 FCA 256, 334 DLR (4th) 180; *Waterman v Canada (Attorney General)*, 2009 FC 844, 350 FTR 88; and *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 36 [*Comeau's Sea Foods*].

[42] Accordingly, I find that the Band Council's December 19, 2012 decision to assign Kaiser the 2013 and 2014 snow crab quota and to afford Kaiser the right to fish the quota may be the subject of a judicial review application to this Court. The respondents' objection to my jurisdiction to hear this judicial review application is therefore dismissed.

Was Ms. Maloney denied procedural fairness?

[43] I turn next to consideration of Ms. Maloney's procedural fairness claim. While the respondents argue that the Band Council owed no duties of procedural fairness to Ms. Maloney because her rights are purely contractual, this assertion cannot be accepted given my determination that the Council's December 19, 2012 decision is amenable to judicial review. As Justice Rothstein noted in *Sparvier v Cowessess Indian Band*, [1993] FCJ No 446 (QL) at para 47, [1993] 3 FC 142,

"to the extent this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied". (See also *Public Service Alliance of Canada v Canada (Attorney General)*, 2013 FC 918 at para 53 [*PSAC*], where I held that the determination that a decision is justiciable necessarily entails the result that affected parties are entitled to some degree of procedural fairness in the decision-making process.) Thus, Ms. Maloney was entitled to procedural fairness in respect of the Band Council's decision regarding the 2013 and 2014 snow crab quota.

[44] In terms of the scope of the Band's procedural fairness duties towards Ms. Maloney, as Justice L'Heureux-Dubé noted in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28, 174 DLR (4th) 193, the content of the duty of procedural fairness depends on the context, which requires consideration of factors such as:

- the nature of the decision in question and the process followed in making it, and, in particular, the degree to which the decision-making process resembles that followed by a court (in which event greater procedural guarantees ought to be afforded to a party);
- the statutory scheme applicable to the decision-maker;
- the importance of the decision to the affected parties;
- the legitimate expectations of the parties; and
- the procedural choices made by the decision-maker, especially where the choice of procedure is left to the decision-maker by statute.

[45] Here, the first, second and fifth factors point to a minimal degree of procedural fairness being required as the *Regulations* do not require that any particular process be followed and the process adopted by the Band Council bears no resemblance to a hearing before a court. Nor would

an adversarial process be appropriate given the type of decision at issue, which is similar to a tendering process, as the respondents correctly note.

[46] The third and fourth factors, on the other hand, do favour a higher degree of procedural fairness.

[47] Contrary to what the respondents claim, the decision at issue in this case is important to Ms. Maloney. Her evidence demonstrates that she derived important income from having her vessel fish the snow crab quota and also that she took out a loan based on the understanding that she would be afforded the right to fish that quota until 2014. This makes the case akin to those where an individual's livelihood is at issue, which have held that affected individuals are entitled to notice and to an opportunity to make submissions before a decision affecting them is made (see e.g. *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105 at 1113, 1116-1117, 110 DLR (3d) 311 and *Ruffo v Conseil de la magistrature*, [1995] 4 SCR 267 at para 125, 130 DLR (4th) 1).

[48] I do not agree with the respondents that the importance of the decision to Ms. Maloney is lessened because she happens to have other employment or because her son has recently acquired the certification required to captain a fishing vessel; neither of these facts makes the decision regarding the snow crab quota unimportant to Ms. Maloney. In short, she still is losing revenue and has a loan to finish paying off.

[49] Likewise, I believe that in the particular circumstances of this case, Ms. Maloney had a legitimate expectation that she would have been advised if there was a risk that she would lose the 2013 or 2014 quota and that she would have been afforded an opportunity to make a proposal and address any concerns the Band Council might have had about her prior performance before the quota was awarded to someone else. Several facts give rise to such an expectation.

[50] First, and most importantly, the February 23, 2009 letter from the former Chief of the Indian Brook First Nation indicted that Ms. Maloney would be afforded access to the Band's communal fishery until 2014. To the knowledge of the Band Council, she borrowed money from the bank to purchase a boat. Second, she had either been allocated or fished the quota in every year since 2009. While it is true, as the respondents note, that she assigned her right to do so in 2010 to one of the Band's councillors, this was a choice she made when the snow crab season opened exceptionally early. Third, the tender package prepared the previous year included a provision that anyone to whom the quota was assigned would have been required to engage Ms. Maloney to fish the quota. While this tender was not issued, it does appear to reflect recognition of Ms. Maloney's interest in the quota until 2014. Finally, the Band Council had not indicated to her that it had any concerns with her performance.

[51] Weighing all the factors together, I am of the view that this case falls towards the lower end of the procedural fairness spectrum but that the Band owed her more than minimum procedural fairness.

[52] In terms of the content of that duty, the respondent Band Council concedes that even under the most minimum threshold for procedural fairness, Ms. Maloney was entitled to notice that she might lose the quota in 2013 and 2014 and an opportunity to make a proposal to fish the quota. In this regard, it is well-settled that these are, indeed, the attributes of a minimal procedural fairness guarantee. As I noted in *PSAC* at paras 58-60:

> [58] As the Supreme Court of Canada noted in *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 [*Mavi*], even where only minimal procedural fairness rights are owed, those rights still require both notice and an opportunity to make submissions in writing. Justice Binnie, writing for the Court, concluded as follows on this point at para 79 of *Mavi*:
>
> > The content of this duty of procedural fairness include the following obligations: (a) to notify [the applicant] at his or her last known address of the claim; (b) to afford [the applicant] an opportunity within limited time to explain in writing his or her relevant personal and financial circumstances […]; (c) to consider any relevant circumstances brought to its attention […]; (d) to notify [the applicant] of the government's decision; (e) without the need to provide reasons.
>
> [59] Similar conclusions have been reached in numerous cases. For example in In *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653, the Supreme Court held that the content of minimal procedural fairness included "notice of the reasons for the appellant Board's dissatisfaction with the respondent's employment and affording him an opportunity to be heard" (at para 51). Likewise, in *Lameman v Cardinal*, 138 FTR 1, Justice Gibson, of this Court, determined that "only a minimal duty of fairness [was] owed", which meant that "the [decision maker in that case] had an obligation to notify those most directly impacted by the appeal […] of the filing of the appeal and of the bases of the appeal and to provide them with an opportunity, however limited, to make representations to him in respect of the appeal" (at para 22). Similarly, in *Russo v Canada (Minister of Transport, Infrastructure and Communities)*, 2011 FC 764, 406 FTR 49, my colleague, Justice Russell, found that minimal procedural fairness required that the applicant be given the opportunity to be heard (at para 59), which entailed notice and the right to make submissions.

> [60] Thus, even in cases where only minimal procedural fairness rights are required, the right to notice and the opportunity to be heard still exist. ...

[53] In addition to the right to notice and the right to submit a proposal, in the particular circumstances of this case, I believe that Ms. Maloney was entitled to be advised of the concerns that were prompting the Band Council to consider awarding the 2013 and 2014 snow crab quota to someone else. In this regard, in cross-examination, Chief Copage stated that the Council determined to award the quota to someone else at least in part because the Band had made virtually no money from it in previous years. However, in previous years, it would appear that Ms. Maloney and her crew were paid less than shore price and she was required to sell the crab to one of the Band's former councillors, whom it appears paid her. It would thus appear that any lack of profitability may not be attributable to Ms. Maloney. Given these concerns and the uncertainty surrounding what had transpired in previous years, I believe that the Band Council ought to have afforded Ms. Maloney an opportunity to address its concerns about what had transpired in previous years before it made the decision to award the 2013 and 2014 quota to someone else.

[54] Ms. Maloney was not afforded this opportunity nor was she given any real notice of the fact that she might not be awarded the right to fish the 2013 and 2014 snow crab quotas. She testified during the re-examination on her affidavit that she happened into a Council meeting in late November 2012, where Kaiser was presenting its proposal. She stated that she inquired what was going on and was told that the Band Council was not making a decision but was just listening to Kaiser's proposal. At no point did the Band Council indicate to her that her ability to fish the 2013 and 2014 quotas might be in jeopardy. While it is true, as the respondents note, that Ms. Maloney

did not thereafter submit her own proposal, the Band Council moved quickly and signed the agreement with Kaiser on December 19, 2011. In many of the previous years, the Council had not finalised its arrangements with Ms. Maloney until much later, sometimes as late as March or even April of the year of the catch. Thus, I find there was nothing that indicated to Ms. Maloney that she needed to prepare a proposal quickly for consideration of the Band Council. Moreover, at no time did Chief Copage or anyone on the Council address the concerns about lack of profitability with Ms. Maloney.

[55] I therefore find that the Band Council violated Ms. Maloney's rights to procedural fairness and that its decision, as concerns the 2014 snow crab quota, must be set aside and the issue of who should be assigned or afforded the right to fish it remitted to the Band Council for a re-determination. Given my findings, Ms. Maloney must be allowed an opportunity to make a proposal to fish the quota with her boat and crew and to address the concerns the Council had regarding her financial performance. In the circumstances, I believe Kaiser must also be afforded an opportunity to make its own proposal as my decision results in it being required to re-bid for 2014. There is no need that their proposals be shared with each other. (Indeed, it would be unusual if not inappropriate for this sort of disclosure to occur in a tendering process.)

[56] My findings should not be taken to mean that in other cases the Band Council must afford similar rights to other bidders as my determination is tied to the particular facts of this case, which include the assurances previously given to Ms. Maloney, her history with the quota and the fact of Kaiser's having been previously assigned the quota.

[57] In the circumstances, I decline to deal with Ms. Maloney's claim that the Band's decision was unreasonable as the decision will be re-made. I would however note that the case law recognises that discretionary licensing decisions are afforded considerable deference and typically will not be set aside unless the decisions are made in bad faith, in an arbitrary fashion or are based on irrelevant considerations (see e.g. *Comeau's Sea Foods* at para 36; *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 at 7-8, 137 DLR (3d) 558; and *Malcolm v Canada (Fisheries and Oceans)*, 2013 FC 363 at paras 49-57, [2013] FCJ No 379 (QL)). I would also note that, in my view, the object of the Interim Fisheries Agreement of providing members of the Indian Brook First Nation opportunities to conduct fishing and related activities could be met in appropriate circumstances by assigning the quota to a non-aboriginal enterprise that undertakes, like Kaiser apparently has, to hire and train members of the Indian Brook First Nation.

[58] I see no need to issue the declaration Ms. Maloney seeks regarding the 2013 quota as it is moot. Nor is it appropriate to issue the injunction she seeks as she is not necessarily entitled to fish the 2014 snow crab quota; that is a matter for the Band Council to decide. Finally, as Ms. Maloney did not seek costs, I award none.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the December 19, 2012 decision of the Indian Brook First Nation Band Council, as it pertains to the 2014 snow crab quota under the communal licence issued under section 4 of the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332, is granted and the decision is set aside;

2. The Indian Brook First Nation Band Council shall re-determine who and which vessel(s) will be designated to fish the 2014 snow crab quota under the communal licence issued under section 4 of the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332;

3. The re-determination shall be made in accordance with these Reasons for Judgment; and

4. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-412-13

STYLE OF CAUSE: CHERYL MALONEY v COUNCIL OF THE SHUBENACADIE INDIAN BAND AND KAISER MARINE INC.

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: NOVEMBER 13, 2013 (IN PERSON)
DECEMBER 16, 2013 (BY TELECONFERENCE)

REASONS FOR JUDGMENT AND JUDGMENT: GLEASON J.

DATED: FEBRUARY 5, 2014

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