Federal Court of Appeal | Cour d'appel fédérale

Date: 20190208

Docket: A-177-17

Citation: 2019 FCA 27

CORAM: **GAUTHIER J.A.**
WEBB J.A.
GLEASON J.A.

BETWEEN:

KIRBY ELSON

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on September 19, 2018.

Judgment delivered at Ottawa, Ontario, on February 8, 2019.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: GAUTHIER J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from a decision of the Federal Court (2017 FC 459) that dismissed Kirby Elson's application for judicial review of a decision of the Minister of Fisheries and Oceans (the Minister) dated December 23, 2015. The Minister at that time was the Honourable Hunter Tootoo. He denied Mr. Elson's request for an exemption from the *Policy for Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries* (PIIFCAF Policy). As a result, Mr. Elson is no longer eligible to obtain a fishing licence for the inshore fishery.

[2] As a preliminary matter, it should be noted that the respondent is identified as "Canada (Attorney General)". This is an appeal from an application for judicial review of a decision of Minister Tootoo. As a result, Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, provides that the respondent shall be identified as the Attorney General of Canada. The name of the respondent is accordingly changed to the Attorney General of Canada.

[3] For the reasons that follow I would dismiss this appeal.

I. Background

[4] The PIIFCAF Policy added the Independent Core category as an eligibility criteria for new or replacement inshore vessel-based fishing licences. Essentially this policy provided that a fishing licence would not be granted to an individual unless the individual could confirm that he or she was not subject to a controlling agreement as defined in that policy. A controlling agreement was defined as:

> **Controlling Agreement (CA)** means an agreement between the licence holder and a person, corporation or other entity that permits a person, other than the licence holder, to control or influence the licence holder's decision to submit a request to DFO for issuance of a "replacement" licence to another fish harvester (commonly referred to as a "licence transfer"). Agreements between the licence holder and a Recognized Financial Institution (RFI) are not Controlling Agreements if (1) there is no third party involved in the Agreement or (2) any co-signor, guarantor or other surety involved in an agreement does not control or influence the licence holder's decision to submit a request to DFO for the issuance of a "replacement" licence to another fish harvester.

[5] The PIIFCAF Policy cannot be read in isolation and is best understood by reviewing other commercial fisheries licensing policies that had previously been adopted, including in particular the Fleet Separation Policy, which had been adopted in 1979. This policy is reflected, in part, in paragraphs 15(1) and (2) of the *Commercial Fisheries Licensing Policy for Eastern Canada – 1996*:

> **15(1)** One of the objectives of the licensing policy is to separate the harvesting and processing sectors of the industry, particularly in the fisheries where licence holders are restricted to using vessels of less than 19.8m (65') LOA [Length Overall – s. 9(19) of this policy]. This is known as the Fleet Separation Policy.
>
> **(2)** Under this policy, new fishing licences for fisheries where only vessels less than 19.8m (65') LOA are permitted to be used may not be issued to corporations, including those involved in the processing sector of the industry.

[6] Under the Fleet Separation Policy, a corporation could not acquire a fishing licence for the inshore fishery. This policy is also reflected in subsections 11(6) and (7) of the *Commercial Fisheries Licensing Policy for Eastern Canada – 1996* which confirm that "[f]or fisheries restricted to using vessels less than 19.8 m (65') LOA, a licence will be issued in the name of an individual fisher" and that any such licence holder "will be required to fish their licences personally".

[7] As a result of the Fleet Separation Policy, a corporation was not eligible to acquire a fishing licence where the licence related to the use of the vessels of the specified length. Following the adoption of this policy, any corporation that wanted to acquire a licence or to continue to hold a licence circumvented this policy by having an individual acquire the licence

and enter into a controlling agreement under which the individual would confirm that he or she was holding the particular licence in trust for the corporation. As a result, the corporation would obtain the benefits of the licence and control over the licence even though it was not named as the licence holder.

[8] In the course of various consultations that took place between the Department of Fisheries and Oceans (DFO) and interested parties, concerns were expressed about the extensive use of these trust arrangements that circumvented the Fleet Separation Policy by having the benefit of the licence still being held by a corporation. To address this issue of controlling agreements and to ensure that the person to whom the licence was being granted was an eligible individual, the PIIFCAF Policy was adopted in April 2007.

[9] As part of the PIIFCAF Policy, an individual who is seeking to have a licence issued to him or her would be required to file a declaration that such person was not a party to a controlling agreement. The first declarations were to be filed by March 31, 2008 and each time thereafter that an individual was requesting a new or replacement inshore vessel-based licence, another declaration was required. Because there were a number of individuals who were parties to controlling agreements, individuals had seven years (until April 12, 2014) to comply with the PIIFCAF Policy and terminate these agreements. If an individual was unable to comply with the policy by being able to sign a declaration that he or she was not a party to a controlling agreement by April 12, 2014, such individual would not thereafter be eligible to be issued a new or replacement licence.

[10] Mr. Elson had signed an agreement confirming that he was a bare trustee for Labrador Sea Products Inc. and Quinlan Brothers Limited of the licence he had acquired, which he acknowledged to DFO on March 25, 2008. DFO sent Mr. Elson a letter on December 3, 2009 indicating that since he was a party to a controlling agreement he did not qualify as an Independent Core fish harvester. Therefore, he would not be eligible to be issued a replacement licence after April 12, 2014, unless he terminated this agreement. He received another letter from DFO on October 18, 2013 to the same effect.

[11] DFO, on March 18, 2014, sent registered letters to all the licence holders who were still a party to a controlling agreement to again remind them of the deadline of April 12, 2014 and urging them to terminate or amend their controlling agreements. They were also advised that they could appeal to the Atlantic Fisheries Licence Appeal Board (the Appeal Board) a determination that they were not eligible to be issued a licence if they were a party to a controlling agreement after April 12, 2014. In early April 2014, Mr. Elson was advised that if he were to apply for a renewal of his licences prior to April 12, 2014, he would be issued licences for the 2014 season even though he could not sign the required declaration. Mr. Elson did this and obtained licences for 2014.

[12] However, in the fall of 2014, DFO advised him that his licences could not be renewed in 2015 if he was still subject to the controlling agreement. As a result, Mr. Elson wrote to the Minister on December 31, 2014 to request an exemption from the PIIFCAF Policy. On March 12, 2015 then Minister Shea sent Mr. Elson a letter indicating that “any licences deemed to be in a controlling agreement as of April 12, 2014, are not eligible for renewal” and that DFO

"will not be considering any exceptions to the PIIFCAF Policy". Mr. Elson was also advised that he could appeal to the Appeal Board.

[13] Mr. Elson appealed the decision to not renew his licences to the Appeal Board and his licences were renewed for the 2015 season. In June 2015, Mr. Elson received an appeal package from DFO and on August 28, 2015, an updated package was provided to Mr. Elson's counsel. Written submissions were provided by Mr. Elson's counsel on October 21, 2015 to the Appeal Board including a copy of Mr. Elson's controlling agreement. On the same day the hearing was held and Mr. Elson's counsel made oral submissions.

[14] Following the hearing, the Appeal Board sent a report to Minister Tootoo in which the Appeal Board outlined certain policies including the PIIFCAF Policy and the Fleet Separation Policy. The report also included the background facts. The submissions of Mr. Elson's counsel were also noted in the report and a copy of these submissions was included in the package sent to Minister Tootoo. In his submissions, counsel for Mr. Elson noted in the fourth paragraph that:

> [t]he Minister must consider each case on its own merits for two reasons. ***First***, it is only fair that she do so. ***Second***, the *Fisheries Act* (section 7) says that she has an absolute discretion to make licencing decisions. That means that she cannot create a general policy and then fail to consider each case on its own merits due to this policy.

[15] Counsel for Mr. Elson outlined the particular circumstances applicable to Mr. Elson that, in his view, would justify an exception to the PIIFCAF Policy. The first submission was that it would be difficult for Mr. Elson to exit his controlling agreement. His counsel stated that:

> [t]he corporation with which he has entered the agreement provides a vessel, crew and support, and finances the license. He depends on this relationship for his livelihood and, without it, will lack the license funding, vessel, employees, connections, suppliers and capital required to continue to fish on his own.

[16] The Appeal Board, at the hearing, requested specifics of Mr. Elson's financial circumstances and the financial hardship that he would suffer if he did not receive an exemption from the PIIFCAF Policy, but the particulars of this were not provided to the Appeal Board.

[17] Following receipt of the report and recommendation of the Appeal Board, Minister Tootoo wrote the letter dated December 23, 2015, which is the subject of this appeal. This letter included the following two paragraphs that are directly related to the decision that was made in relation to Mr. Elson's request for an exemption:

> Having considered all relevant information, I have decided to deny the appeal. Therefore, you will not be provided with an exemption to the PIIFCAF policy.
>
> Accordingly, you will no longer be eligible to have licences reissued to you for the 2016 fishing season and beyond.

[18] Following the receipt of this letter, Mr. Elson brought his application for judicial review of this decision.

II. Decision of the Federal Court

[19] The Federal Court Judge found that Minister Tootoo's decision concerning the issuance of a fishing licence is a discretionary decision to be reviewed on the standard of reasonableness and that the reasonableness standard would also apply to the issue of whether Minister Tootoo

had fettered his discretion. The Federal Court Judge found that any issue of procedural fairness would be reviewed on the correctness standard.

[20] In her decision the Federal Court Judge framed the issues that were before her as follows:

(1) Which decision(s) is (are) subject to judicial review?

(2) Was the Minister's decision based on relevant considerations?

(3) Did the Minister reasonably exercise, or did he fetter, his discretion?

(4) Did the Minister have an open mind?

(5) What is the appropriate remedy?

[21] The Federal Court Judge concluded that the only decision that was subject to judicial review in this matter was the one contained in the December 23, 2015 letter from Minister Tootoo.

[22] The issue related to whether Minister Tootoo relied on relevant considerations was part of Mr. Elson's argument that the PIIFCAF Policy is *ultra vires* the Minister. Mr. Elson argued that in pith and substance it is a regulation of contracts – a matter that is within the jurisdiction of the provinces as it relates to property and civil rights in a province (section 92(13) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5). Mr. Elson also argued that the PIIFCAF Policy is generally a matter of merely local or private nature in the province (section 92(16) of the *Constitution Act, 1867*). The Federal Court Judge

noted that, in her view, because it was a policy, the PIIFCAF Policy could not be the subject of a division of powers challenge as being *ultra vires*. However, she did find in paragraph 74 of her reasons that even if the PIIFCAF Policy could be subject to a division of powers challenge, the pith and substance of the PIIFCAF Policy was the management of the inshore fishery and the protection of the economy of coastal communities who depend on the resource and therefore fell within Parliament's broad powers to manage the fisheries.

[23] With respect to the issue of whether Minister Tootoo's decision was unreasonable on the basis that he fettered his discretion, the Federal Court Judge noted in paragraph 126 of her reasons that:

> **126** In sum, for the reasons set out above, I do not accept the Applicant's submissions that the Minister's discretion was fettered because the PIIFCAF Policy purports to create mandatory requirements, because the Minister did not consider the Applicant's individual circumstances, or, because of the absence of exemptions or flexibility for individual fish harvesters in the PIIFCAF Policy.

[24] Nevertheless, in paragraph 135 she found that:

> **135** I accept the Respondent's submissions that it was appropriate for the Minister to rely on the PIIFCAF Policy as indicated in *Maple Lodge Farms*, *Stemijon*, and *Gordon* discussed above. However, in this case the concern is that the Minister's decision letter failed to acknowledge the source and breadth of his broad discretion under section 7 of the *Fisheries Act*, referring only to the PIIFCAF Policy. He thereby fettered his discretion by not also considering that it was open to him to afford the relief sought other than by way of the PIIFCAF Policy and the appeal process.

[25] However, having found that Minister Tootoo had fettered his discretion she also found that the result would not have been any different in this particular case. Mr. Elson had placed his individual circumstances before the Appeal Board and he did not provide any financial or other information to support his claim of financial hardship. She found that it would have been open to Minister Tootoo to refuse to issue licences based on a consideration of the PIIFCAF Policy and in his absolute discretion pursuant to section 7 of the *Fisheries Act*, R.S.C. 1985, c. F-14. However, in her view, as stated in paragraph 162 of her reasons, "the Minister could not reasonably reach a different outcome on the facts and law when exercising his s 7 discretion". She concluded that, even though Minister Tootoo had fettered his discretion, she would not remit the decision back to the Minister.

[26] With respect to the issue of whether Minister Tootoo had an open mind, she found in paragraph 152 of her reasons that Mr. Elson had failed to establish that Minister Tootoo had "prejudged the matter to the extent that representations at variance with the adopted view would be futile".

[27] As a result, the Federal Court Judge dismissed the application for judicial review.

III. Issues

[28] Mr. Elson does not challenge the finding by the Federal Court Judge that Minister Tootoo fettered his discretion; however, the Crown does challenge this finding. As a result, the issues in this appeal can be summarized as follows:

(a) Did Minister Tootoo fetter his discretion which would make his decision unreasonable?

(b) If Minister Tootoo fettered his discretion (which made his decision unreasonable), should the matter be referred back to him?

(c) Was Mr. Elson treated fairly?

(d) Can the PIIFCAF Policy be subject to a division of powers challenge as being *ultra vires* or, in any event, is the PIIFCAF Policy a valid exercise of the federal fisheries powers pursuant to subsection 91(12) of the *Constitution Act 1867*?

IV. Standard of review

[29] This is an appeal from a judgment of the Federal Court that dismissed Mr. Elson's application for judicial review of a decision of Minister Tootoo. The role of this Court is to determine whether the Federal Court Judge selected the appropriate standard of review and then applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paras. 45-47, [2013] 2 S.C.R. 559). As a result, this Court is to step into the shoes of the Federal Court Judge and focus on the decision of the Minister (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 247, [2012] 1 S.C.R. 23; *Kinsel v. Canada (Citizenship and Immigration)* 2014 FCA 126, at para. 23, [2016] 1 F.C.R. 146).

[30] The Federal Court Judge concluded that the standard of reasonableness would apply to the review of the decision of Minister Tootoo. I agree that reasonableness is the standard to be applied when reviewing the decision of Minister Tootoo, including whether he fettered his discretion and, therefore, rendered his decision unreasonable.

[31] With respect to Mr. Elson's allegation of a lack of procedural fairness, the role of the reviewing court for procedural fairness matters is simply to determine whether the procedure that was followed was fair, having regard to the particular circumstances of the case. I agree with the analysis of this Court in *Canadian Pacific Railway Company v. Canada (Attorney General*), 2018 FCA 69, [2018] F.C.J. No. 382, at paragraphs 34 to 56. If a breach of the duty to act fairly has occurred, this Court will generally intervene.

[32] The argument related to whether the PIIFCAF Policy falls within provincial jurisdiction was not raised before either the Appeal Board or Minister Tootoo. It was raised for the first time before the Federal Court. The standard of review for this issue is as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, i.e., for any question of fact or mixed fact and law (for which there is no extricable question of law) the standard of review is palpable and overriding error and for any question of law it is correctness.

V. Analysis

[33] At the commencement of the hearing, counsel for Mr. Elson submitted two outlines of their oral argument. One was titled "Outline of the Appellant's Submissions – Fettering" and the other was titled "Outline of Oral Argument – Division of Powers". The submissions related to whether Mr. Elson was treated fairly were listed as part of the "Outline of the Appellant's Submissions – Fettering".

[34] Not all of the arguments that were in the memorandum for Mr. Elson are referenced in the two outlines that were presented at the hearing. This raises the question of whether any

argument that was in the memorandum but not in the outline (and consequently not addressed during the hearing) has been abandoned. One such argument that was raised in Mr. Elson's memorandum was the issue of whether the Federal Court Judge had erred in concluding that only the decision rendered by Minister Tootoo on December 23, 2015 was the one that was under review. It was the position of Mr. Elson, in his memorandum, that the previous decision of the former Minister Shea was also part of the review. During the hearing of this appeal, counsel for Mr. Elson acknowledged that this argument had been abandoned. Therefore, this argument will not be addressed.

A. *Finding that the Minister had fettered his discretion*

[35] The Federal Court Judge made the unusual finding that even though Minister Tootoo had fettered his discretion "by not also considering that it was open to him to afford the relief sought other than by way of the PIIFCAF Policy and the appeal process" (para. 135 of her reasons), "the Minister could not reasonably have reached a different decision even on the basis of and despite his broad s 7 discretion" (para. 160 of her reasons). The Federal Court Judge noted in paragraph 161 of her reasons that "the Applicant did not meet, and was not exempted from, the eligibility criteria set out in the PIIFCAF Policy".

[36] There is an apparent dichotomy between the finding that Minister Tootoo had fettered his discretion by not addressing his broad discretion to issue a licence under section 7 of the *Fisheries Act* and the finding that there was only one possible outcome that Minister Tootoo could have reached (even if he had exercised his broad discretion). Mr. Elson addressed this by

submitting that the Federal Court Judge was correct in finding that Minister Tootoo had fettered his discretion, but she erred in not setting aside the decision and referring the matter back to the Minister. The Attorney General submitted that Minister Tootoo did not fetter his discretion and therefore the decision was reasonable and should not be set aside.

[37] As part of the analysis with respect to whether Minister Tootoo had fettered his discretion, the Federal Court Judge noted in paragraph 116 of her reasons that:

> …it was open to the Minister not to include within the PIIFCAF Policy an exemption for individual harvesters. It was within his discretion to omit such exemptions as contrary to the Policy objections [*sic*]. There is nothing improper in establishing criteria to be policy objectives. This is not, in and of itself, evidence of fettering of his discretion.

[38] As well, in paragraph 126 she noted that she did not accept Mr. Elson's "submissions that the Minister's discretion was fettered because the PIIFCAF Policy purports to create mandatory requirements, because the Minister did not consider [Mr. Elson's] individual circumstances, or, because of the absence of exemptions or flexibility for individual fish harvesters in the PIIFCAF Policy".

[39] I agree with these findings as made by the Federal Court Judge for the reasons that she provided. However, having made these findings she ultimately concluded that Minister Tootoo had fettered his discretion. The sole basis for this finding appears to have been the lack of any reference to section 7 of the *Fisheries Act* in his letter dated December 23, 2015. In paragraph 130, the Federal Court Judge stated:

> [t]he difficulty here is that the Minister links his decision to deny the appeal, and thereby refusing to grant an exemption under the PIIFCAF Policy, to the issuance of a fishing licence. More specifically, the decision does not identify any considerations other than the PIIFCAF Policy, suggesting that the Minister was limiting his consideration of the issuance of the fishing licences to whether the Applicant was provided an exemption to the PIIFCAF Policy eligibility requirements, rather than relying upon his absolute discretion.

[40] The Federal Court Judge relied on the decision of this Court in *Stemijon Investments Ltd. v. Canada (Attorney General),* 2011 FCA 299, 425 N.R. 341 (*Stemijon*) in reaching her conclusion that Minister Tootoo had fettered his discretion by failing to refer specifically to his broad discretion under section 7 of the *Fisheries Act* to issue licences. However, *Stemijon* can be distinguished.

[41] As noted by this Court in *Stemijon*, "[a]lone, reference to a policy statement, such as the Information Circular, is not necessarily a cause for concern"(para. 31) and "[p]olicy statements play a useful and important role in administration" (para. 59). Therefore, Minister Tootoo could refer to the PIIFCAF Policy in his decision letter. The question is whether Minister Tootoo limited his considerations to only the PIIFCAF Policy and thereby fettered his discretion.

[42] In his brief letter, Minister Tootoo stated that he did consider all relevant information. All relevant information would include the record that was before Minister Tootoo. In *Florea v. Minister of Employment and Immigration*, [1993] F.C.J. No. 598, the Federal Court – Appeal Division noted that "a tribunal is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown". In *Stemijon*, the record was of no assistance to the Court because there was nothing in the record to support any finding that the Minister of

National Revenue had considered that he was not governed exclusively by the Information Circular.

[43] In this case, there were more detailed reasons of the Appeal Board in support of its recommendations to Minister Tootoo that Mr. Elson's appeal be denied. These reasons include references to Mr. Elson's submissions in relation to his personal circumstances and his financial hardship. The reasons also include a reference to the request of the Appeal Board for Mr. Elson to quantify his claimed financial hardship. This indicates that the Appeal Board did not simply refuse to entertain this request for an exemption. However, Mr. Elson indicated that he could not provide the requested information. Mr. Elson cannot complain that the Appeal Board and Minister Tootoo did not consider that he could be exempted from the PIIFCAF Policy based on financial hardship when he was unable or unwilling to provide any details or particulars of this alleged financial hardship.

[44] The brief submissions from counsel for Mr. Elson would have been included in the relevant information that was considered by Minister Tootoo. In the letter from Mr. Elson's counsel, the general discretion that is available to the Minister under section 7 of the *Fisheries Act* to grant a fishing licence is set out in the third paragraph. Simply because Minister Tootoo failed to specifically identify and refer to this section of the *Fisheries Act* is not sufficient to rebut the presumption that he reviewed all of the record and therefore, considered whether to exercise his broad discretion under section 7 of the *Fisheries Act* to grant Mr. Elson a licence.

[45] In my view, there is no basis to find that Minister Tootoo fettered his discretion and the Federal Court Judge erred in making this finding. The Federal Court Judge did not, therefore, properly apply the standard of reasonableness to the determination of whether Minister Tootoo had fettered his discretion which would thereby render his decision unreasonable. Since the finding should have been that Minister Tootoo did not fetter his discretion, the issue referred to in paragraph 28(b) above does not arise.

B. *Was Mr. Elson treated fairly?*

[46] In his memorandum, Mr. Elson submitted, in relation to his argument that he was not treated fairly, that the Federal Court Judge went beyond the record and referred to select statements from Mr. Elson's affidavit that he submitted as part of his application for judicial review (and which was not before the Appeal Board). This is the same affidavit that Mr. Elson is using to establish facts concerning his background and certain matters related to his licence in paragraphs 10, 11 and 12 of his memorandum. In the outline that was submitted at the commencement of this hearing, this argument was stated to be in support of the submissions that the Federal Court Judge erred in not remitting the matter back to the Minister once she had determined that Minister Tootoo had fettered his discretion. Mr. Elson is not objecting to the admissibility of his own affidavit but rather is objecting to the use of evidence that was contained in his affidavit. The Crown is not objecting to the admissibility of this affidavit or the use of the evidence contained therein.

[47] Whether this argument is being submitted in relation to the issue of whether Mr. Elson was treated fairly by the Appeal Board and Minister Tootoo or whether the Federal Court Judge erred in not remitting the decision to the Minister, is, in my view, of no consequence as the evidence is irrelevant to the issues before us. The Federal Court Judge referred to this evidence in paragraphs 121 to 123 of her reasons in relation to the issue identified as "Did the Minister reasonably exercise, or did he fetter, his discretion?".

[48] In the affidavit in question, Mr. Elson:

(a) provided further background information for himself;

(b) summarized the various steps that he took in relation to his claim for an exemption from the PIIFCAF Policy;

(c) summarized his dealings with DFO;

(d) submitted that the Minister did not ask to see his controlling agreement; and

(e) referred to the letter from Minister Shea.

His affidavit does not set out any facts that would support a finding that he was not treated fairly by the Appeal Board.

[49] Whether Mr. Elson was treated fairly by the Appeal Board can and will be determined without regard to this new evidence. If, however, this argument is submitted in relation to whether the Federal Court Judge erred in not remitting the decision to the Minister (once she

found that Minister Tootoo had fettered his discretion), this submission is moot since, in my view, Minister Tootoo did not fetter his discretion.

[50] Mr. Elson submitted that he was not treated fairly because no criteria for claiming an exemption from the PIIFCAF Policy had been identified. The absence of any specified criteria to justify an exemption from the PIIFCAF Policy does not lead to a conclusion that he was not treated fairly. In this case, Mr. Elson was given the opportunity to make submissions to the Appeal Board, which his counsel did in his two-page letter and in his oral submissions. Mr. Elson was claiming that he should be exempt from the PIIFCAF Policy largely based on his claim of the financial hardship that he would suffer if the controlling agreement was terminated. However, when he was asked by the Appeal Board to provide specific details of this financial hardship, he indicated that he could not do so. Since he was the person asking for an exemption based on financial hardship, it was incumbent upon him to establish this financial hardship. His failure to do so does not mean that he was not treated fairly.

[51] Mr. Elson submitted that he was not treated fairly because the Appeal Board was limited to determinations of whether he came within the Independent Core category, i.e., whether he was party to a controlling agreement. However, the questions from the Appeal Board related to the details of his financial hardship indicate that the Appeal Board did not only consider that it could determine whether his agreement was a controlling agreement and, therefore, whether he satisfied the Independent Core criteria. The questions indicate that the Appeal Board was prepared to consider his financial hardship argument.

[52] Mr. Elson, in paragraph 58 of his memorandum, submitted that he "did not receive a fair hearing from a fair and unbiased tribunal". The outline that was submitted as the beginning of the hearing of this appeal did not include any reference to any argument based on bias. In any event, the onus would be on Mr. Elson to establish bias. As noted by the Supreme Court of Canada in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 116 N.R. 46, at para. 94:

> …The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of council, while they may very well give rise to an appearance of bias, will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

[53] Mr. Elson has failed to establish that the Appeal Board or Minister Tootoo had prejudged the matter to the point where any representations that he made were futile. It is undisputed that the Appeal Board asked Mr. Elson for particulars concerning his financial hardship which indicates that the Appeal Board was prepared to hear him on this matter.

[54] Mr. Elson also submitted that the reasons were inadequate. The "adequacy" of reasons is not a stand-alone basis for quashing a decision (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para. 14, [2011] 3 S.C.R. 708). As well, since Minister Tootoo effectively adopted the recommendation of the Appeal Board, the reasons provided by the Appeal Board are to be considered as part of the reasons of

Minister Tootoo (*Canada* (*Attorney General) v. Shakov*, 2017 FCA 250, at para. 39, 2017 CarswellNat 7326).

[55] While Mr. Elson had submitted that he should be granted an exemption based on his individual circumstances and financial hardship, only limited general statements of his individual circumstances and no details of his alleged financial hardship were provided in his two-page submission to the Appeal Board. Given this lack of evidence, Mr. Elson's argument related to the "adequacy" of the reasons is without merit.

[56] In this case, there is no basis to interfere with the finding of the Federal Court Judge that Mr. Elson was treated fairly.

C. *Can Mr. Elson challenge whether the PIIFCAF Policy is ultra vires?*

[57] In his memorandum, Mr. Elson submitted that "[i]t would fundamentally undermine the rule of law to shield decisions from review that are based solely on a policy that would exceed federal authority if enacted as legislation or a regulation". Mr. Elson's argument is that if the PIIFCAF Policy would have been enacted as legislation or a regulation, it would be found to be a matter of provincial and not federal jurisdiction since the PIIFCAF Policy would restrict his right to enter into contracts. Therefore, any decision made by Minister Tootoo based on this policy would be unreasonable.

[58] Although not a direct challenge to the constitutional validity of the PIIFCAF Policy, in essence Mr. Elson is alleging that this is not a valid policy upon which Minister Tootoo could have relied. Mr. Elson is therefore indirectly challenging this policy. In my view, it is not necessary to decide in this case whether the PIIFCAF Policy could be directly or indirectly challenged on the basis that it is *ultra vires* the federal government. The PIIFCAF Policy, in any event, in pith and substance, does not affect property and civil rights in a province nor is it a matter of merely local or private nature in the province. Although this policy does restrict the ability of individuals to enter into certain contracts, the types of contracts are only those that would frustrate the authority of the Minister to issue licences. The Minister's authority to restrict these contracts would be within his scope of authority to issue licences.

[59] In this case, as noted above, the PIIFCAF Policy must be viewed in the context in which it was adopted. Prior to the adoption of this policy, the Fleet Separation Policy provided that corporations would not be eligible to hold a fishing licence. That policy is not under review in this case. The PIIFCAF Policy was introduced because corporations had found a way around the Fleet Separation Policy by using trust agreements. The PIIFCAF Policy was adopted to ensure that a fishing licence was being granted to the person who would benefit from the licence and not to an individual to be held in trust for a corporation. As part of the management and control of the fisheries, DFO has the right to know whether the named licence holder is the beneficial owner of that licence, or whether he or she is simply holding the licence in name only. DFO has the right to know whether a non-eligible person (such as a corporation) is the person who will be controlling that licence and who will be entitled to the benefits of it.

[60] The authority of any federal minister to issue a licence includes the right to ensure that the person to whom a licence is granted is actually the person who is acquiring that licence and that such person is not simply acting on behalf of and for the benefit of another person who would not be eligible to obtain that licence. In this case, as a result of the controlling agreement, Mr. Elson had effectively transferred to Labrador Sea Products Inc. and Quinlan Brothers Limited all of his rights to exploit the licences that were issued in his name and his control over these licences. These companies acquired the benefit of these fishing licences and the right to exploit the fisheries resource related thereto. As a result of the Fleet Separation Policy (which has been in place since 1979), this is something that these companies could not do. These companies would, therefore, be doing indirectly what they could not do directly. In pith and substance, the PIIFCAF Policy simply prevents a person from circumventing any existing policies or regulations and indirectly acquiring the benefit of a licence that such person could not acquire directly. This right to prevent this abuse in circumventing policies or regulations is undoubtedly included in the power to issue a licence.

[61] In addition, in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569 (*Ward*) the Supreme Court of Canada noted that the powers of the Minister to manage the fisheries are broad and can include their management and control:

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

> But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation.
>
> **42** Although broad, the fisheries power is not unlimited. The same cases that establish its broad parameters also hold that the fisheries power must be construed to respect the provinces' power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. This too is a broad, multi-faceted power, difficult to summarize concisely. For our purposes, it suffices to note that the regulation of trade and industry within the province generally (with certain exceptions) falls within the province's jurisdiction over property and civil rights: see *Citizens Insurance, supra*; see also *Canada (Attorney General) v. Alberta (Attorney General)*, [1916] 1 A.C. 588 (Canada P.C.).

[62] In *Ward*, the Supreme Court of Canada found that a prohibition on the sale of seal pelts was within the federal jurisdiction to manage the fishery because if the pelts could not be sold then the seal pups would not be harvested.

[63] The Minister has the power to issue licences to exploit the fisheries resource. This must include the authority to ascertain the true identity of the person who will be exploiting the resource as a result of the issuance of a licence. The PIIFCAF Policy simply ensures that the person who applies for a licence is the person who will benefit from the exploitation of the fisheries resource that the licence permits such person to catch. Although it does restrict an individual’s right to enter into certain contracts, it is not, in pith and substance, a restriction or limitation on property and civil rights in a province nor is it a matter of merely local or private nature in the province. It simply restricts an individual’s right to enter into contracts that would circumvent the Minister’s right to determine who will benefit from a licence. The Fleet Separation Policy (which restricts corporations from acquiring licences) is not the subject of this appeal.

[64] I would, therefore, find that Minister Tootoo's decision was not based on irrelevant considerations.

D. *Conclusion*

[65] As a result, I would find that Minister Tootoo's decision was reasonable and I would dismiss this appeal. Following the hearing, the parties submitted a letter confirming that they had agreed that neither party is seeking costs. Therefore, I would dismiss the appeal without costs.

"Wyman W. Webb"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MAY 5, 2017, CITATION NUMBER 2017 FC 459 (DOCKET NUMBER T-138-16)

DOCKET:	A-177-17
STYLE OF CAUSE:	KIRBY ELSON v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 19, 2018
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	GAUTHIER J.A. GLEASON J.A.
DATED:	FEBRUARY 8, 2019

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