Federal Court  Cour fédérale

Date: 20090826

Docket: T-2059-07

Citation: 2009 FC 844

Ottawa, Ontario, August 26, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

JOHN WATERMAN

Applicant

and

ATTORNEY GENERAL FOR CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. John Waterman (the "applicant"), seeks judicial review of a decision made by Mr. Loyola Hearn, then Minister of Fisheries and Oceans (the "Minister"), dated October 26, 2007. In his decision, the Minister rejected the applicant's request to reinstate his groundfish fixed gear licence, which had been previously denied to him in1993.

[2] As stated in the letter sent to the applicant by the Minister, his case has been the subject of numerous reviews over the years leading to the same results. Having carefully reviewed the file and the arguments submitted by the parties, relating both to alleged errors of fact and violations of

procedural fairness, I am unable to find in favour of the applicant. The following are my reasons for this conclusion.

I. FACTS

[3] In the course of a broad adjustment and conservation strategy to rebuild the Atlantic groundfish industry, the Department of Fisheries and Oceans ("DFO") decided in 1993 to freeze all groundfish licences in the applicant's fishing area that were deemed inactive. On February 17, 1993, John Crosbie, Minister of Fisheries and Oceans, announced that groundfish licences inactive in 1990 and 1991 in NAFO Area 2J3KL would be frozen for 1993.

[4] Inactive groundfish licences were those for which there had been zero groundfish landings during the period from January 1, 1990 to December 31, 1991. The Minister's policy document states that in order to acquire a groundfish licence for 1993, each fisher in NAFO Area 2J3KL was required to provide documentation as proof of groundfish landings during the period indicated. The types of documentation generally acceptable for that purpose were purchase slips, logbooks or other documents showing verifiable recorded groundfish landings in the name of the fisher for his registered groundfish vessel during the relevant period, along with the vessel's Canadian Fishing Vessel (CFV) number used to fish groundfish. It was also a requirement that the vessel's CFV number coincide with the CFV number on the applicant's groundfish licence. The fisher had to present this documentation to his local Fishery Officer for review within 30 days of the date of the letter advising him of the requirements. Failure to contact the Fishery Officer within 30 days could

result in the fisher's groundfish licence being frozen for 1993 and a refund of the fisher's fee for that licence.

[5] After receiving the fisher's documentation, the Fishery Officer would provide the information to the fisher's Area Licencing Administrator for review. If approved, the fisher's groundfish licence would be issued and mailed to him. If the fisher's groundfish licence could not be renewed, the fisher would be notified in writing and if not satisfied with the decision, the fisher would be advised how to appeal through the Department's administrative licence appeal process.

[6] Mr. Waterman held a groundfish licence from 1989 to 1992. He submitted an application with fees for licence renewal of his groundfish licence and vessel registration. This application is dated January 11, 1993. There is some dispute as to when exactly Mr. Waterman was sent a letter outlining the policy decision relating to the freezing of inactive groundfish licences setting out the criteria for a 1993 groundfish licence, and acknowledging the receipt of his application for a groundfish licence for 1993 along with the payment of the fee. On the photocopy of that letter, the name of the addressee is not clear, and it appears to be dated March 2, 1993. However, the Department of Fisheries and Oceans ('DFO") claims that it received payment of the fees on March 26, 1993, at which time Mr. Waterman's application was stamped March 29, 1993, and a notation was made on the application that the letter appraising him of the new policy was sent. While it is difficult to come to a definitive conclusion on this matter, the explanation provided by the Department is clearly plausible. I note that there is an unusual space on the stamp between 'MAR 2' and '1993', which would be consistent with a missing number between the '2' and '1993'.

Be that as it may, that explanation was accepted by the Atlantic Fisheries Licence Appeal Board in its second report to the Minister following its hearing of February 21, 2006.

[7] Mr. Waterman did not respond to the letter within the requisite 30 days, as directed, and did not provide the required documentation in support of his application. Since no documentation was provided to a Fishery Officer, no information was sent to the Area Licencing Administrator for review. As a result, Mr. Waterman's groundfish licence was frozen.

[8] Mr. Waterman claims that he made both telephone calls and written requests to DFO to inquire as to the status of his application, but there is no trace of these in the record. It appears that he did not contact DFO before 2003; there was some confusion in locating the letter that was sent to him in 1993, but it was eventually found and Mr. Waterman was offered a complete copy of his file in February 2004.

[9] In a letter dated June 3, 2004 to the Honourable Geoff Regan, then Minister of Fisheries and Oceans, Mr. Waterman acknowledged that he had received the notice concerning his groundfish licence, although he erroneously indicated that he received it in 1992 instead of 1993. In that letter, the applicant submitted that he did not know, at the time, that he could appeal that decision, as he had not been informed of the appeal process. Accordingly, he requested the opportunity to file an appeal to have his licence reinstated.

[10] In a letter dated July 5, 2004, the Honourable Geoff Reagan agreed that Mr. Waterman's file be reviewed by the Atlantic Fisheries Licence Appeal Board ("AFLAB"). The Minister's letter refers to Mr. Waterman not being informed of a right to appeal. However, the evidence shows that such advice was provided only to fishers who responded to the initial letter requesting supporting documentation and where the documentation provided was deemed inadequate. Under the process at the time, fishers who did not respond to the initial letter were not sent a second letter informing them of the appeal process because there would be no basis for an appeal.

[11] The letter from the Minister also indicated that Mr. Waterman would be expected to provide the AFLAB with evidence demonstrating that he had fished groundfish in 1990 and 1991 and that he landed groundfish under his own licence and vessel. Mr. Waterman was also advised that the AFLAB would assess his case in the same manner and along the same criteria that were applied under similar circumstances in reviewing groundfish licence freeze cases at the time.

[12] The AFLAB is a panel set up pursuant to the Commercial Fisheries Licencing Policy for Eastern Canada to hear administrative appeals; it reviews all pertinent information and recommends to the Minister that an appellant's request for reconsideration be approved or denied. The AFLAB is mandated to determine whether the appellant was treated fairly in accordance with departmental licencing policies, practices, and procedures, and whether there exist any extenuating circumstances for deviating from policies, practices or procedures.

[13] The AFLAB heard Mr. Waterman's appeal on December 2, 2004. At the hearing, Mr. Waterman presented evidence including a letter from the former Manager of Beothic Fish Processors, which stated that Mr. Waterman had participated in the fishery. In addition, the Board heard viva voce evidence from Gerald Hounsell, Chairman of the Bonavista Inshore Fisherman Committee and Mr. Waterman himself. Since Mr. Waterman was unable to provide any documentation regarding groundfish landings for the requisite period, the Board asked him if his landings would be reflected in his income tax returns for the applicable years. Mr. Waterman's lawyer advised that he would get back to the AFLAB with any further documentation that they could obtain. On December 23, 2004, the AFLAB received two signed affidavits, one from the Master of the fish collection vessel owned by Beothic Fisheries at the relevant time, and the other from the Manager of Beothic Fish Processors, who confirmed that John Waterman delivered and sold groundfish to Beothic during the years 1989, 1990 and 1991. No income tax records were produced.

[14] The AFLAB recommended that the appeal be denied on the basis that Mr. Waterman did not provide the requisite proof of groundfish landings. On April 8, 2005, Mr. Waterman was informed by letter from the Assistant Deputy Minister of DFO that the Minister had denied his appeal.

[15] Subsequently, on December 5, 2005, Mr. Waterman provided DFO with additional information and, as a result, was granted another AFLAB appeal by the Minister. On February 21, 2006, the AFLAB held a second hearing concerning the renewal of Mr. Waterman's groundfish

licence. The Board again heard Mr. Waterman's submissions. Mr. Waterman emphasized the fact that he had initially not appealed the decision of DFO because he had not received the letter apprising him of that possibility, and relied once more on the three affidavits already submitted to the Board.

[16] The AFLAB concluded that there was insufficient information to reinstate Mr. Waterman's groundfish licence and recommended his appeal be dismissed. The AFLAB also noted that Mr. Waterman did not provide requisite records of groundfish landings during the period from January 1, 1990 to December 31, 1991 as required by the Honourable Geoff Reagan, Minister of Fisheries and Oceans in his letter dated July 5, 2004 ordering a second hearing. On June 2, 2006, a letter signed by the Assistant Deputy Minister was sent to Mr. Waterman to inform him that the Honourable Loyola Hearn, Minister of Fisheries and Oceans, had denied his appeal after a review of all available information.

[17] Upon a further request for reinstatement of his licence, the Minister appointed a consultant firm to hold an independent review of Mr. Waterman's case, amongst others. As a result of this independent review, the Minister affirmed the decision not to reinstate Mr. Waterman's groundfish licence. In a letter dated October 26, 2007, the Honourable Loyola Hearn informed Mr. Waterman that his case had been reviewed a number of times, and that the matter was now considered closed. While it is not entirely clear from his application, it appears that Mr. Waterman is now seeking judicial review from that decision.

II. ISSUES

[18] The applicant has raised a number of issues in his memorandum of facts and law as well as in oral submissions, which can be summarized in the following three questions:

1) Did the AFLAB ignore the evidence or base its recommendation on erroneous findings of fact?
2) Did the AFLAB fail to exercise its jurisdiction in not determining if the applicant was treated fairly, and in not assessing whether extenuating circumstances existed that would justify deviating from established policies, practices and procedures?
3) Has the applicant established a reasonable apprehension of bias, or denial of natural justice on the part of the AFLAB?

III. ANALYSIS

[19] Before embarking upon a discussion of the various issues raised by the applicant, two preliminary matters need be addressed. First, the exact decision to be reviewed must be determined. Second, the applicable standard of review for each of the issues raised by the applicant must assessed.

[20] In his oral and written submissions, the applicant focused on the reasons provided by the AFLAB and barely mentioned the decision of the Minister. Yet, the Board is only empowered to make recommendations to the Minister. This is made clear by section 35(7) and (8) of the Licencing Policy, which state as follows:

35. Appeal System (Structure)

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

(a) The Board will consider only those licensing appeals which deal with policies for vessels less than 19.7m (65') LOA.

(b) The Board will only hear appeal requests made within three years from the date of a licensing decision or a change in policy.

(c) The Board will make recommendations to the Minister on licensing appeals rejected through the Regional Licensing Appeal Structure by:

(i) determining if the appellant was treated fairly in accordance with the Department's licensing policies, practices and procedures;

35. Structure du processus d'appel

(7) L'Office des appels relatifs aux permis de pêche de l'Atlantique n'entend que les appels présentés par des pêcheurs dont les appels ont été refusés suite à des audiences tenues par un comité d'appel régional relatif à la délivrance des permis.

(a) L'Office n'examine que les appels relatifs à des permis de pêche découlant de l'application de politiques s'adressant aux bateaux de moins de 19,7 m (65 pi) de LHT.

(b) L'Office n'entend que les demandes d'appel présentées au cours des trois années suivant la date de la décision visant le permis ou un changement de politique.

(c) L'Office formule des recommandations au Ministre sur les appels refusés conformément à l'application du processus d'appel régional et, pour ce faire :

(i) détermine si le requérant a été traité équitablement conformément aux politiques, méthodes et procédures du Ministère;

(ii) determining if extenuating circumstances exist for deviation from established policies, practices, or procedures;

(ii) détermine si des circonstances atténuantes justifient de déroger aux politiques, méthodes ou procédures établies.

(e) Where the Board recommends making an exception to policy, practice or procedure in an individual case, the Board will provide a full rationale for its recommendation to the Minister.

(e) Lorsque l'Office recommande de déroger à une politique, une pratique ou une procédure, il accompagne sa recommandation au Ministre de raisons détaillées.

(f) The Board may make recommendations to the Minister on changes to licensing practices and procedures where, in the opinion of the Board, they are inappropriate or unfair, by:

(f) L'Office peut recommander au Ministre de modifier certaines méthodes ou procédures de la délivrance des permis lorsqu'il les juge inappropriées ou inéquitables. Pour ce faire:

(i) the Chairman advising the Board Administrator of Board concerns;

(i) le Président avise l'administrateur des préoccupations de l'Office;

(ii) addressing such concerns at full Board meetings;

(ii) ces préoccupations sont examinées au cours d'une séance plénière de l'Office;

(iii) providing a written rationale or justification supporting the recommended change;

(iii) les raisons ou justifications à l'appui du changement recommandé sont présentées de façon écrite et

(iv) providing a written

(iv) les incidences

assessment of the perceived implications of the proposed change.	prévues du changement proposé font l'objet d'une évaluation écrite.
8) Notwithstanding subsection (7), the Minister may refer to the Board any decision he may wish to have reviewed.	(8) Nonobstant le paragraphe (7), le Ministre peut présenter à l'Office toute décision qu'il veut voir examiner.

[21] It is plain that the decision-making authority remains in the hands of the Minister of Fisheries and Oceans as laid out in section 7(1) of the *Fisheries Act*, R.S.C. 1985, c. F-14:

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.	**7.** (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences d'exploitation de pêcheries — ou en permettre l'octroi —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.

[22] That being said, the decision of the Minister is essentially based on the recommendations of the Board. As the Federal Court of Appeal recognized in *Jada Fishing Co.* v. *Canada (Minister of Fisheries & Oceans)*, 2002 CAF 103, 41 Admin. L.R.(3d) 281, the AFLAB's recommendations are "inexorably connected" to the Minister's decision and are without legal effect unless "adopted" by the Minister as a basis for his decision. On that basis, the Court found that these recommendations can be challenged in an application for judicial review, even if it is the Minister's decision that should formally be the subject of the review.

[23] There is, however, a further complication. The decision made by the Minister on the basis of the second hearing before the AFLAB dates back to June 2, 2006. The 30-day limitation period for bringing an application for judicial review had, therefore, long expired when Mr. Waterman brought his application on November 26, 2007. Therefore, the only ministerial decision that could formally be challenged was the one that followed the independent review, which was communicated to the applicant by way of letter dated October 26, 2007. The parties, however, did not raise this issue. As I find that this last decision was also closely connected to the recommendations of the two AFLAB panels, I am prepared to entertain the applicant's challenge to these two sets of recommendations.

[24] As to the appropriate standard of review, there is no dispute between the parties. It is clear that any questions pertaining to natural justice and procedural fairness must be determined against the standard of correctness. Indeed, the Supreme Court of Canada held in *Canadian Union of Public Employees (C.U.P.E.)* v. *Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 that the standard of review analysis does not apply to issues of procedural fairness, as these questions are for the Court and not for the Minister (at para. 102); see also *A.G. Canada* v. *Sketchley,* 2005 FCA 404, at paras. 52-55.

[25] With respect to the merits of the AFLAB's recommendations, this Court and the Federal Court of Appeal have already determined that the proper standard of review is reasonableness: see *Fennlly* v. *A.G. of Canada*, 2005 FC 1291, at paras. 30-32; *Jada Fishing Co.* v. *Canada (Minister of Fisheries and Oceans)*, 2002 FCA 103, at para. 14. This is consistent with the fact that there is no vested right in a licence and that the discretion to issue a licence is in the Minister's absolute

discretion, subject only to the requirements of natural justice: *Comeau's Sea Foods Ltd.* v. *Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12.

[26] Following the decision of the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, it is not always necessary to conduct an exhaustive review of the four elements that once constituted the "pragmatic and functional approach" and which was recast as the "standard of review analysis": *Dunsmuir*, para. 63. When the analysis has already been performed, there is no need to repeat it. The standard of reasonableness has indeed been held to apply generally to questions of fact, discretion and policy as well as to questions where the legal issues cannot be easily separated from the factual issues: *Dunsmuir*, para. 51.

[27] As stressed by the majority in *Dunsmuir*, the reasonableness standard implies deference from the reviewing court; in other words, courts must give due consideration and respect to the determination of decision makers. The Court expanded on this notion of deference in the now well-known paragraph 47 of its decision:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification,

> transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[28] This conclusion is all the more applicable in the context of s. 18.1(4)(d) of the *Federal Courts* Act, R.S.C. 1985, c. F-7. In *Canada (Citizenship and Immigration)* v. *Khosa*, 2009 SCC 12, the Supreme Court recently stressed that administrative fact finding commands a high degree of deference (at para. 46).

[29] Turning now to the first issue raised by the applicant, the Court must consider whether the two AFLAB panels ignored the evidence or based their recommendations on erroneous findings of fact. On this score, the applicant essentially made two arguments. First, he argued that the Board ignored the three affidavits he submitted, as well as his own evidence and that of the Chairman of the Bonavista Inshore Fisherman Committee. In his view, this should have been sufficient to establish that he met the criteria for the issuance of a groundfish licence as it could be considered as "other documents" demonstrating a verifiable recorded groundfish landing. Second, the applicant contended that he never received the March 29, 1993 letter, that it was not in his original file and that it was subsequently fabricated, such that he was not apprised of the documentation required by DFO to establish groundfish landings during the relevant period.

[30] After having carefully reviewed the record, I can find no basis for the proposition that the Board ignored the evidence submitted by the applicant. Both panels of the AFLAB referred specifically to the applicant's evidence and concluded that it was inadequate. After having met with

the applicant, the independent reviewer came to the same conclusion. Finally, both Minister Hearn and Minister Regan made their decision after “a thorough review of all available information”. There is quite simply no ground to determine that the written and oral evidence submitted by the applicant was ignored by the Board or the Ministers.

[31] Mr. Waterman obviously disagrees with the recommendations of the AFLAB and with the decisions of the two Ministers. But this is not the issue. The real question is whether the conclusions of the two AFLAB panels to the effect that the applicant had failed to provide sufficient information to reinstate his groundfish licence “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. (see *Dunsmuir*, para.47)

[32] While the AFLAB did not spell out in detail the reasons for concluding that the evidence submitted by the applicant was found to be insufficient, it is to be inferred that it accepted the Departmental representative’s submission that the affidavits and the oral testimonies did not constitute “other documents” demonstrating a verifiable recorded groundfish landing. According to the policy, the documentation supplied must be “either purchase slips or logbooks or other verifiable documentation”. This requirement was communicated to all fishermen applying to renew their registrations and licences by way of letter. In his third affidavit filed in response to the applicant’s second set of interrogatories, the Departmental representative who appeared before the first panel of the AFLAB explained that affidavits were not accepted as “other documents” because affidavits do not necessarily constitute a contemporaneous record and do not provide adequate particulars and readily verifiable data.

[33] The conclusions of the AFLAB panels that the evidence provided was not sufficient to meet the stated criteria for a groundfish licence for 1993 are in the range of acceptable outcomes that are defensible based on the facts before them. The affidavit evidence offered by the applicant speaks to events 13 to 15 years in the past, and they obviously do not provide the information that the groundfish renewal policy required. The AFLAB and, subsequently, the Ministers, could reasonably conclude, therefore, that the affidavit and the oral evidence do not offer the required proof of verifiable groundfish landings during 1990 and 1991, in the applicant's name, for his registered groundfish vessel. The applicant was also offered the possibility to file his tax returns for these two years, but failed to do so. In the cover letter by which two further affidavits were transmitted to the first panel of the AFLAB, counsel for the applicant explained that Mr. Waterman's tax returns "do not show income from Beothic for the periods in question". While there is no policy that requires income tax returns from the fisher who is seeking reactivation of a groundfish licence, this option was offered to the applicant as an alternative to the requisite documentation required by the policy.

[34] The applicant tried to explain that he was never made aware of the requirements set out in the policy as he never received the March 29, 1993 letter; he went as far as intimating that this letter was subsequently fabricated. But the facts contradict the applicant's suggestion.

[35] First, there was no mention of lack of receipt the March 29, 1993 letter during the first appeal hearing before the AFLAB. At that hearing, the applicant only spoke of not receiving an appeal letter, another piece of correspondence to which I shall revert shortly. Indeed, the reason why

the applicant did not provide any supporting documentation of groundfish landings during the requisite period of time is explained in his correspondence addressed to Minister Regan, dated June 3, 2004. In that letter, the applicant explained that DFO had advised him that his groundfish licence had been revoked, and that "[A]t that time, I felt there was no reason to fight the decision based on the information I received". This flatly contradicts his assertion that he never received the policy letter.

[36] The applicant also questioned the date of the March 29, 1993 letter at the second AFLAB appeal hearing. The appeal panel was satisfied, based on the evidence before it, that the correspondence from DFO to the Applicant was dated March 29, 1993, simply because it is a response to the applicant's application for re-issuance of his groundfish licence which was received by DFO on March 26, 1993. In any event, this point is of no consequence. Moreover, there is no shred of evidence that this letter was fabricated *ex post facto*. And even if the applicant had never received that letter indicating what was required of him, he should have inquired why his licence was not renewed. Instead, he waited ten years before seeking the reinstatement of his groundfish licence. This is clearly not the behaviour of an active fisherman who genuinely believes that he is entitled to the renewal of his licence.

[37] I shall now turn to the second issue raised by the applicant. The applicant submits that his inability to produce purchase slips, log books or other contemporaneous documentation was due to the passage of time, which, in turn, was caused by his ignorance of the appeal process. He appears to be of the view that the AFLAB's failure to accept his affidavits in lieu of proper records

demonstrates that the appeal panels did not do their job, as they did not determine whether he "was treated fairly in accordance with the department's licencing policies, practices and procedures", and also failed in determining "if extenuating circumstances exist for deviation from established policies, practices, or procedures".

[38] The applicant could not have been under any misconception regarding the matter of an appeal. The availability of an appeal process from the decision to freeze his groundfish licence was spelled out in the policy instrument that was provided to all fishers in the normal course. It is also noteworthy that the applicant was well aware of the appeal structure, having exercised the right to appeal on a prior occasion, and being successful at that time, as revealed by the record.

[39] Contrary to the applicant's assertion, DFO made no mistake in failing to send him an appeal letter. According to the respondent, that advice was only provided to fishers who responded to the initial letter requesting supporting documentation and where the documentation provided was deemed inadequate. These fishers were offered an appeal. Since Mr. Waterman did not respond to the March 29, 1993 letter, his groundfish licence was frozen and his file was closed. Under the process at the time, fishers who did not respond to the initial letter were not sent a second letter informing them of the appeal process because there would be no basis for an appeal. This explanation is perfectly sensible and entirely consistent with the policy. It is therefore the applicant's inability to provide the requisite proof of groundfish landings and his failure to respond for more than ten years to the freezing of his groundfish licence that are at the root of his problem.

[40] The appeal panels did not ignore the circumstances surrounding the applicant's application for a reissuance of a groundfish licence. Rather, the two appeal panels, the consultant and the two Ministers, all of whom reviewed the circumstances of the applicant, concluded that the applicant simply failed to provide the requisite proof of groundfish landings, and that the delay, and hence the alleged consequent unavailability of requisite documentation by virtue of the delay was not caused by DFO. At any rate, the inability to provide the requisite information cannot be due to the applicant never receiving the appeal letter – the issue on which he is focused. Had the applicant provided information as proof of his groundfish landings for the requisite period of time, he would have either received a groundfish licence for 1993, or his application would have been denied, and DFO would then have sent him a letter advising him of his right to appeal. Accordingly, the AFLAB could reasonably conclude that Mr. Waterman was treated fairly and in accordance with policy at the time, and could determine that there were no extenuating circumstances.

[41] Finally, the applicant alleges that the AFLAB's recommendations were biased against the applicant because the procedure allowed for the active participation of a departmental representative both at the hearing and while the Board deliberated on the issue. The onus of demonstrating bias or apprehension of bias lies with the applicant, and the threshold for such a finding is high. As this Court recently reaffirmed, there is a presumption of impartiality which mere suspicion cannot overcome: see *Pelletier* v. *Canada (A.G.)*, 2008 FC 803, at para. 74; *Chrétien* v. *Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, 2008 FC 802, at para. 76.

[42] An allegation of bias must always be raised at the first opportunity. An applicant is not entitled to simply wait until informed of the recommendations of the appeal panels before raising the spectre of bias. In the present case, there was no allegation of bias before either of the appeal panels – the first of which the applicant was represented by counsel. It seems to have been raised as an afterthought, and for that reason alone, the argument should be dismissed.

[43] At any rate, the allegation of bias appears to be without merit. The test for reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, in the following terms:

> …the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, the test is "what would an informed person, viewing the matter realistically and practically – having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[44] As the Supreme Court later acknowledged, the standard of impartiality expected of a decision-maker is variable and must depend on the role and function of the decision-maker involved. Administrative boards that are primarily adjudicative in their functions will be expected to comply with a higher standard than those dealing with policy issues and whose members are elected. But there is no need to delve further into the exact standard of impartiality to be applied here, for at least two reasons.

[45] First, the allegation of bias based on the participation of the departmental representative in the appeal process is without merit. Generally speaking, the composition and structure of the appeal panel, which included DFO's Chief of Licencing and Appeals in the role of providing administrative support as a non-voting member does not raise a reasonable apprehension of bias despite his presence in the course of the deliberations of the appeal panels. As explained by my colleague Justice Kelen in *Fennelly* v. *A.G. of Canada*, 2005 FC 1291, the AFLAB is an internal appeal process designed to provide recommendations to the Minister; it has no statutory authority. Furthermore, the DFO representative is to act as a secretary to the Board and merely provides background information to the Board; his role is not to advocate for any position.

[46] As in *Fennelly*, Mr. Perry confirms by way of his affidavit that he played no role in the deliberations on the part of the appeal panels. He states in his affidavit: "As Administrator for AFLAB, I facilitated the hearing of appeals before the Panel in the role of providing administrative support and as a non-voting member. I provided information on fisheries policy as applicable in each case. I was present at both hearings, but did not take part in the deliberations of AFLAB".

[47] As proof of a reasonable apprehension of bias, the applicant refers to Mr. Perry actively questioning the applicant at the first AFLAB hearing in 2004. But the single question that Mr. Perry addressed to the applicant pertained to names of individuals that fished with him and how he fished. The question was innocuous and cannot form the basis of an alleged bias. The second alleged instance of bias is that Mr. Perry remained in the room while the appeal panels deliberated on their recommendations. This has already been determined by Mr. Justice Kelen in *Fennelly* as not

constituting a reasonable apprehension of bias. For the remainder of the alleged bias, the applicant is seemingly mixing the responses provided by Mr. Perry to specific questions put to him by the applicant in the context of his interrogatories, to which Mr. Perry properly responded.

[48] But there is a second reason why the applicant failed to discharge his onus of demonstrating an apprehension of bias. Before the Court are the recommendations of the appeal panels, and it is their approach to the appeals which is being reviewed by the Court, not what Mr. Perry said in response to questions in the course of interrogatories. Not only is there no basis for a reasonable apprehension of bias on the part of Mr. Perry, but more importantly, there is absolutely nothing before the Court indicating in any way that Mr. Perry unduly influenced the appeal panels. For those reasons, the argument of the applicant based on a reasonable apprehension of bias must therefore be rejected.

[49] In light of the foregoing reasons, the application for judicial review is dismissed, with costs to the respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, with costs to the respondent.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2059-07
STYLE OF CAUSE:	JOHN WATERMAN and ATTORNEY GENERAL FOR CANADA
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APPEARANCES:

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