Federal Court  Cour fédérale

Date: 20131126

Docket: T-488-13

Citation: 2013 FC 1191

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, November 26, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

7687567 CANADA INC.

Applicant

and

FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, to quash a decision rendered on February 20, 2013, on behalf of the Minister by the Trade Controls Policy Division of the Department of Foreign Affairs and International Trade Canada, represented in this proceeding by the Attorney General of Canada [the respondent, the Minister or the decision maker], regarding Flavio Corneli, Director, 7687567 Canada Inc. [the applicant]. In that decision, the respondent stated that it was unable to consider the application for a

share of the portion of the tariff rate quota allocation for chicken products not included in the *Import Control List* (ICL) for the year 2013, on the grounds that the applicant was allegedly related to an entity that already had an allocation, in which case only one allocation is allowed. For the reasons that follow, the application for judicial review is allowed.

II. Facts

[2] The applicant was incorporated on October 27, 2010, in accordance with an agreement entered into on December 9, 2010, by three companies: MTY Tiki Ming Inc. [MTY], Les Aliments Flavio Inc. [Aliments Flavio] and Nipun Inc. [Nipun]. Under this agreement, these companies became shareholders in the applicant so that the applicant could expand and acquire new facilities.

[3] As a result of this agreement, MTY became majority shareholder and now holds 51% of the shares, while Aliments Flavio and Nipun respectively hold 40% and 9% of the shares.

[4] MTY is a franchisor in the food industry, whereas Nipun is solely an investor.

[5] The applicant, which does business under the name "Aliment Flavio Foods", manufactures and distributes food products, continuing the activities of Aliments Flavio, which operated in the same fields before the new facilities were acquired.

[6] Every year since 2006, Aliments Flavio has received from the respondent, under *Export and Import Permits Act*, RSC, 1985, c E-19 [the EIPA], a share of the portion of the chicken tariff rate quota for processors of non-ICL products.

[7] The holder of a share of this portion may import chickens duty free for processing and distribution in Canada, without having to pay an import tax of 238%.

[8] On or about November 24, 2011, the applicant submitted to the respondent an application for a share of the portion of the 2012 chicken tariff rate quota for processors.

[9] On July 26, 2012, the Department refused the application on the grounds that, for the purposes of Notice to Importers No. 792, the applicant is considered to be related to MTY, the holder of a share of the portion of the chicken tariff rate quota reserved for the food-service group, and that a processor that is considered to be related to a food-service company is not normally eligible for a share of the portion of the chicken tariff rate quota for processors of non-ICL products.

[10] On September 24, 2012, the applicant sent the respondent a five-page letter asking the respondent to review its decision and to hold a meeting on the matter.

[11] On October 15, 2012, the respondent issued Notice to Importers No. 815, which replaced Notice to Importers No. 792.

[12] Like Notice to Importers No. 792, Notice to Importers No. 815 contains a provision, section 10.1, stipulating that where two or more applicants are considered to be related, "they shall normally be eligible for only one allocation" [the related persons policy].

[13] In the meantime, on November 29, 2012, the applicant applied for a share of the portion of the 2013 chick tariff rate quota for processors. In that application, the applicant stated that it was not related to any other persons.

[14] The related persons policy was discussed by the Chicken Tariff Rate Quota Advisory Committee, the body responsible for this issue. The matter was then submitted directly to the Minister, who decided to confirm the related persons policy.

[15] On February 20, 2013, the respondent refused to consider the 2013 application on the grounds that the Minister had confirmed the policy. This decision is the subject of the present application for judicial review.

III. Impugned decision

[16] In a brief letter dated February 20, 2013, after noting that the matter had been referred to the Minister, the respondent informed the applicant that the Minister intended to maintain the policy prescribed in section 9.2 of Notice to Importers No. 815 regarding processors and was therefore unable to consider the application for 2013. Section 9.2 of the Notice to Importers indicates, however, that exceptions may be made.

[17] The impugned decision was signed by Guy Giroux, Trade Controls Policy Division. However, in connection with these proceedings, the respondent filed in support of its arguments an affidavit by Katharine Funtek, the Division's director. This affidavit will be discussed later on.

IV. Applicant's arguments

[18] The applicant relies primarily on three arguments which, in its opinion, invalidate the respondent's decision: (1) the respondent did not exercise its delegated discretion on a case-by-case basis; (2) insufficient reasons were given for the ultimate decision; and (3) the decision is unreasonable, having regard to the Department's objectives.

[19] First, the applicant submits that the respondent, in rendering its decision, did not exercise its discretion on a case-by-case basis and therefore breached its duty of procedural fairness.

[20] According to the applicant, the language itself of the applicable legislation and the policy at issue in this application for judicial review gives the respondent discretion, that is, the option to decide whether or not to follow the general statement of the policy, on a case-by-case basis, depending on the particular circumstances of an application. The applicant also argues that its case met all the regulatory requirements for issuing an import allocation and that, as an entity responsible for making individual decisions, the respondent was supposed to exercise its discretion on a case-by-case basis and could not fetter its discretion by transforming its discretion into a systematically applied rule.

[21] The respondent had to inquire into whether there are any special circumstances in this case that would justify allocating a share as an exception to the general policy. However, in the present case, the question submitted to the Minister—the answer to which is, in all likelihood, the basis for the impugned decision—dealt precisely with this general policy, not the particular circumstances of the applicant's case, and the respondent then relied on the Minister's decision to maintain the policy

and refuse to consider the application. Since it did not take into account the unique characteristics of the applicant's case, as it was supposed to do, the respondent erred in not exercising its discretion on a case-by-case basis.

[22] Second, the applicant argues that the respondent did not give sufficient reasons for its decision and this on its own warrants quashing the decision.

[23] The applicant submits that the respondent's decision sets out no grounds for refusing the application in issue, as the respondent merely stated that it was unable to consider the applicant's case because the Minister had decided to maintain the policy regarding the eligibility of processors related to a food-service company for a share of the portion of the chicken tariff rate quota for processors of non-ICL products. Indeed, the Minister's finding regarding the policy became the ground for not considering the applicant's 2013 application for a share of the allocation.

[24] The applicant adds that the respondent tried to make up for the insufficient reasons for its decision by introducing new evidence upon judicial review, particularly through the affidavit filed by Ms. Funtek in support of the respondent's position, thereby unduly adding grounds to those set out in the decision dated February 20, 2013, according to the applicant. The affidavit in question sets out the factors that the respondent had supposedly taken into account in making its decision. However, these factors do not appear in the reasons for the decision, and the respondent was required to disclose the supporting grounds for its decision. It is not allowed to improve on its answer after the fact.

[25] Finally, the applicant argues that the respondent's decision is unreasonable in light of the respondent's own objectives, that is, the Department's objectives.

[26] When it submitted the matter to the Minister, the respondent recommended that the Minister eliminate the policy at the heart of this dispute so as to allow processors related to food-service companies to receive a share of the portion of the chicken tariff rate quota for processors of non-ICL products. The Department itself called this policy restrictive, even arbitrary, deeming it likely to give rise to applications for judicial review. The Department made this recommendation on the basis of the three main objectives of its related companies policy. However, the Minister decided to ignore the Department's recommendation and instead chose the contrary option, that is, to maintain the existing policy.

[27] In short, the applicant is of the view that the decision dated February 20, 2013, should be set aside because the decision is not the product of a case-by-case exercise of the respondent's discretion, and because the decision is not supported by sufficient reasons and does not comply with the Department's objectives.

V. Respondent's arguments

[28] The respondent argues that the applicant's situation is not only unexceptional, but precisely the type of situation contemplated by the related persons policy.

[29] As regards procedural fairness requirements, the respondent submits that the process that it has adopted goes far beyond the demands of the common law in this regard. It argues that the

applicant was consulted several times, was allowed to submit five pages of written representations and was even granted a meeting with the decision maker. It adds that the duty of procedural fairness is minimal in the present case, for the following reasons:

1. Approvals of allocations under the chicken tariff rate quota are part of a complex supply-management system involving at times conflicting policy considerations, and the approval process is policy-based and discretionary, not adjudicative.

2. The decision is final, but the Minister has an ongoing power of review.

3. The decision only involves economic interests, which are not rights.

4. The applicant cannot claim any legitimate expectation, except that the published policy be followed.

5. Parliament has given the Minister the discretion to make allocations under the tariff rate quota in accordance with criteria that the Minister sets. The Department had to process more than 560 import permit applications for chicken in 2013.

[30] Next, as regards the exercise of its discretion, the respondent claims that the decision dated February 20, 2013, is reasonable because it is entirely legal for the holder of such a power to set policies to guide it in exercising its discretion. The respondent adds that adopting such policies is not only normal, but also desirable, to ensure that applications are handled in a just and equitable manner. Moreover, it is completely appropriate for a decision maker to attach considerable weight

to policy thus adopted, since to do otherwise without valid reason would expose it to accusations of bias.

[31] Regarding the sufficiency of the reasons, the respondent states that this Court should not limit its analysis of the reasons to the letter dated February 20, 2013, but should instead consider the entire record and all the facts as a whole. The Court should try to supplement the reasons in light of the decision maker's record before finding the reasons deficient, especially since the decision maker's discretion does not entail any duty to provide reasons, owing to the mainly legislative, as opposed to judicial, nature of the decision.

[32] The respondent submits that, contrary to what the applicant states, the application was given serious consideration before it was refused, as appears from the decision maker's record. Ms. Funtek personally met with the applicant and, after completing her analysis, found that the only equitable way to render a decision in the applicant's favour would require the Minister to revise the policy. However, the Minister did not share Ms. Funtek's view and decided to maintain the policy. Ms. Funtek was nevertheless open to the possibility of making an exception for some companies; in the applicant's case, however, there were no factors entitling it to an exception. Moreover, Ms. Funtek did not present any new grounds in her affidavit; rather, she confirmed the evidence already on record, that is, that the application had been considered but it was determined that the applicant was related to another applicant, MTY. The applicant simply disagrees with the outcome of the policy's application.

[33] Therefore, the respondent is of the view that the intervention of this Court is unwarranted with regard to the decision dated February 20, 2013, to refuse the application because it is the product of a discretionary authority exercised in accordance with the related persons policy, which very clearly applied in the circumstances of the application in issue.

VI. Issues

[34] This application for judicial review raises the following two issues, which are intimately linked:

1. Are there sufficient reasons for the impugned decision?

2. Did the respondent breach its duty of procedural fairness by applying the policy set out in section 9.2 of Notice to Importers No. 815 systematically, thereby unduly fettering its discretion?

VII. Standard of review

[35] The two issues are subject to different standards of review. The issue of the sufficiency of the reasons given by the decision maker must be examined in accordance with the reasonableness standard (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22, [2011] 3 SCR 708 [*Newfoundland Nurses*]). This Court must therefore afford a high degree of deference to this aspect of the decision.

[36] However, the parties disagree on how to characterize the second issue, that is, the one regarding discretion. The respondent argues that the issue should be subject to the reasonableness

standard because it merely involves an assessment of an exercise of discretion (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51 and 53, [2008] 1 SCR 190 [*Dunsmuir*]). However, as the applicant correctly points out, the issue here is not whether or not the respondent had discretion, nor is it an issue of how the respondent exercised this discretion. The issue raised in this case is whether the respondent did indeed breach its duty of procedural fairness in systematically applying the policy set out in section 9.2 of Notice to Importers No. 815 such that it unduly fettered its discretion. In short, did it or did it not exercise its discretion, or in other words, did it transform its discretion into a rule? This question of procedural fairness may be examined in accordance with the correctness standard (*Dunsmuir*, above, at para 129; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53, [2005] FCJ No. 2056; and see for example *Lopez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 359 at para 9, [2007] FCJ No. 497; and *Zabsonre v Canada (Minister of Citizenship and Immigration)*, 2013 FC 499 at para 18, [2013] FCJ No. 586).

VIII. Analysis

A. *Preliminary remarks for the purposes of the analysis*

[37] At the outset, at the hearing, the applicant consented to the respondent's motion to strike certain pieces of evidence which it argued were inadmissible. An order in this regard was delivered from the Bench and is confirmed in the present proceedings. Accordingly, the Court will disregard the exhibit and the paragraphs of the applicant's memorandum of fact and law that are described in the motion to strike.

[38] It is important to take note of the following to properly understand the analysis.

[39] In this case, the Minister is acting through two (2) persons. The person who signed the decision is Guy Giroux of the Department's Trade Controls Policy Division, and the affiant is Ms. Funtek, the Division's director. Her affidavit explains at length Mr. Giroux's decision dated February 20, 2013 (see paragraph 66, as well paragraphs 43 *et seq*. dealing with the applicant). The case law of the federal courts on this subject do not recognize this as the way to proceed: a decision must be reviewed on the basis of the record as it was at the time of the decision (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19 to 22, [2012] FCJ No. 93; *Bekker v Canada*, 2004 FCA 186 at para 11, [2004] FCJ No. 819). The record does not contain any notes by the Minister's representatives; it consists instead of a series of letters, an investigation report, etc. From this, the Court infers that the respondent made a deliberate effort to improve on its record and even add to it with the affidavit.

[40] For information purposes, it should be noted that the decision maker's record contains documents regarding not only the share application for 2012, but the 2013 application as well. There was no reply to the request to review the 2012 refusal decision even though it advised the Department of the applicant's share capital and control and included a declaration that the applicant did not sell meals containing chicken to its shareholder, MTY. When she was cross-examined on her affidavit, Ms. Funtek confirmed that she did not have any information in this regard (see page 96 of the transcript of the cross-examination). To sum up, the decision maker's record consists of a collection of documents dealing with two separate applications but contains no notes by the decision makers explaining their reasoning and the decision made. The respondent asks the Court to do this in the decision maker's place.

[41] Ms. Funtek acknowledged that the format of the decision dated February 20, 2013, is "unfortunate" (see paragraph 66 of her affidavit) and then tried to make it acceptable for the purposes of this judicial review. Moreover, if the decision dated February 20, 2013, refusing the 2013 application is compared with the decision refusing the 2012 application, it becomes clear that the latter is more explanatory. For example, reference is made to section 2(1)(*b*)(*i*) of Appendix 11 to Notice to Importers No. 792. However, the decision dated February 20, 2013, contains no such reference, despite the fact that the decision in question is based on the notion of related persons. The respondent is of the opinion that it is up to the Court to compensate for such an omission by examining the decision maker's record so as to make up for it.

[42] On this point, paragraph 83 of the respondent's memorandum of fact and law says it all:

> [TRANSLATION]
> If the Court were to limit its analysis to the text of this letter (i.e., the one dated February 20, 2013), it could be argued that it would be wise to refer the case back to the decision maker so that it could exercise its discretion.

However, in the respondent's view, the Court should consider the decision maker's record [TRANSLATION] "in its entirety" before finding that the application was not considered on its merits.

[43] During the respondent's oral arguments, the Court summarized the respondent's position as follows:

> [TRANSLATION]
> The reasons for the February 20 decision do not need editing because procedural fairness does not require this, and although the EIPA and Notice to Importers No. 8l5 involve discretion, the decision maker does not have to prove that it exercised any. Therefore, on judicial

> review, the Court merely has to look over the decision maker's record and note whether or not the decision is reasonable.

Counsel agreed with this summary, stating that the discretion to be exercised was found in the EIPA.

[44] I find that this is asking a lot of the Court in such circumstances. The reasons that follow explain the decision and the conclusion that the Court has reached.

B. *Does such a decision require supporting reasons for the conclusion?*

[45] The Court is perfectly aware that the decision dated February 20, 2013, is administrative in nature, not judicial or quasi-judicial. Accordingly, the reasons do not have to be as exhaustive as those of a court or a tribunal. An administrative decision of this sort must nonetheless, at minimum, outline the reasons for refusing the application and show on its face that the relevant discretion was at least taken into consideration on the basis of the facts presented. This does not have to be a detailed exercise, but in general, the decision maker should explain, in a succinct manner, the factual basis for the conclusion and the extent to which the particular situation was taken into consideration.

[46] In our case, the decision of February 20, 2013, states a conclusion without giving a factual basis for it or referring to the relevant legislation. In addition, there is no indication that the particular situation of the applicant was taken into consideration or that discretion was exercised. According to the respondent, it is up to the judge to read the record and draw from it the appropriate findings.

[47] The respondent submits that in the present case, the decision maker was under no obligation to give anything more than a summary explanation for its decision. On this point, the respondent argues that the procedural fairness requirements are minimal here, and it is of the opinion that the applicant was given the opportunity to attend meetings, make written representations and have the Notice to Importers reviewed by the Minister, which in the respondent's view goes well beyond what is required in such circumstances. It is interesting to note that the meetings, the written representations and the Minister's intervention took place in the context of the contested refusal of the 2012 application, not the 2013 application under review here.

[48] All the while persistently arguing that the chicken share allocation is part of a complex supply-management system involving often conflicting policy considerations, the respondent states that, although the system is complex, there was no need to give reasons for the Minister's decision. However, it was necessary, in the course of this process, to hold meetings, exchange points of view and even ask the Minister to intervene, but when it came time to render the decision, the applicant was not entitled to any reasons or explanations for it. In my view, the complex decision-making process followed is inconsistent with the fact that the decision is not limited to a simple conclusion. If the decision-making process required taking all these steps, would it not be more logical for the decision to include an explanatory component taking into account the particular situation of the applicant? In its current form, the decision is impersonal, in that it could apply to many other importers. Nothing in the decision, apart from the name of the letter's recipient and the reference in the first paragraph to Aliments Flavio Foods, speaks to the particular circumstances of the

applicant's application. As I stated above, it is noteworthy that the decision attesting to the refusal of the 2012 application was more explanatory than the decision regarding the 2013 application.

[49] The respondent concludes that the procedural fairness requirements are minimal, relying on the factors set out at paragraphs 23 to 28 of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. Here is my analysis of these factors in the context of the present case:

A. The nature of the decision being made, which in our case is administrative and discretionary, not adjudicative.

B. The nature of the statutory scheme, which leads to a determinative decision not subject to appeal. (It is important to note that no response was ever given to the request to review the decision to refuse the 2012 application, even though the applicant submitted a five-page letter explaining why there should be a review.) It is also informative to note that Notice to Importers No. 815, at section 9.2, was referred to in a memorandum to the Minister written by the Deputy Minister as possibly being [TRANSLATION] "too restrictive, possibly arbitrary and vulnerable to judicial review". Section 9.2 is the legal basis for the decision of February 20, 2013, now under review.

C. The importance of the decision to those affected. It is true, as the respondent submits, that the decision involves economic interests and therefore does not create rights *per se*. However, one should nonetheless bear in mind that the fact that the refused applications for an allocation share represent for each year, 2012 and 2013, sales of products

including less than 10% chicken, which is not negligible for the applicant. It is inconceivable that the applicant should have to pay an import tax of 238% instead of being able to import the products duty free, as some of its competitors do. The decision is therefore a significant factor affecting procedural fairness, a factor that is not to be overlooked when one must ask whether explanations should have been given for this decision.

D. The legitimate expectations of the person challenging the decision. The respondent argues that there was no legitimate expectation, apart from the fact that Notice to Importers No. 815 would be followed. This goes without saying, but the respondent seems to forget that this same notice, by virtue of how it is worded, creates an exception to the rule. Sections 9.2 and 10.1 state that where entities are related within the meaning of Appendix 11 to the Notice to Importers, they will "normally" be eligible for only one allocation.

E. Notice to Importers No. 815, as it is worded, creates an expectation that the particular circumstances of a case will be considered. Here, the applicant alleged that although it might appear to be related to MTY, a food-service company, because of how its share capital is distributed, MTY is in no way involved in the applicant's daily operations, and the applicant does not sell any of the items listed in its application or any of the products in its facilities to MTY (see the letter dated November 8, 2012). When cross-examined on her affidavit, Ms. Funtek acknowledged that the Minister could make an exception to the rule laid down in Notice to Importers No. 815. The letter dated November 8, 2012,

was a request for an exception, but it went unanswered. It may be that the request for an exception was considered, but neither the letter dated February 20, 2013, nor any other document says so explicitly. In my view, the applicant could legitimately expect in such circumstances that its particular situation be taken into consideration and that it be able to understand, upon reading the decision, why the exception was granted or not. The letter dated February 20, 2013, expressly states that the 2013 application for a share of the allocation was refused on the basis of section 9.2 of Notice to Importers No. 815 and that the applicant's particular situation would not be considered.

F. The analysis of what procedures the duty of fairness requires. On this point, the respondent simply states that Parliament gives the Minister discretion to allocate shares in accordance with his own criteria. In addition, there were more than 560 share applications in 2013, which in the respondent's view justifies not having to issue reasons for the decision. I state once again that there is no need to give reasons comparable to those given by a court or a tribunal. All that is required is to explain the rationale for the decision, including the legal basis, according to the facts of the case, and, if necessary, an explanation, again according to the facts of the case, as to why an exception should or should not apply here. In such circumstances, the Minister simply has to give a comprehensible justification for his decision. This is not asking too much. I note that the letter dated February 20, 2013, invites the applicant to telephone the Department if it has any questions. A sufficiently explanatory letter would make such calls unnecessary.

[50] In *Baker*, above, Justice l'Heureux-Dubé, writing on behalf of the Court, recognized that the duty of procedural fairness includes, depending on the circumstances, the requirement to give written reasons for a decision. She wrote the following at paragraph 43:

> **43** . . . The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. . . . It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.
> [Emphasis added.]

These comments are highly applicable to the circumstances in the present case, although such decisions are not subject to appeal and the consequences for the applicant are not just economic ones. A preceding review of the factors from *Baker*, above, leads me to conclude that the Minister must explain his decisions and state how he went about considering the request for an exception and arrived at the conclusion he made.

[51] I also note that in *Baker*, above, no reasons were given but the notes in the decision maker's record met the requirement of giving reasons in the decision. In our case, there is absolutely nothing comparable in the record: no notes, comments or anything whatsoever from the decision maker that might explain its conclusion or confirm that the special request for an exception was taken into consideration.

[52] The respondent relies on *Canada (Attorney General) v Mavi*, 2011 SCC 30, in support of its argument that the duty of procedural fairness does not require giving reasons in the present case. That judgment concerned an administrative decision to collect a debt arising out of an immigration

sponsorship undertaking. Citizens and permanent residents may sponsor family members who want to immigrate to Canada, provided that they sign an undertaking to support them. If the family member receives social assistance, the citizen or permanent resident is deemed to have breached the undertaking and therefore becomes liable for costs incurred by the Crown. As Justice Binnie wrote on behalf of the Court, in such circumstances, the duty of procedural fairness is minimal because the collection procedure is not a complicated process. However, there is a procedure to be followed which does not entail a duty to give reasons, as the very existence of the debt is the only justification needed for the collection action.

[53] *Mavi* cannot be compared to the present case. By the respondent's own admission, the share allocation and the process it entails are complex and may require, as in the present case, an application, meetings, written submissions in support of the application and a request to the Minister concerning the possibility of changing the Notice to Importers. There is also discretion involved in deciding whether to make an exception to the rule laid down by the Notice to Importers. This process cannot be compared to a debt collection action for the breach of an undertaking. What remains at stake and subject to discretion in such a case are the terms of repayment; in the case under review, we have the interpretation to be given to the notion of related persons, the legal basis supporting the conclusion, and the consideration of the requested exception.

C. *Did the respondent give sufficient reasons for its decision dated February 20, 2013?*

[54] The decision dated February 20, 2013, does not provide sufficient reasons. Truth be told, I do not see in the decision any grounds on which to base a rational argument for it. The answer given to the applicant is such that it warrants the intervention of the Court regardless of the assessment of

the reasonableness of the decision as a whole. The case will have to be referred back to the decision maker for redetermination.

[55] At this stage in the analysis, there is a point that needs to be clarified on the subject of the impugned decision, specifically as regards the somewhat confusing exchange of correspondence between the parties. On November 8, 2012, after its 2012 application for a share of the chicken tariff rate quota was refused, the applicant asked the Minister to review that decision. In a letter dated January 2, 2013, a Department employee informed the applicant that the question of whether processors considered to be related to food-service companies should be eligible for a share of the portion of the chicken tariff rate quota for processors of non-ICL products had been submitted to the Chicken Tariff Rate Quota Advisory Committee and that the Minister was reviewing the Notice to Importers. The facts on record show that the question was presented to the Minister, who decided to maintain the policy.

[56] At the hearing, the parties agreed that the impugned decision, that is, the one dated February 20, 2013, relates to the 2013 application, not the review request concerning the 2012 refusal. In this letter, the respondent states that the Minister intends to maintain the policy set out in section 9.2 of Notice to Importers No. 815 and gives a final answer to the 2013 application in the last paragraph of the decision, which is apparently based on the Minister's decision. This paragraph is so short that I will reproduce it here in its entirety: [TRANSLATION] "Consequently, the Minister is unable to consider your application for a share of the 2013 chicken tariff rate quota". Moreover, as was mentioned above, regardless of whether it gave rise to communications between the parties, the respondent gave no final answer to the request to review the 2012 refusal.

[57] As has already been explained, by the respondent's own admission, if the Court limited its analysis to a plain reading of the impugned decision, it might be more prudent to refer the case back to the decision maker so that it could exercise its discretion appropriately. The respondent correctly points out that the Court's analysis is not limited to this letter; on the contrary, the Court may not substitute its own reasons for those of the decision maker, but it may look to the record that was available to the respondent when it made its decision, for the purpose of "assessing the reasonableness of the outcome" (*Newfoundland Nurses*, above, at para 15).

[58] However, I am of the opinion that it would be appropriate to make the work of a reviewing court such as this Court easier by applying this principle laid down in *Newfoundland Nurses*. An insufficiency of reasons does not necessarily mean an absence of reasons. It should be noted that the decision at issue in *Newfoundland Nurses* was 12 pages long, was the product of a quasi-judicial proceeding supported by an ample evidentiary record and outlined the facts, the arguments of the parties, the relevant provisions of the collective agreement, a number of applicable interpretive principles as well presenting an analysis (*Newfoundland Nurses*, above, at para 5). In the present case, the Minister's decision, which has real consequences for the applicant, is only a few lines long. Recently, in *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at paras 9 to 11, [2013] FCJ No. 449, Justice Rennie wrote the following:

> **[9]** The decision provides no insight into the agent's reasoning process. The agent merely stated her conclusion, without explanation. It is entirely unclear why the decision was reached.
>
> **[10]** *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 does not save the decision. *Newfoundland Nurses* ensures that the

> focus of judicial review remains on the outcome or decision itself, and not the process by which that outcome was reached. Where readily apparent, evidentiary lacunae may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn. A reviewing court looks to the record with a view to upholding the decision.
>
> **[11]** *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.
> [Emphasis added.]

[59] In the present case, I must agree with the words of my colleague Justice Rennie. The decision under judicial review does not give any reasons or explanations which the Court could connect: the respondent merely announces the Minister's decision to maintain the policy on related persons and then refuses to consider the 2013 application. The decision gives this reviewing Court no clue whatsoever as to what lines to draw, or between which dots or in which direction to draw them.

[60] What is more, in her affidavit, Ms. Funtek herself states that the wording of the reply was "unfortunate". She refers to the fact that, in its decision, the Department says that it is [TRANSLATION] "unable to consider the application", which would suggest that the application was simply refused without even being looked at first. She states in her affidavit that the 2013

application [TRANSLATION] "was indeed considered" and that it was refused because the following conclusions were reached after considering it:

> [TRANSLATION]
> 1. 7687567 Canada Inc. [the applicant] was related to another applicant for a share of the chicken tariff rate quota, namely MTY – (Under section 10.1 of Notice to Importers No. 815, except as per sections 4.10 and 8.6, where two or more applicants are considered to be related, they shall normally be eligible for only one allocation).
>
> 2. MTY was a food-service company – (Under section 9.2 of Notice to Importers No. 815, 7687567 Canada Inc., as a processor of non-ICL products, would not normally be eligible for a share of the portion of the chicken tariff rate quota for processors of non-ICL products).
>
> 3. As in his 2011 application for a share of the portion of the chicken tariff rate quota for processors and in his 2012 application for a share of the portion of the chicken tariff rate quota for processors of non-ICL products, Mr. Corneli failed to report the association between 7687567 Canada Inc. and MTY – (Under section 10.1 of Notice to Importers No. 815, applicants for an allocation are required to provide a list of related persons or companies so it can be determined which companies are related).

Trying to supplement insufficient reasons or give reasons after a decision has been made is not allowed by the case law. However, a court may take this intention to add to the decision into

account when assessing the reasonableness of that decision (*Stemijon Investments Ltd. v Canada (Attorney General) et al*, 2011 FCA 299 at para 40, [2013] FCJ No. 553).

[61] I share the view of the respondent that the form of the response is indeed [TRANSLATION] "unfortunate". However, the fact remains that this is how the respondent chose to formulate it and that this is what the applicant received as an answer. Thus, in its affidavit, the respondent admits that its response was badly worded and poorly documented and, moreover, asks the Court to make up for the shortcomings by interpreting the decision in accordance with Ms. Funtek's statement in her affidavit. This pushes the exercise contemplated by the Supreme Court of Canada in *Newfoundland Nurses* too far. In that case, the Court stated the following at paragraph 17:

> **[17]** The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful. [Emphasis added.]

[62] This Court cannot substitute its own opinion for that of the decision maker, who is of course in a better position to analyze the applicant's case. Consequently, in light of the total lack of reasons for the impugned decision—that is, to borrow Justice Rennie's metaphor, the total lack of dots on the page allowing the judge to draw the lines between the reasons—this Court, upon review, would be merely "guessing" the reasons if it had to infer all the reasons from the record, as the respondent asks the Court to do. The reviewing Court would then find itself substituting its reasons for those of the decision maker, an outcome which *Newfoundland Nurses* expressly tries to avoid. In this regard,

Justice Phelan acknowledged the following at paragraph 9 of *Canada (Minister of Citizenship and Immigration) v Liu*, 2012 FC 1403, [2012] FCJ No. 1504:

> **[9]** With respect to the adequacy of reasons, while *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], has held that adequacy of reasons is not a stand alone grounds for review, inadequate reasons go to the root of "reasonableness" of a decision. The Court is, according to Newfoundland Nurses, required to find support for a decision in the record where it can. However, that does not mean the Court must guess as to the reasons or substitute its reasons for those of the decision-maker.
> [Emphasis added.]

[63] *Newfoundland Nurses* thus allows gaps in the reasons to be filled or supplemented to an extent, in light of the decision maker's record. However, the Supreme Court of Canada certainly did not intend to allow decision makers to render decisions that are devoid of any justification and, moreover, "unfortunately" drafted, nor did the Court intend to allow these same decision makers to defend the essence of their decisions by requiring a reviewing court to rely on the decision maker's record and infer all the reasons from it, all the while accepting an affidavit that adds, after the fact, reasons that did not appear in the decision dated February 20, 2013.

[64] The Supreme Court of Canada's intentions in *Newfoundland Nurses* raises another issue. If, as the respondent claims, that judgment does indeed save the respondent's decision in the present case, how could a decision that is totally devoid of justification inform the applicant of the decision made in its regard, unless the recipient of the decision letter telephones the decision maker, as the applicant was invited to do ("If you have any question [*sic*], please contact me at . . .")? What recourse would the applicant have to obtain an explanation for the decision? Would the applicant be

obliged to apply for judicial review of the decision to obtain the decision maker's record, or would it have to make a request under the *Access to Information Act*, RSC, 1985, c A-1? I doubt that the decision maker would disclose the entire record to the applicant if the applicant called for an explanation. I find it difficult to believe that such was the Supreme Court's intention when it wrote its judgment.

[65] One thing is certain: the general lack of justification in the respondent's decision allows me to conclude that the reasons do not meet the criteria in *Dunsmuir*, above, that is, the justification, transparency and intelligibility of the decision-making process, because the reasons, by virtue of their absence, do not allow a reviewing court "to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses*, above, at para 16).

D. *Did the respondent breach its duty of procedural fairness by applying the policy set out in section 9.2 of Notice to Importers No. 815 systematically, thereby unduly fettering its discretion?*

[66] The answer to the first question in this case is sufficient to quash the respondent's decision and refer the matter back for reconsideration. However, in the interests of transparency and thoroughness, I will nevertheless deal with the second question.

[67] The applicant is of the view that the respondent did not exercise its discretion and that it is entitled to have its case considered on the merits, not on the basis of a systematic application of a departmental policy. According to the applicant, by slavishly applying the policy on related persons, the respondent breached its duty of procedural fairness and made a jurisdictional error, since it

transformed its discretion into a rule. The respondent, meanwhile, argues that it did indeed analyze the case on the merits and denies having applied the related persons policy systematically. As I explained above, there is nothing in the record that would allow me to conclude that the respondent exercised its discretion.

[68] I note that as a result of the present situation, the respondent owes the applicant certain obligations in terms of procedural fairness. In its memorandum and at the hearing, the respondent argued that its obligations in this regard are very limited and that the accommodations offered to the applicant to date go far above and beyond those obligations. Both the applicant and the respondent base their procedural fairness arguments on the Supreme Court of Canada's judgment in *Baker*, above, among others. For various reasons given above and below, I find that the respondent's decision regarding the request for an exception had to give reasons in the present case so that a person could understand the decision's main points and know whether or not the respondent exercised its discretion.

[69] As was explained above, the consequences of a refusal are considerable for a company operating in what is undeniably a highly competitive environment. Moreover, as the respondent so aptly noted, the respondent gave the applicant the benefit of an ongoing and inclusive decision-making process. So why stop at the decision stage? Since reasons were given for the 2012 application, I find that the applicant could reasonably expect to receive an answer with at least minimal reasons for its 2013 application, especially since the 2012 decision was made under Notice to Importers No. 792, while the 2013 decision involved Notice to Importers No. 815. The context in which the decision was made had thus changed from one year to the next. In addition, the applicant

submitted to the respondent a body of evidence supporting its argument that it was not a related person, but nothing in the decision indicates that these new allegations were assessed. Finally, the fact that the decision could be subject to judicial review demanded the addition of at least minimal reasons so that the Court could understand the decision's content.

[70] To better understand the situation, it would be appropriate to review the provisions creating the discretion in issue here. Sections 6.2 and 8 of the EIPA allow the Minister to determine the quantities of goods covered by a particular import access regime, decide how the quotas in issue are allocated to the public and choose whether or not to grant shares of the portion of the chicken tariff rate quota to those who request it.

[71] The *Import Allocation Regulations*, SOR/95-36, made pursuant to the EIPA, set out in section 6 the six considerations that the Minister should take into account when exercising his discretion to issue allocations. In addition, the Department publishes Notices to Importers explaining how it normally exercises its discretion. Section 10.1 of Notice to Importers No. 815 provides that where two or more applicants are considered to be related, they shall "normally" be eligible for only one allocation. The definition of "related persons" is found in Appendix 11 to this Notice to Importers. What is more, section 9.2 of Notice to Importers No. 815 (section 8.9 of Notice to Importers No. 792) states the following:

> **9.2.** Processors considered to be related to foodservice companies are not normally eligible for an allocation under the non-ICL portion of the chicken TRQ. [Emphasis added.]

[72] This is the provision at the heart of this dispute. First of all, I would note that the legality of Notice to Importers No. 815 has not been challenged in this case. The case law confirmed that it is

perfectly legitimate for a public administrative agency to use rules, or non-legally binding instruments, for guidance in exercising its discretion. Such guidelines allow the agency in question to deal with a specific problem proactively and help applicants affected by that problem predict how the agency will likely deal with it (*Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at paras 55 and 57, [2007] FCJ No. 734 [*Thamotharem*]).

[73] However, I must add that a public administrative agency that bases its discretion on such guidelines must ensure that it does not apply them as if they were legal rules, since they are not. In this regard, the Federal Court of Appeal states as follows at paragraph 62 of *Thamotharem*, above:

> **[62]** Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered: see, for example, *Maple Lodge Farms*, at page 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.

[74] Thus, neither the content of the policy, particularly section 9.2 of Notice to Importers No. 815, nor its effect on the respondent is being challenged in this case. Rather, it is a question of reviewing how the policy was applied. Although valid, for the purposes of this case, the policy nonetheless requires an additional exercise on the respondent's part: the wording chosen by the Department in Notice to Importers No. 815, through the use of the adverb "including" (and "normally" in section 10.1), is the underpinning for a discretionary authority. In addition, on cross-examination, Ms. Funtek acknowledged that exemptions from the policy may be granted in

exceptional circumstances. It would therefore be possible for a company deemed to be related to nevertheless receive a share of the portion of the chicken tariff rate quota for processors of non-ICL products. Moreover, in confirming that the policy was being maintained, the Minister at the same time confirmed that it is possible to make exceptions to it.

[75] However, in exercising its discretion to deviate from the guideline it legitimately set in Notice to Importers No. 815, the respondent cannot limit its efforts to determining whether a company is deemed to be related before refusing its application. Obviously, the respondent must analyze the case as a whole and determine whether there are exceptional circumstances that justify bending the rule.

[76] In the present case, after establishing that the applicant was considered to be related to MTY, the respondent should have then analyzed the case on its merits. Such an exercise may have taken place, but nothing in the decision indicates that it did. As the applicant aptly pointed out, the brief letter serving as a decision merely refers to the Minister's decision to maintain the policy. There is no mention of an analysis of the case on its merits. As both parties have argued, an administrative agency with discretionary authority is required to exercise that discretion on a case-by-case basis after considering the particular circumstances of a case (*Canada (Minister of Employment and Immigration) v Jiminez-Perez*, [1984] 2 SCR 565).

[77] Given the answer to the first question in this case, that is, that the decision had no reasons whatsoever, it goes without saying that the decision likewise does not present any grounds allowing this Court to assess any such exercise of discretion by the respondent.

[78] That being said, some of the evidence appearing in the written documentation and raised at the hearing suggests that the respondent did not exercise its discretion on a case-by-case basis here and did indeed apply the policy systematically. For example, at the hearing, the respondent stated through its counsel that it would have been inappropriate to make an exception in the applicant's case because such a decision would open the door to multiple requests for exceptions from other companies, which according to the respondent could result in an excessive workload, placing it in an untenable situation. However, after drawing such a conclusion, how can the respondent then state that it decided the fate of the applicant's application on the basis of a thorough review of the case? In saying that the decision not to make an exception was made to avoid a potential avalanche of requests for exceptions, the respondent confirms the applicant's fear, that is, that the policy was applied automatically as if it were a rule, without discretion.

[79] In light of the preceding and the general lack of grounds in this regard, I see no hint of anything that would allow me to conclude that the respondent exercised its discretion in analyzing the 2013 application under the policy; consequently, the respondent committed a jurisdictional error resulting in a breach of procedural fairness.

[80] Since the standard of review applicable to the second question is correctness, the respondent's decision, which has already been invalidated because of a lack of reasons, is not entitled to any deference from this Court.

[81] The applicant asks the Court to quash the decision dated February 20, 2013, declare that the respondent shall exercise its discretion in accordance with the principles of procedural fairness, and order the respondent to do so. The applicant also asks the Court to order the respondent to not allocate to any other person the shares initially intended for the applicant, pending a final judgment. The respondent did not comment on the relief sought.

[82] The Court has no objection to granting the relief sought, in part. Therefore, for the reasons set out above, the decision dated February 20, 2013, will be quashed, and the application will be referred back to the decision maker for reconsideration on the basis of these reasons. However, there is nothing to be gained in ordering the decision maker to exercise its discretion in accordance with the principles of procedural fairness because, as the decision maker is already required to do so, such an order would be pointless for stating the obvious. The applicant also asks the Court to prohibit the respondent from allocating to any person the shares that had originally been granted to it, pending a final judgment. However, this case clearly constitutes an application for judicial review, not a motion for an injunction, which by its nature involves an entirely different set of criteria that the parties did not address or argue in the slightest in the course of this proceeding. Consequently, the Court cannot grant the injunction as requested.

ORDER

1. First, the Court orders that the motion to strike be granted and that paragraphs 10(c), 59, 60, 61(a) to (c) and (f) to (k), 62 and 114 to 116 of the applicant's memorandum of fact and law and Exhibit FC-5 ("Memorandum of Agreement made and entered into in the City and district of Montreal, on the 9 day of December 2010") be struck.

2. Second, the Court orders that this application for judicial review be allowed, that the respondent's decision dated February 20, 2013, be quashed, and that the case be referred back to the respondent for reconsideration in accordance with these reasons for judgment.

3. With costs.

"Simon Noël"

_____

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-488-13
STYLE OF CAUSE:	7687567 CANADA INC. v FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 6, 2013
REASONS FOR ORDER AND ORDER:	SIMON NOËL J.
DATED:	November 26, 2013

APPEARANCES:

Karl Delwaide Karine Joizil	FOR THE APPLICANT
Alexander Pless Michelle Kellam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin, LLP Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT