

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20101005

Docket: A-520-09

Citation: 2010 FCA 257

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

BETWEEN:

ALBERT RALPH

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at St. John's, Newfoundland, on September 24, 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] The Atlantic Fisheries License Appeal Board (Board) was established by the Minister of Fisheries and Oceans (Minister) to be the last administrative level of appeal for fishers who are dissatisfied with licensing decisions made by the Department of Fisheries and Oceans (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; and

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

The final decision to accept or reject the Board's recommendations is made by the Minister.

[2] Albert Ralph is licensed as a core enterprise fisherman by DFO. In 1988, 1989 and 1990 Mr. Ralph was licensed by DFO to participate in a supplementary crab fishery. In 1991, Mr. Ralph again applied for a supplementary crab license; however no license was issued to him by DFO in 1991.

[3] Mr. Ralph appealed to the Board from the decision not to issue a supplementary crab license to him. The Board recommended to the Minister that the appeal be denied because DFO policies and procedures were applied correctly, and the Board could find no extenuating circumstances to justify departure from existing policies, practices or procedures. After receiving 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 1239 and reported as (2009), 354 F.T.R. 312.

[4] On this appeal from the decision of the Federal Court Mr. Ralph puts in issue the findings of the Board, and subsequently the Minister, that in refusing to issue a license DFO procedures were applied correctly, and there were no extenuating circumstances to justify departure from the existing policies, practices or procedures.

[5] For the following reasons I would dismiss the appeal without costs.

The Facts

[6] The following additional facts are relevant to the issues before this Court.

[7] In order to qualify for a supplementary crab license in 1988, the Crab Management Plan required applicants to:

- (a) be resident in the management area for which the licenses were available;
- (b) own or operate a registered commercial fishing vessel that was not less than 35 feet in length overall (LOA) or was 10 gross tons and did not exceed 64'11" LOA; and
- (c) possess a groundfish license for management areas 2+3KL or Sector I.

[8] The applications filed by Mr. Ralph for supplementary crab licenses in 1988, 1989 and 1990 were made in respect of the Motor Vessel "Misty Dawn" (see pages 89, 101 and 103 of the appeal book). In the 1988 crab license and the 1989 Limited Fishery Application, both signed by Mr. Ralph, the M.V. Misty Dawn was described to be 35 feet LOA. No gross tonnage was specified.

[9] On April 7, 1989, the "1989 Crab Management Plan Newfoundland Region" was publicly announced. The second requirement for the issuance of a supplementary crab license, that is item (b) in paragraph 7 above, was revised in this management plan. Reference to gross tonnage was removed. Instead, an applicant was required to:

- (b) operate a registered commercial fishing vessel that is not less than 35 feet LOA and does not exceed 64'11" LOA.

Requirements (a) and (c) remained unchanged.

[10] In April, 1990, Mr. Ralph requested of DFO that the groundfish fixed gear license issued to him in relation to the M.V. Misty Dawn be relinquished and be re-issued to his son, Shawn Ralph. Registration of the vessel was also transferred to Shawn Ralph. There is no evidence that Mr. Ralph possessed any groundfish license after this license was relinquished. In the written "Application for Relinquishment of Rights", Mr. Ralph acknowledged that any future requests to re-enter the crab fishery would be subject to the licensing policy or management plan in effect at the time of any request.

[11] No supplementary crab license was issued to Mr. Ralph in 1991 or thereafter.

[12] In 1993, the Crab Management Plan imposed a freeze on the issuance of new supplementary crab licenses.

[13] In April, 1993, Mr. Ralph wrote to DFO requesting the reinstatement of his supplementary crab license. He wrote again in January, 1994 and March, 1994. In April, 1994, DFO responded, stating:

This will acknowledge your correspondence regarding your Supplementary Crab Licence.

Information on file indicates your crab licence was renewed in 1990. However, due to the fact your 35' vessel was reissued to your son, Shawn, for the purpose of acquiring a vessel registration (Combining Policy) up to 64' 11" LOA, you no longer meet the criteria regarding vessel requirements to maintain the crab licence.

In 1989, the criteria for the issuance of Supplementary Crab Licences changed, restricting the vessel to 35' LOA and greater. Furthermore, the 1993 Crab Management Plan imposed a freeze on the issuance of new licences.

In light of these changes, we are not in a position to respond positively to your request.

The Decisions of the Board and the Minister

[14] The Board's decision denying Mr. Ralph's appeal was brief. After reviewing the information put before it, the Board wrote:

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 that the appeal be denied based on the fact that Mr. Ralph did have a groundfish licence for a vessel greater than 35' in 1988 and his supplementary crab licence was issued on that criteria not on the criteria of less than 35' and 10 gross tones [sic.]. In 1990, the Department of Fisheries and Oceans policy for the issuance of new supplementary crab licences stated you had to hold a groundfish licence for a vessel greater than 35'. Since Mr. Ralph transferred his greater than 35' groundfish fixed gear licence to his son Shawn Ralph, he was not eligible to hold a supplementary crab licence after that date. The Board could find no extenuating circumstances in this case and the Department of Fisheries and Oceans policies and procedures were applied correctly.

[15] The Minister made his decision on the basis of the Board's recommendation. The Minister's decision was expressed as follows:

The Honourable Loyola Hearn has asked me to respond to your letter regarding your request for reinstatement of your supplementary crab licence. 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.

[16] When the Minister adopts a recommendation of the Board, this Court has held that 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 requires the reasons to be read together.

The First Issue: the finding that DFO procedures were applied correctly

[17] Before the Board Mr. Ralph argued that when he was issued a supplementary crab license in 1988, DFO policy required an applicant to operate a vessel of at least 35 feet LOA or 10 gross tons. At the time he qualified for the license Mr. Ralph was the registered owner of two vessels. One met the length requirement, the other the tonnage requirement. Mr. Ralph further argued that when in 1990 he transferred the registration of his 35 foot vessel, the M.V. Misty Dawn, he did not transfer the right to his supplementary crab license. This was because Mr. Ralph intended to continue to fish for crab using his other vessel that met the gross tonnage requirement.

[18] As can be seen from its reasons, the Board rejected that submission. The Board found that the 1988 license was issued on the basis that Mr. Ralph owned a vessel that was 35 feet in length, and was not issued on the basis of the gross tonnage of any vessel. Once Mr. Ralph transferred his

35 foot vessel and relinquished his greater than 35 foot groundfish fixed gear license he was no longer eligible to hold a supplementary crab license.

[19] On the application for judicial review of the Minister's decision, the Federal Court Judge (Judge) found that the Minister's decision to refuse to issue a supplementary crab license was reviewable on the standard of reasonableness. She then went on to consider that:

- i. The Minister possesses broad discretion over the issuance of licenses. Reliance was placed upon *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 at paragraphs 36-37.
- ii. Pursuant to section 10 of the *Fishery (General) Regulations*, SOR/93-53, a license expires at the end of the year in which it was granted. Licenses are re-issued annually by the Minister in accordance with then prevailing policies.
- iii. The Minister was entitled to change the Crab Management Policy in 1989.
- iv. Once Mr. Ralph relinquished his groundfish fixed gear license attached to the M.V. *Misty Dawn*, he was unable to meet the new regulatory policy.
- v. When Mr. Ralph relinquished that right he acknowledged that his future ability to re-enter the crab fishery would be dependent upon any change in policy.
- vi. The Minister's decision was reasonable. It properly took into consideration the new policy with respect to the issuance of supplementary crab licenses.

[20] On this appeal from that decision, this Court is required to determine whether the Judge correctly identified the standard of review and then applied the standard correctly to the Minister's

decision. See: *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, (2010) 399 N.R. 127 at paragraph 84, and the authorities referred to therein.

[21] Here, the parties agree that the Judge applied the correct standard of review. The standard applied by the Judge was reasonableness. The issues before the Board and the Minister were questions of mixed fact and law, and such questions are generally reviewable on the reasonableness standard. I agree the Judge applied the correct standard of review.

[22] As to the application of that standard of review, Mr. Ralph did not demonstrate any error on the part of the Judge. I agree, substantially for the reasons given by the Judge, that the Minister reasonably concluded that DFO policies and procedures were applied correctly when DFO decided not to issue a supplementary crab license to Mr. Ralph in 1991.

[23] In this Court, Mr. Ralph's counsel argued forcefully that it was wrong for the Board to conclude that Mr. Ralph's supplementary crab license was issued on the basis that the M.V. Misty Dawn was 35 feet in length. Reliance was placed upon licensing documents that described the vessel to be both 10.61 meters and 35 feet in length. Counsel argued that because 10.61 meters converts to 34.81 feet, DFO and the Board knew, or ought to have known, that the M.V. Misty Dawn was not 35 feet in length.

[24] In my view, this submission does not assist Mr. Ralph for the following two reasons. First, having applied for supplementary crab licenses on the basis of the length of the M.V. Misty Dawn,

and having received licenses on that basis, it is difficult for Mr. Ralph to now argue his vessel did not meet the requisite length requirement. More importantly in 1991, the first year a supplementary crab license was not re-issued to Mr. Ralph, the Crab Management Plan required applicants to operate a registered commercial fishery vessel that was not less than 35 feet in length and to possess a groundfish license for a vessel between 35 feet and 64'11" LOA. After Mr. Ralph transferred the M.V. Misty Dawn and associated groundfish fixed gear license to his son, he no longer met the qualifying criteria because he held neither a groundfish license nor a vessel registration for a vessel over 35 feet in length. The applicable Crab Management Plan required fishers applying for a supplementary crab license to possess a groundfish licence. Mr. Ralph did not possess one, so his ownership of a vessel of a certain tonnage was irrelevant.

The Second Issue: extenuating circumstances

[25] Mr. Ralph also argued in this Court that the Board failed to consider and to give adequate reasons concerning whether in light of the unique facts before the Board there were extenuating circumstances. The facts said to give rise to extenuating circumstances were:

- (a) Mr. Ralph asserted that several fishers in his area maintained supplementary crab licenses throughout the 1990s for vessels less than 35 feet in length, but over 10 tons in weight.
- (b) Mr. Ralph stated that in making his decision in 1990 to transfer his 35 foot vessel to his son, he relied upon the fact that he could still qualify for a supplementary crab license on the basis of owning a vessel of 10 gross tons.

[26] In *Shawn Ralph v. Attorney General of Canada*, 2010 FCA 256, this Court reviewed principles concerning the duty to give reasons and the assessment of the adequacy of reasons. The Court concluded on the facts before it that the Board was required as a matter of law to give reasons. With respect to the adequacy of reasons, the Court concluded that there is no obligation on any administrative decision-maker to write reasons on arguments that, in light of the facts and the law, have no hope of success. I incorporate by reference into these reasons paragraphs 17 to 19 of the reasons given in the case of *Shawn Ralph*.

[27] Applying those principles to the facts now before the Court, I conclude that at law the Board was required to give reasons for its decision. This reflects the financial significance to Mr. Ralph of the denial of access to the supplementary crab fishery and the nature of this administrative process. As explained in *Shawn Ralph*, at paragraph 22, the Minister does not have the benefit of hearing or seeing the evidence given to the Board. Thus, 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.

[28] As to the adequacy of the Board's reasons concerning extenuating circumstances, there was no evidence before the Board with respect to any improper differential treatment of crab fishers. At paragraph 13 of its reasons, the Board noted that any right to harvest crab from a vessel under 35 feet was confined to harvesters who had acquired their supplementary crab license under the greater than 10 gross ton criterion. The Board found as a fact that Mr. Ralph did not acquire his license under that criterion. That finding has not been shown to be unreasonable. It follows that any exemption conferred on fishers who qualified under the gross tonnage criterion were not

applicable or available to Mr. Ralph, who qualified under a different criterion. On the evidentiary basis before the Board, its reasons adequately dealt with the issue of differential treatment.

[29] With respect to Mr. Ralph's asserted expectation that when he transferred the M.V. Misty Dawn he believed he could qualify for a supplementary crab license on the basis of the gross tonnage of another vessel, Mr. Ralph adduced no evidence that after relinquishing his groundfish license in 1990 to his son he possessed any other groundfish license. At all times from 1988 to at least 1991, it was a requirement to obtain a supplementary crab license that the applicant possess a groundfish license. No matter what the length or tonnage of any vessel owned by Mr. Ralph in 1991, without possessing a groundfish license Mr. Ralph did not meet the criteria for the issuance of a supplementary crab license. Mr. Ralph has not shown how any belief that he could qualify for a license on the basis of another vessel is relevant when he lacked a groundfish license. Irrelevant considerations cannot constitute extenuating circumstances. It follows that Mr. Ralph has failed to demonstrate that this issue was sufficiently arguable that the Board was required to expressly explain why Mr. Ralph's belief that he could qualify for a license on the basis of another vessel's gross tonnage was not an extenuating circumstance.

Conclusion

[31] For these reasons, I would dismiss the appeal. As in the *Shawn Ralph* decision, in my view, the terse manner in which the Board dismissed the claim to extenuating circumstances makes this an appropriate case for each party to bear their own 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

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Stratas J.A.

DATED: October 5, 2010

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