Federal Court of Appeal

Cour d'appel fédérale

Date: 20101005

Docket: A-9-10

Citation: 2010 FCA 256

CORAM: **BLAIS C.J.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

SHAWN RALPH

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at St. John's, Newfoundland, on September 23, 2010.

Judgment delivered at Ottawa, Ontario, on October 5, 2010.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: BLAIS C.J.
STRATAS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Shawn Ralph, the appellant, is licensed by the Department of Fisheries and Oceans (DFO) as a core enterprise fisherman. Since 1990, he has held a groundfish fixed gear license for Northwest Atlantic Fisheries Organization (NAFO) areas 2GHJ 3KL. In 1996, he sought and obtained an amendment to his license which added as a license condition the right to fish for Greenland halibut, also known as turbot, in NAFO sub-area 0 (sub-area 0) from July 5, 1996 to September 30, 1996. In 2000, Mr. Ralph asked the DFO to have a similar condition added to his license. His request was refused.

[2] Mr. Ralph appealed the issue of access to the sub-area 0 turbot fishery to the Atlantic Fisheries License Appeal Board (Board). After hearing his appeal, the Board recommended to the Minister of Fisheries and Oceans (Minister) that the appeal be denied. Thereafter, following receipt of the Board's report, the Minister denied Mr. Ralph's appeal. A judge of the Federal Court dismissed an application for judicial review of the Minister's decision in reasons cited as 2009 FC 1274, and reported as (2009) 357 F.T.R. 300.

[3] On this appeal from the decision of the Federal Court, the sole issue is whether the Minister's decision is, and ought to have been found to be, unreasonable due to the inadequacy of the reasons supporting the decision. See: appellant's statement of issues on appeal. For the reasons below, I find an insufficient basis to intervene in the decision. I would, therefore, dismiss the appeal without costs.

The Facts

[4] The following additional facts are relevant to the assessment of the adequacy of the reasons given for denying Mr. Ralph's appeal.

[5] Despite receiving the amendment to his license in 1996 to allow access from July to September of 1996 to the sub-area 0 turbot fishery, Mr. Ralph did not fish for turbot in that area during that period. Nor did he apply for, or receive, a similar license condition in 1997, 1998 or 1999. I pause here to note that while Mr. Ralph argues that the "turbot license" reappeared on his 1999 license, on a proper reading of the commercial fishing license conditions of his groundfish

license for that year (at page 142 of the appeal book) I am satisfied that the license was limited to NAFO areas 2GHJ 3KL, and conferred no license condition giving access to the sub-area 0 turbot fishery. In any event, it is agreed by the parties that prior to 2000 Mr. Ralph did not have any turbot landings in sub-area 0.

[6] On May 5, 2000, DFO determined that it was necessary to limit participation in the sub-area 0 turbot fishery, and that participation would be limited to fishers who had been active in that fishery over the past number of years. Thereafter, Mr. Ralph's request for access to sub-area 0 in 2000 was refused on the basis that he had no existing record of turbot landings in sub-area 0.

[7] Mr. Ralph appealed DFO's decision denying him access to the sub-area 0 turbot fishery to the Board. The Board is the body established by the Minister to be the last administrative level of appeal for fishers who are dissatisfied with licensing decisions made by DFO. The mandate of the Board is to make recommendations to the Minister on license appeals by:

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

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

iii. providing a full rationale to the Minister where exceptions to licensing policies, practices and procedures are recommended in individual cases.

The final decision to accept or reject such recommendations is made by the Minister.

[8] With respect to the second element of its mandate, the Board advises appellants that "extenuating circumstances" can include factors such as illness, mechanical failure, the loss of a vessel or demonstrated financial commitment. Of relevance to this appeal is the factor of demonstrated financial commitment.

[9] On his appeal to the Board, Mr. Ralph advised that he had expended approximately $400,000.00 in order to prepare his vessel to fish in the distant and ice infested waters of sub-area 0. The Board summarized its understanding of this information at paragraph 9 of its reasons where it wrote:

> He explained the effort required to gear up for this type of fishery (i.e. 81/2 inch mesh size gillnets, larger lead ropes, ice reinforcement for vessel and bigger fuel tanks etc.) prepare[d] for a fishery in which Mr. Ralph felt he would have renewed access to. He stated that "sub-area O" was a great distance from Mr. Ralph's homeport, and an area know[n] for ice infested waters and as such, Mr. Ralph underwent extensive major renovations to his vessel which would allow safe access to this fishery. All renovations were made at Mr. Ralph's expense.

[10] No evidence such as invoices or receipts for payments was placed before the Board. The parties agree that the best evidence concerning the renovations to Mr. Ralph's vessel is a letter dated May 30, 2002 from Glovertown Marine Ltd. which was put in evidence before the Board. This letter is quoted in full in the reasons of the Federal Court at paragraph 39. In material part, the letter advises that since 1999 the facility performed major renovations to Mr. Ralph's vessel and lists the completed items of renovation. The work is stated to enable the vessel to fish further from its homeports for longer durations and in ice infested waters and to have cost "close to $400,000.00". Unfortunately, the letter is silent as to which items were completed before the May, 2000 change in DFO policy concerning access to the sub-area 0 turbot fishery. The parties agree that there was no

evidence before the Board on this point. Similarly, the parties agree that there was no evidence before the Board as to what, if any, monies were paid by Mr. Ralph to Glovertown Marine Ltd. prior to May, 2000. On the evidence, Mr. Ralph may have paid nothing, the full amount or some amount in between.

The Decisions of the Board and the Minister

[11] The Board's decision was brief. Its analysis is contained in the following paragraph:

> RECOMMENDATION: APPEAL DENIED
>
> The Board reviewed all the information presented by the appellant, his representatives and the Department of Fisheries and Oceans. The Board recommends the appeal be denied based on the fact that Mr. Ralph did not provide proof of fishing Greenland Halibut in sub area OB prior to the announcement of May 2000, which restricted access to fishers that had landings prior to May 2000. Also, Mr. Ralph did not provide proof or documentation to the board of any request after 1996 up to May 2000 requesting access to the OB Greenland Halibut fishery. The Board could find no extenuating circumstances in this case and that the Department of Fisheries and Oceans policies and procedures were applied correctly.

[12] Subsequently, Mr. Ralph received a letter advising him of the Minister's decision. The letter stated:

> The Honourable Loyola Hearn has asked me to respond to your letter regarding your request for access to Greenland Halibut in sub-area OB. As you know, your request was referred to the Atlantic Fisheries Licence Appeal Board and was heard on December 11, 2007 at the Battery Hotel & Suites, St. John’s, Newfoundland and Labrador.
>
> The Minister has made a decision based on a thorough review of all available information and I regret to inform you that he has denied your appeal. The Minister concluded that the licensing policy was correctly interpreted and applied by the Department of Fisheries & Oceans in your case.

[13] These are the totality of the reasons provided to Mr. Ralph.

[14] The jurisprudence of this Court has confirmed that while it is the decision of the Minister that is judicially reviewed, if the Board's recommendation is adopted by the Minister the Board's decision is inexorably linked to the Minister's decision in the sense that the Board's decision forms one of the bases for the exercise of ministerial discretion. See: *Jada Fishing Co. v. Canada (Minister of Fisheries and Oceans)* (2002), 288 N.R. 237 at paragraphs 12-13 (F.C.A.). This explains the relevance of the Board's reasons to the Minister's decision; the two sets of reasons may be read together.

The Positions of the Parties

[15] Mr. Ralph submitted that the Board, and subsequently the Minister, failed to address the issue of whether extenuating circumstances were established in light of his demonstrated financial commitment to the sub-area 0 turbot fishery.

[16] In oral argument, it was submitted by the Attorney General that there was no legal obligation on the Board or the Minister to explain why there were no extenuating circumstances. In the alternative, it was submitted that any duty to provide reasons was met by the reasons provided by the Board.

The Duty to give Reasons and the Adequacy of Reasons

[17] This Court has recently reviewed the nature and content of the duty to give reasons and the principles that apply in order to assess the adequacy of reasons. With respect to the need to give

reasons, in *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, the Court wrote at paragraph 7:

> Nothing in these reasons for judgment should be taken as suggesting that all administrative decision-makers must give reasons in all circumstances. It depends. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 43, the Supreme Court regarded the common law obligation to provide reasons as a subset of the duty to afford procedural fairness to the parties. In that case, the Supreme Court held that a Minister deciding a refugee claim owed the claimant a duty of procedural fairness and, due to the importance of the decision to the claimant, the claimant needed to know why her claim was dismissed. *Baker* emphasizes at paragraphs 23 to 28 that the level of procedural fairness to be afforded depends upon the circumstances and may vary from no obligation whatsoever, to a high obligation. Finally, there are some administrative decision-makers that are not obligated to afford procedural fairness at all: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 670.

[18] The Court went on to discuss, at paragraphs 16 and 17, how a reviewing Court evaluates the adequacy of reasons:

> Where, as here, an administrative decision-maker, acting under a procedural duty to receive and consider full submissions, is adjudicating on a matter of significance, what sort of reasons must it give? From the above authorities, and bearing in mind a number of fundamental principles in the administrative law context, the adequacy of the decision-maker's reasons in situations such as this must be evaluated with four fundamental purposes in mind:
>
> (a) *The substantive purpose*. At least in a minimal way, the substance of the decision must be understood, along with why the administrative decision-maker ruled in the way that it did.
>
> (b) *The procedural purpose*. The parties must be able to decide whether or not to invoke their rights to have the decision reviewed by a supervising court. This is an aspect of procedural fairness in administrative law. If the bases underlying the decision are withheld, a party cannot assess whether the bases give rise to a ground for review.
>
> (c) *The accountability purpose*. There must be enough information about the decision and its bases so that the supervising court can assess, meaningfully, whether the decision-maker met minimum standards of legality. This role of supervising courts is an important aspect of the rule of law and must be respected: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dunsmuir, supra* at paragraphs 27 to 31. In cases where the standard of review is reasonableness, the supervising court must assess "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir, supra* at

paragraph 47. If the supervising court has been prevented from assessing this because too little information has been provided, the reasons are inadequate: see, *e.g., Canadian Association of Broadcasters, supra* at paragraph 11.

(d) The "*justification, transparency and intelligibility" purpose*: *Dunsmuir, supra* at paragraph 47. This purpose overlaps, to some extent, with the substantive purpose. Justification and intelligibility are present when a basis for a decision has been given, and the basis is understandable, with some discernable rationality and logic. Transparency speaks to the ability of observers to scrutinize and understand what an administrative decision-maker has decided and why. In this case, this would include the parties to the proceeding, the employees whose positions were in issue, and employees, employers, unions and businesses that may face similar issues in the future. Transparency, though, is not just limited to observers who have a specific interest in the decision. The broader public also has an interest in transparency: in this case, the Board is a public institution of government and part of our democratic governance structure.

The reasons of administrative decision-makers in situations such as this must fulfil these purposes at a minimum. As courts assess whether these purposes have been fulfilled, there are a number of important principles, established by the authorities, to be kept firmly in mind:

(a) *The relevancy of extraneous material*. The respondent emphasized that information about why an administrative decision-maker ruled in the way that it did can sometimes be found in the record of the case and the surrounding context. I agree. Reasons form part of a broader context. Information that fulfils the above purposes can come from various sources. For example, there may be oral or written reasons of the decision-maker and those reasons may be amplified or clarified by extraneous material, such as notes in the decision-maker's file and other matters in the record. Even where no reasons have been given, extraneous material may suffice when it can be taken to express the basis for the decision. *Baker, supra*, provides us with a good example of this, where the Supreme Court found that notes in the administrative file adequately expressed the basis for the decision. See also *Hill v. Hamilton-Wentworth Police Services Board*, [2007] 3 S.C.R. 129 at paragraph 101 for the role of extraneous materials in the assessment of adequacy of reasons.

(b) *The adequacy of reasons is not measured by the pound*. The task is not to count the number of words or weigh the amount of ink spilled on the page. Instead, the task is to ask whether reasons, with an eye to their context and the evidentiary record, satisfy, in a minimal way, the fundamental purposes, above. Often, a handful of well-chosen words can suffice. In this regard, the respondent emphasized that very brief reasons with short-form expressions can be adequate. That is true, as long as the fundamental purposes, above, are met at a minimum. In this regard, the respondent cited the example of the Board sometimes issuing orders without reasons. Whether such orders are adequate depends on the facts of a specific case, but the methodology for assessing adequacy is clear: the preambles, recitals and provisions of the orders, when viewed with an eye to their context and the evidentiary record, must satisfy, in a minimal way, the fundamental purposes, above.

(c) *The relevance of Parliamentary intention and the administrative context*. Judge-made rulings on adequacy of reasons must not be allowed to frustrate Parliament's intention to remit subject-matters to specialized administrative decision-makers. In many cases, Parliament has set out procedures or has given them the power to develop procedures suitable to their specialization, aimed at achieving cost-effective, timely justice. In assessing the adequacy of reasons, courts should make allowances for the "day to day realities" of administrative tribunals, a number of which are staffed by non-lawyers: *Baker, supra* at paragraph 44; *Clifford v. Ontario Municipal Employees Retirement System* (2009), 98 O.R. (3d) 210 at paragraph 27 (C.A.). Allowance should also be given for short-form modes of expression that are rooted in the expertise of the administrative decision-maker. However, these allowances must not be allowed to whittle down the standards too far. Reasons must address fundamental purposes - purposes that, as we have seen, are founded on such fundamental principles as accountability, the rule of law, procedural fairness, and transparency.

(d) *Judicial restraint*. The court's assessment of reasons is aimed only at ensuring that legal minimums are met; it is not an exercise in editorial control or literary criticism. See *Sheppard, supra* at paragraph 26.

[19] At the same time, the requirement to provide adequate reasons does not require a decision-maker to deal with every matter or issue raised before it. An applicant or appellant bears the burden of establishing that an issue was sufficiently arguable, such that, in light of the Court’s comments in *Vancouver International Airport Authority*, the administrative decision-maker was obligated to explain itself. See: *Stelco Inc. v. British Steel Canada Inc.*, [2000] 3 F.C. 282 at paragraphs 24 to 26 (C.A.). There is no obligation on any administrative decision-maker to write reasons on arguments that, in light of the record and the governing law, have no hope of success. This principle is illustrated by the case law that states that a decision-maker has no obligation to address particular evidence where the applicant or appellant fails to establish that the ignored evidence is material to an arguable point or of probative value.

Application of these Principles to this Case

[20] Turning first to consider whether the Board was required to give reasons to support its statement that it could find no extenuating circumstances, I repeat the cautionary note sounded in *Vancouver International Airport Authority* that not all administrative decision-makers are required to give reasons in all circumstances. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 43, the Supreme Court found that the duty of procedural fairness required a written explanation for a decision in certain circumstances, including where the decision has important significance for an individual, or where there is a statutory right of appeal.

[21] In the present case, the denial of access to the sub-area 0 turbot fishery was a decision of important significance to Mr. Ralph: it is evident that, at least at some time in the 1999 – 2002 period, he invested $400,000, to make his vessel suitable for the sub-area 0 turbot fishery.

[22] It is true that the Board is not the ultimate decision-maker, and, viewed in isolation, that would work against an obligation to give reasons. However, this administration process must be viewed as a whole. After hearing the parties, the Board considers the information and submissions before it and then makes a recommendation to the Minister who in turn accepts or rejects the recommendation. The Minister does not have the benefit of hearing or seeing the evidence given to the Board. Therefore, reasons must be provided by the Board in order for the Minister to be able to assess the Board's recommendation and make a decision.

[23] In those circumstances, I reject without hesitation the submission that as a matter of law there was no obligation to give reasons for the decision refusing Mr. Ralph’s appeal.

[24] I now turn to the assessment of the adequacy of the reasons given by the Board for its conclusion that it could find no extenuating circumstances to justify departure from existing DFO policies, practices or procedures.

[25] For Mr. Ralph to succeed in establishing the existence of extenuating circumstances as a result of his demonstrated commitment to the sub-area 0 turbot fishery, he was required to adduce evidence that he expended money in pursuit of that fishery. In order for funds to be expended in pursuit of that fishery, the expenditures must have been made while Mr. Ralph met, or at least believed he met, the requirements for access to that fishery. In the present case there is no evidence to suggest that Mr. Ralph did not learn of the May 5, 2000 policy limiting participation in the sub-area 0 turbot fishery around the time the change was implemented. Thus, relevant expenditures must have been made prior to the decision by DFO in May, 2000 to restrict access to the sub-area 0 turbot fishery to those fishers who had turbot landings prior to 2000.

[26] As noted above, there was no evidence before the Board about what, if any, renovations to Mr. Ralph's vessel were completed, or what, if any, monies were expended in respect of those renovations, prior to the change in policy in May, 2000. Because there was no evidence that Mr. Ralph caused renovations to be made, or monies to be spent, prior to May, 2000 there was no evidence upon which the Board could find that prior to May, 2000 Mr. Ralph had demonstrated a financial commitment to the sub-area 0 turbot fishery. In turn, in the absence of a finding of demonstrated financial commitment, there was no basis for the further finding that extenuating

circumstances existed. In short, on the evidence the point was not arguable. In that circumstance, the Board's failure to provide more extensive reasons was not a breach of the duty to provide reasons. This is, in my view, dispositive of the appeal.

[27] That said, I believe it is important to clarify that had there been material evidence of an expenditure of funds in pursuit of the turbot fishery the Board's reasons would have been inadequate. This is so because the Board simply asserted a bald conclusion without setting forth which, if any, principles were applied or what, if any, evidence was considered. Where an adequate evidentiary basis exists, the absence of such an analysis means an appellant before the Board is left with no understanding as to why the Board recommended the dismissal of his or her appeal. Further, to be reasonable a decision must be justified, transparent and intelligible. See: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47. As a matter of logic, it is more difficult to find a decision given without reasons to be justified, transparent or intelligible. Nothing in the duty to give reasons when the Board recommends that an appeal be denied ignores the administrative realities facing the Board. In any case, one or two sentences will likely be sufficient to explain why the Board did not find extenuating circumstances to exist.

[28] It is possible that the Board was led into confusion by that portion of the statement of its mandate which speaks only of a requirement on the Board to provide a full rationale for its decision to the Minister where extenuating circumstances are found to exist and the Board recommends an exception be granted from applicable licensing policies, practices or procedures. The mandate is set out at paragraph 7 above. The Board may have interpreted this portion of its mandate as imposing

no requirement to provide reasons where extenuating circumstances are not found to exist. Of course, in a given case the Minister is able to request that the Board provide a full rationale for such a finding. This ability of the Minister cannot, however, dilute the requirements to give reasons in appropriate circumstances. Put simply, the mandate to give reasons to the Minister when a fisher's appeal succeeds does not detract from the duty at common law to give adequate reasons when a fisher's appeal fails.

Procedural Matter - the absence of a certified tribunal record

[29] Some confusion arose before this Court as to what evidence was before the Board. This was because on the application for judicial review in the Federal Court no certified tribunal record was requested or filed. Instead, each party filed an affidavit in the Federal Court. It was not clear that the narrative contained in the affidavits was confined to information provided to the Board, or that documents in the Appeal Book had been placed before the Board.

[30] Counsel are thanked for their assistance at the hearing in clarifying the evidentiary record.

[31] This confusion should be avoided in a future case. Rule 317 of the *Federal Courts Rules* allows a party to request material in the possession of a decision-maker. An applicant for judicial review in the Federal Court may include such a request in its notice of application. Rule 318 then obliges a decision-maker to transmit a certified copy of the requested material to the Court and the person making the request within 20 days of the service of the request under Rule 317.

[32] In the present case, the appellant did make a request that the Board provide a copy of the record before it to the Registry of the Federal Court of Appeal. This request was contained in the notice of appeal filed with this Court. Such form of request is neither proper nor effective. Evidence not before the Federal Court cannot be placed before this Court on an appeal unless an order is granted permitting a party to file new evidence. See: Rule 351. The appropriate time for invoking Rule 317 is by requesting material in the notice of application in the Federal Court.

Conclusion

[34] There was no evidence before the Board or the Minister as to the amount of money spent by Mr. Ralph in pursuit of the sub-area 0 turbot fishery before access to that fishery was restricted in 2000. Thus, no finding could be made of any demonstrated financial commitment by Mr. Ralph to that fishery. It follows that no extenuating circumstances could be established on the basis of monies expended by Mr. Ralph. It further follows that the Board was not required as a matter of law to address in its reasons submissions that were not supported by evidence. For that reason I would dismiss the appeal.

[35] At the same time, an explanation of the rationale for a decision is desirable for a number of reasons. Reasons reinforce confidence in the judgment and fairness of administrative tribunals, afford parties an opportunity to assess the utility of an appeal or judicial review, foster better decision-making and allow effective judicial oversight. The delivery of reasons that permit parties

to know how a decision was reached is to be encouraged. The provision of adequate reasons need not place any undue burden upon an administrative decision-maker. In a case such as this, had the issue of extenuating circumstances been arguable, it might only have taken a few words.

[36] In the present case, neither the reasons of the Board nor the reasons of the Minister enabled Mr. Ralph to see why his appeal to the Minister did not succeed. For that reason, I believe this is an appropriate case for each party to bear their own costs in this Court. I would, therefore, dismiss the appeal without costs.

"Eleanor R. Dawson"
J.A.

"I agree
Pierre Blais C.J."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-9-10
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APPEARANCES:

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