

Federal Court



Cour fédérale

Date: 20250422

Docket: T-2608-22

Citation: 2025 FC 727

Ottawa, Ontario, April 22, 2025

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

HELSHIRON FISHERIES LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS AND JUDGMENT

I. INTRODUCTION

[1] Helshiron Fisheries (the “Applicant”) seeks judicial review of the decision made on November 8, 2022, by the Minister of Fisheries, Oceans and Canadian Coast Guard (the “Minister”), refusing its request for an exemption to the requirements set out in the *Commercial Fisheries Licensing Policy for Eastern Canada – 1996*, Chapter 3, Section 11 (the “CFLP” or the “Policy”). The Minister refused to reissue three (3) herring weir licenses (the “Licenses”),

that is Licenses numbered 140049, issued in 1987; 140048, issued in 2015; and 140085, issued in 1996.

[2] Pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 (the “Rules”), the Attorney General of Canada is the Respondent (the “Respondent”) to this application.

[3] In its application for judicial review the Applicant seeks the following relief:

1. An order quashing the Decision as unreasonable or incorrect;
2. An order referring the matter back to the Minister for a determination in accordance with such directions as the Court considers to be appropriate;
3. Costs of this application; and
4. Such further and other relief as this Honourable Court deems to be just and appropriate.

II. BACKGROUND

A. *The Certified Tribunal Record*

[4] The following facts and details are taken from the affidavits filed by the parties and from the Certified Tribunal Record (the “CTR”).

[5] The Respondent produced the Certified Tribunal Record, pursuant to Rule 318 of the Rules. Ms. Caroline Quinn, Chief of Staff to the Deputy Minister of the Department of Fisheries and Oceans (the “DFO” or the “Department”) certified as follows:

I, Caroline Quinn, Chief of Staff to the Deputy Minister of the Department of Fisheries and Oceans, of Ottawa, in the Province of Ontario, certify that the documents attached to this certificate are true copies of the materials that were considered by the Honourable Joyce Murray, Minister of Fisheries and Oceans and the Canadian Coast Guard when her decision on the Applicant's request for an exception to the requirements set out in the Commercial Fisheries Licensing Policy for Eastern Canada was made on November 8, 2022.

Attachment	Title or Description of Document
	2021-201-00057 – Memorandum for the Minister – Appeal to the Atlantic Fisheries Licence Appeal Board
Tab 1	Atlantic Fisheries Licence Appeal Materials
Tab 2	Atlantic Fisheries Licence Appeal Board Case Summary and Recommendation
Tab 3	DFO Analysis of AFLAB Recommendations
Tab 4	Justice Canada Memorandum for Sarah Chamberlain, Regional Fisheries Management Officer, Maritimes Region, DFO

Tab 5

November 8,
2022 Letter from
Minister of
Fisheries and
Oceans to
Helshiron
Fisheries Ltd.

Advice to the
Minister – Appeal
to the Atlantic
Fisheries Licence
Appeal Board

B. *The Affidavits*

[6] The Applicant filed three affidavits in support of this application and the Respondent filed one affidavit in response.

[7] The Applicant filed the affidavits of Mr. Morton Benson, sworn on February 14, 2023; the affidavit of Ms. Susan Benson sworn on February 14, 2023; and the affidavit of Mr. Stacy Brown, sworn on February 15, 2023.

[8] The Respondent filed the affidavit of Ms. Shannon Spence, sworn on March 16, 2023.

[9] Mr. Benson is the President, Chief Executive Officer and Director of the Applicant. In his affidavit, he deposed to the history of its business, that is as a family-owned fishing company. He also deposed to the circumstances that led to the Applicant's failure to renew its Licenses in 2016.

[10] As well, Mr. Benson deposed to the Applicant's pursuit of the appeal processes available under the CFLP, first before the Regional Licencing Appeal Committee (the "RLAC") and then before the Atlantic Fisheries Licence Appeal Board (the "AFLAB").

[11] Mr. Morton Benson is the President, Director and Chief Executive Officer of the Applicant. He began working with the company in 1985.

[12] Mr. Benson deposed that the Applicant is a family-owned fishing company, in operation since 1971. Until 2016, the company held licenses to fish herring at weir locations at Nubble, Prescription and King, formerly known as "Shag Rock". He deposed that the licenses had been renewed annually since 1996, for a fee of \$100.00 per license.

[13] Mr. Benson deposed that around 2016, the Applicant was not building weirs due to a shortage of herring in the area but continued to hold the licenses in anticipation of building weirs "when it made business sense to do so".

[14] Mr. Benson deposed that the herring fishery brought a financial benefit to the Applicant, as well as a source of bait for the lobster fishery.

[15] Mr. Benson deposed that when he learned that the license fees had not been paid by December 31, 2016, he informed DFO that there "had been an oversight in the renewal process". According to his affidavit, the oversight was due to the change to the National Online Licensing

System (“NOLS”) whereby renewal licenses were no longer sent out by email and the licenses were no longer printed out.

[16] Mr. Benson also deposed that during that time, there were changes in office staff. The effect of these changes, that is with the introduction of NOLS and internal office changes, led to the failure to pay the license fees.

[17] Mr. Benson also deposed that around this time that the Applicant “lost” three lobster licenses. These licenses were restored.

[18] Mr. Benson deposed that the Applicant’s request for the restoration of the three licenses was supported by Connors Bros., a local fishing company, and the Grand Manan Fishermen’s Association Inc., as appears from letters from each entity dated November 29, 2019.

[19] Mr. Benson deposed that the loss of the three licenses had an impact on the Applicant’s business since it lost the opportunity to sell its herring catch or to use it for bait.

[20] Mr. Benson deposed that following the hearing before the AFLAB, he understood that a decision would be made by the Minister within two weeks but no decision was forthcoming for more than two years. In that period, the Applicant could not fish the licenses.

[21] Mr. Benson deposed that one of the licenses was held in a partnership whose income was also affected by the loss of the license.

[22] Mr. Benson deposed that while it is possible to buy weir licenses to replace the three that were “lost”, it would take time to find such replacement licenses and each would cost approximately \$10,000.00.

[23] Ms. Benson is the main office administrator of the Applicant. She has held that position for twenty years. She too deposed to the circumstances surrounding the loss of the Licenses.

[24] Ms. Benson deposed that around early January 2019, she learned that the three licenses had not been renewed. She deposed that there was no invoice or reminder about the license renewal, so that the renewal was overlooked when the Applicant changed staff and emails around 2018.

[25] Ms. Benson deposed as well that the Applicant was not building weirs at the time, so the license renewal was overlooked.

[26] Ms. Benson deposed that there was no record of notification from DFO. When she realized that the licenses were “gone”, NOLS was checked for any notifications and none were open or read.

[27] Mr. Brown provided an affidavit in support of the within application for judicial review.

[28] Mr. Brown deposed that he is the owner of Sea Dream Fisheries Limited and holds a herring weir license. He deposed that he inadvertently failed to pay the license fee in 2013 and

the license was not “offered for renewal” in 2014. He deposed that he had fished the license since 2010.

[29] Mr. Brown deposed that he ultimately appealed to the AFLAB and his appeal was heard on March 29, 2019. He deposed that participants in the herring fishery supported his request for the reinstatement of the herring license. He attached three letters to his affidavit.

[30] The first letter, dated March 22, 2019, from Connor Bros. Clover Leaf Seafoods Company noted problems with the NOLS and the lack of notices about license renewal.

[31] The second letter, dated March 26, 2019, from the Grand Manan Fishermen’s Association Inc., was submitted in support of Mr. Brown’s appeal to the AFLAB. The Association also expressed concern about the NOLS.

[32] The third letter, dated March 26, 2019, was written by Ms. Karen Ludwig, then the Member of Parliament for New Brunswick Southwest, was addressed to Minister Jonathan Wilkinson and his Parliamentary Secretary, Mr. Sean Casey. Ms. Ludwig expressed support for the renewal of Mr. Brown’s herring weir license and noted problems with the absence of a written or automated warning notification about license renewal.

[33] Mr. Ludwig also commented on the level of computer literacy required by the NOLS is higher than the basic level held by most participants in the fishery.

[34] Mr. Brown deposed that on June 27, 2019, the then Minister of Fisheries and Oceans Wilkinson authorized the reissuance of his herring weir license.

[35] None of these deponents were cross-examined upon their affidavits.

[36] Ms. Spence, as of the date of swearing her affidavit was a Regional Manager, Licencing Policy and Operations in the Maritimes Region with DFO. She attached a number of exhibits to her affidavit, including a copy of the Policy, and the decisions of the RLAC and the AFLAB.

[37] In her affidavit, Ms. Spence described the fisheries management considerations that lie behind the decisions to issue licences, as well as the rationale behind the policy that requires annual renewal of licenses.

[38] Ms. Spence also addressed the details of the NOLS and the appeal processes available under the CFLP, and the Decision.

[39] Ms. Spence deposed that the Applicant maintained and renewed the Licenses every year from their issuance up to 2015. It did not operate weirs every year.

[40] In 2014, the Department changed its processes to require the renewal of licenses and payment of the related fees by means of the NOLS. The Applicant renewed the Licenses, paying the renewal fee of \$100.00 per license, in 2014 and 2015.

[41] The Applicant did not pay the renewal fees for the Licenses in 2016. It claims that it did not receive a physical renewal notice nor an email reminder. It also claims that due to changes in offices and staff, clerical errors occurred that led to the failure to renew the licences.

[42] Ms. Spence deposed that the NOLS provides that users are to be notified by email when they will receive a notification from NOLS.

[43] Upon cross-examination, Ms. Spence acknowledged that there had been some problems with the notifications following the introduction of the NOLS system. She testified that this system was implemented in 2015/16. She testified that the fishing industry requested the reinstatement of notifications about license renewals.

[44] Ms. Spence opined that the failure to log into the system and pay the license fees over an extended period of time would be sufficient grounds to not renew a licence. She testified that each case was considered on an individual basis, and was unable to say why there was a different result in the case of Mr. Brown.

[45] Ms. Spence focused on the nature of a license, that it is a “privilege” not a right. She testified that it was “fair” to say that a license holder would have a reasonable expectation that the license would be renewed. She offered the opinion that it was unusual for a license to be held for a long time without being used, although she apparently countered that view by saying it was “very common” to hold herring licenses inactive for “a period of time”.

[46] Ms. Spence, in cross-examination, offered the view that the Applicant could buy another herring weir license.

[47] Ms. Spence acknowledged that the RLAC was independent of DFO management. She testified that the briefing note prepared for the Minister after the AFLAB hearing and decision was prepared by the Senior Advisor, then reviewed by her and reviewed again by the Director of Resource Management and Licensing.

C. *The Appeals*

[48] Ms. Julia McCleave, Senior Advisor, Resource Management Policies, Fisheries and Oceans, Maritimes Region, signed a letter dated February 4, 2019, advising that the Applicant's request to appeal was refused. In part the letter provides as follows:

In keeping with the provisions outlined in s.34 of the Commercial Fisheries Licensing Policy for Eastern Canada 1996 and the Appeal Guidelines, a fisher's reason for appealing a decision must be substantive, such as alleged extenuating circumstances and/or alleged incorrect application of licensing policy. The circumstances outlined in your written request for appeal do not constitute extenuating circumstances. Thus, in keeping with the policy requirements it is my responsibility to inform you that you do not meet the eligibility criteria for access to the appeal system.

[49] By a letter dated May 23, 2019, Counsel for the Applicant responded, requesting clarification of Ms. McCleave's comment that "a fisher's reason for appealing a decision must be substantive, such as alleged extenuating circumstances". Counsel also asked for confirmation of the "scope and meaning of extenuating circumstances" as interpreted and applied by the Department in connection with licensing appeal requests.

[50] By an email dated August 7, 2019, Ms. McCleave replied in the following terms:

You asked me to confirm the scope and meaning of “extenuating circumstances” as interpreted and applied by the Department in connection with licensing appeal requests. Extenuating circumstances are situations outside of the appellant’s control, and include “unusual or extraordinary events that prevent performance”. The circumstances are linked to the reason(s) why the appellant cannot meet the policy. If a request for appeal is accepted to proceed to the Regional Appeal Committee, it is up to the appellant to provide all supporting documentation in support of what they are claiming.

[51] Ultimately, the Applicant’s request for an appeal was accepted and the appeal was heard before the RLAC on December 11, 2019. According to its decision, the following persons attended the hearing:

- Chairperson: Mike Campbell
- Committee Members: Lynn Cullen, Bob. St-Laurent
- Departmental Caseworker: Julia McCleave, Regional Senior Fisheries Management Officer
- Board Liaison Officer: Glenn MacKay, Regional Senior Fisheries Management Officer
- Appellant and/or Appellant’s representative: Morton Benson (appellant), Susan Benson (appellant), Sarah Shiels (counsel)

[52] The RLAC made the following recommendation:

The Committee recommends to the Regional Director General that an exemption to policy for Helshiron Fisheries, due to extenuating circumstances, be granted and that Herring weir licences # 14049 [sic], 140085, and 140048 be made available to Helshiron Fisheries for renewal.

The Committee bases its recommendation on the following factors:

- The company had a turnover in staff during the 2016 season and this seemed to have contributed to the missing payments. They also switched buildings and installed a new computer system. The case seems more about an administrative oversight than avoidance of payment.
- Helshiron Fisheries had an excellent history of payment for the three licences in question and are long time licence holders.
- The timing of the renewal notices issued for the person tasked with renewing the licences. The 2015 and 2016 renewal notices were both sent in the same year.

The Committee would like to note that the extenuating circumstances above may not be in concordance with the guidance received from Licensing Policy and Operations. The Committee does believe, however, that allowing Helshiron Fisheries to renew the licenses is a reasonable solution to the situation.

[53] Following receipt of the decision of the RLAC, Ms. Annette Daley, then the Regional Director, Fisheries Management, Maritime Region, prepared a three page Memorandum dated March 11, 2020 for consideration by the Regional Director General. Page 1 of that Memorandum contains a recommendation, as follows:

Herring weir licences 140048, 140049, and 140085, previously issued to Helshiron Fisheries Limited, were not offered for renewal in 2017 because the 2016 licence fees were not paid. The licence fees were available to pay in the National Online Licensing System (NOLS) from December 09, 2015 to December 31, 2016.

RLAC is recommending to you that licences 140048, 140049, and 140085, be re-instated to Helshiron Fisheries Limited based on extenuating circumstances.

It is recommended that you do not accept the recommendation of RLAC and that the request of Helshiron Fisheries Limited for the re-instatement of licences 140048, 140049, and 140085, be denied

because the circumstances presented by Helshiron Fisheries Limited do not constitute extenuating circumstances.

If you concur, your signature is required on the attached draft letter which will be sent to Helshiron Fisheries Limited to inform the company of your decision. If you wish to accept the recommendation of RLAC, another letter has been prepared for your signature.

[54] The closing paragraph of the Memorandum provides as follows:

With regards to the allegations raised by Helshiron Fisheries that there was an incorrect application of licensing policy and the concerns raised regarding procedural fairness, Licensing Policy and Operations agrees with RLAC in its determination that these are not grounds for an exception to the policy.

[55] I note that the last sentence of this paragraph is redacted.

[56] The Regional Director General ticked the box that says “I concur with the recommendation”.

[57] By a letter dated February 20, 2020, the Regional Director General communicated her decision to the Applicant. That letter provides in part as follows:

The Committee reviewed the information provided with respect to extenuating circumstances. I am writing today to inform you that I have denied Helshiron Fisheries request for an exception to the requirements set out in *Commercial Fisheries Licensing Policy for Eastern Canada, 1996, Chapter 3, Section 11*.

[58] By a letter dated February 21, 2020, Counsel for the Applicant requested an appeal of the decision of the Regional Director General.

[59] By an email dated August 4, 2020, Counsel for the Applicant wrote to Ms. Sarah Chamberlain, Board Liaison Officer with the AFLAB, forwarding an email chain received from Ms. Bonnie Morse of Grand Manan Fishermen's Association, relating to problems with email notifications from the NOLS. The emails date back to December 2014 and include emails exchanged with DFO, Maritimes Region.

[60] Counsel for the Applicant wanted to add this email chain to the material to be presented to the AFLAB.

[61] The appeal before the AFLAB was heard by teleconference on August 18, 2020. The following persons attended:

- Chairperson: Eric Allaby
- Committee Members: Bill Powers, Chris Boyd
- Departmental Caseworker: Julia McCleave, Regional
Senior Fisheries Management Officer
- Board Liaison Officer: Sarah Chamberlain, Licensing
Policy and Operations
- Appellant: Morton and Susan Benson for Helshiron
Fisheries Ltd.
- Appellant's Representative: Sarah Shiels, Legal
Representative; Bonnie Morse, Grand Manan
Fisherman's Association

[62] In its decision dated September 23, the AFLAB reviewed the evidence and submissions made on behalf of the Applicant and DFO. It identified two issues for decision: first, was the Applicant treated fairly in accordance with the licensing policies, practices and procedures of the Department and second, did extenuating circumstances “exist for deviation from established policies, practices and procedures”.

[63] With respect to the first issue the AFLAB said that the Applicant was treated “fairly”, insofar as it had the same access to the appeals process as “any harvester”. However, it added a cautionary note as follows:

However, AFLAB feels that this type of appeal could be avoided if harvesters are sent a follow up message of some sort before the licences are cancelled.

[64] The AFLAB found as follows with respect to the second issue:

AFLAB has determined that there are extenuating circumstances that exist for deviation from the licence fee payment policy. AFLAB agrees with RLACs original rationale provided to the RDG that staff turnover, switching buildings, new computer systems contributed to a situation where the issue is one of administrative oversight versus deliberate avoidance of payment. In addition, the history of fees being paid consistently in the past indicates that this was not a deliberate non-payment. Finally, AFLAB determined that, since neither DFO nor the appellant can confirm that the email was sent from the NOLS system, the lack of notification can be considered an extenuating circumstance in and of itself. Since a notification is supposed to be sent, the absence of one is a circumstance outside of the appellant's control that contributed to them not realizing the licence fee was available to be paid, especially given the administrative transition that the company was undergoing at the time.

D. *Post-Appeal*

[65] The Department reviewed the AFLAB decision and prepared a briefing note, in the form of a memorandum. According to the cross-examination of Ms. Spence, this memorandum was reviewed by upper management, legal counsel and the Deputy Minister. Since the Minister was the decision maker in this case the briefing note was ultimately sent to her.

[66] Part 1 of this memorandum contained a summary as follows:

The Department's concern arises with the Board's second finding, that a period of administrative change or "administrative oversight" would be considered an extenuating circumstance that would warrant a deviation from policy. In the Department's view, these are not extenuating circumstances in this particular case. Additionally, the Department does not agree that the presence or absence of the notification email from NOLS, or the lack of a reminder from the Department, has any bearing on the licence holder's responsibility to renew a licence each year. Helshiron Fisheries LTD. is a long-standing participant in the fishing industry and would be well aware of the requirement to renew licences via their application and payment of fees through NOLS on an annual basis. Finally, Helshiron Fisheries LTD. neglected to renew the licences for many years, failed to contact DFO during the intervening years, and these licences have not been fished since 2007. This is not an extenuating circumstance justifying an exception to the CFLP.

[67] Mr. Benjamin Longpré prepared a Memorandum dated March 26, 2021 for Ms. McCleave and Ms. Chamberlain. At this time, Ms. Chamberlain was the Regional Fisheries Management Officer, Maritimes Region, DFO. This Memorandum is found in the CTR. Page 1 of the Memorandum is blacked-out. The bottom of the page contains the following note "Subsequent 9 pages of this document omitted for solicitor-client privilege".

[68] An undated “Confidential Advice to the Minister” was prepared by Mr. Liam MacKinnon. The Advice was prepared for the purpose of getting a decision from the Minister following the appeal to the AFLAB. Among other things, the note addresses “Key Political Issues”, “Key Political Considerations” and “Political Recommendations & Next Steps”. Under this last heading, Mr. MacKinnon wrote:

We recommend that you do not concur with the department, and rather agree with AFLAB, and reinstate the licences.

While the requirement to pay an annul fee for a licence is a fundamental component of DFO policy, so too is the independent, arms length analysis of AFLAB who have found that extenuating circumstances exist in this case.

In addition to the points outlined in the departmental memo, the National Online Licensing System (NOLS) was implemented in the years proceeding this non-payment, and the 2015/2016 window was the first time paper notices to renew were not issued. It's understandable that during this change in renewal systems, that oversights could happen. To quote from the AFLAB decision, *"this is a "situation where the issue is one of administrative oversight versus deliberate avoidance of payment."* Further, AFLAB *"determined that, since neither DFO nor the appellant can confirm that the email was sent from the NOLS system, the lack of notification can be considered an extenuating circumstance in and of itself. Since a notification is supposed to be sent, the absence of one is a circumstance outside of the appellant's control that contributed to them not realizing the licence fee was available to be paid, especially given the administrative transition that the company was undergoing at the time."* We agree.

In previous appeal cases you have received, all three groups (AFLAB, DFO, and MinO) have been in agreement on the outcome. Those are obviously easier to decide.

[69] The last paragraph of this Advice provides as follows:

This is a minor decision. Either way you choose to go, it will not be a large political issue. This is about three commercially low-valued licences, in one community, with limited impacts either way you decide.

[70] The Minister accepted the recommendation from the Deputy Minister and signed the decision. That decision provides, in part, as follows:

After careful review and consideration of all the relevant information pertaining to your licensing case, including your representations, the materials submitted to AFLAB, and AFLAB's recommendations, I am of the view that the circumstances you have put forward do not constitute extenuating circumstances that would warrant making an exception to [the CFLP] in this case.

...

I have therefore decided that your request for the issuance of herring weir licences 140049, 140048, and 140085 will not be approved.

III. SUBMISSIONS

A. *The Applicant's Submissions*

[71] The Applicant argues that the Decision is unreasonable because it does not show appreciation of the facts and the reasons are inadequate. It submits that the Minister failed to engage with the facts and carry out an adequate analysis.

[72] The Applicant also contends that the Minister acted arbitrarily.

[73] Finally, the Applicant argues that the Minister breached its rights to procedural fairness by relying on two memoranda prepared by DFO that were not disclosed to it, thereby depriving it of the opportunity to make submissions on those memoranda.

B. *The Respondent's Submissions*

[74] The Respondent notes that presumptively, the Minister considered all the relevant information. It submits that the “central issues” were the Applicant’s legitimate expectation of receipt of a renewal notice and extenuating circumstances.

[75] The Respondent submits that the Minister addressed these issues by discussing the CFLP and the Applicant’s failure to contact DFO for three years after its failure to renew the licenses.

[76] The Respondent disputes the argument that the Minister failed to engage with the facts. He argues that the Decision outlines the key facts and shows an evidentiary basis for the conclusion.

[77] The Respondent submits that the content of procedural fairness due in respect of a licensing decision is low.

IV. DISCUSSION

[78] This application for judicial review does not raise questions of law. Following the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653, the applicable standard of review is reasonableness.

[79] For any issues of procedural fairness, the standard of correctness will apply; see the decision in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 S.C.R. 339.

[80] The overriding context for this application is the *Fisheries Act*, R.S.C. 1985, c. F-14 (the “Act”). Subsection 7(1) of the Act gives the Minister absolute discretion about the issuance of licenses and provides as follows:

7 (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

7 (1) En l’absence d’exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, délivrer des baux et permis de pêche ainsi que des licences d’exploitation de pêches — ou en permettre la délivrance —, indépendamment du lieu de l’exploitation ou de l’activité de pêche.

[81] The CFLP applies to commercial fishing licenses. Section 6 sets out certain objectives of the Policy including the encouragement of sustainable harvesting of the fishery resource, encouragement and fostering of the greater economic viability of the fisheries. Subsection 6.1(1) provides as follows:

6.1 (1) In the management of fisheries, the Minister shall implement measures to maintain major fish stocks at or above the level necessary to promote the sustainability of the stock, taking into account the biology of the fish and the environmental conditions affecting the stock.

6.1 (1) Dans sa gestion des pêches, le ministre met en œuvre des mesures pour maintenir les grands stocks de poissons au moins au niveau nécessaire pour favoriser la durabilité des stocks, en tenant compte de la biologie du poisson et des conditions du milieu qui touchent les stocks.

[82] The Policy addresses the “practicalities” of the issuance of licenses. Section 11(2)

requires the annual payment of a fee to keep a license viable. It provides as follows:

Except where a fishery is closed for conservation purposes, licence renewal and payment of fees is mandatory on a yearly basis in order to retain the privilege to be issued the licence.

[83] The Policy gives access to an appeal process, pursuant to section 34 that provides as follows:

Persons who are not satisfied with decisions regarding licensing taken by DFO officials have the right of appeal. Only eligible inshore fishers who file a written request within three years of a departmental licensing decision or a change in policy have access to the Fisheries Licence Appeal System.

[84] According to section 34 of the CFLP, the appeal process is not available by right, but by request. The Request, dated January 23, 2019, submitted by the Applicant provides as follows:

To be completed by an appellant who is seeing [sic] an exception to policy based on a Licensing decision. To be eligible for an appeal, the reason for an appeal must fall within one of the following categories

(check one)

- ☒ Extenuating Circumstances
- ☐ Incorrect interpretation of licensing policy
- ☐ Incorrect application of licensing policy

[85] The Policy allows for exemptions from the general rule that licenses must be renewed on an annual basis, upon payment of the prescribed fee.

[86] The Policy provides an appeal process before tribunals that are independent of the Department. The appeal process is not available as of “right”. At subsection 34(1), the Policy outlines that a request must be made to appeal.

[87] In this case, the Applicant’s “request” for an appeal was refused by Ms. McCleave, on the grounds that it had not shown extenuating circumstances. With the assistance of Counsel, the Applicant made submissions and ultimately, the appeal proceeded.

[88] At the first stage, the RLAC recommended that the licenses be reissued to the Applicant.

[89] As noted above, in a memorandum prepared by DFO, the Department recommended that the Regional Director General (the “RDG”) reject the recommendation of the RLAC. The RDG followed the advice of the Department.

[90] Upon appeal from the decision of the RDG, the AFLAB also recommended that the licenses be reissued to the Applicant. Notably, the AFLAB expressed some concern about the fairness of the process at that stage, involving the lack of a follow up message sent before the licences were cancelled.

[91] According to the CTR, the recommendation of the AFLAB was reviewed by the Department. The CTR contains a legal opinion prepared for DFO. This document is redacted and solicitor-client privilege was claimed.

[92] The CTR also contains an “Advice” to the Minister by Mr. McKinnon. Again, the recommendation was in favour of reissuing the licenses.

[93] Once again, the Minister did not accept the positive recommendation.

[94] It is recognized that the Minister enjoys broad discretion in the matter of licensing, as addressed by the Supreme Court of Canada in the decision of *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12. However, that discretion must be exercised reasonably.

[95] In my opinion, the Decision does not meet the standard of reasonableness as set out above. While the Minister sets out the facts, she does not address why they do not constitute extenuating circumstances and does not explain why an exemption that was granted in similar circumstances, that is for Mr. Brown and Sea Dream Fisheries Limited, can be distinguished from the Applicant’s situation.

[96] The Minister does not give reasons for not following the recommendations of the AFLAB or of Mr. McKinnon. In *Wilkinson v. Canada* (2014), 460 F.T.R. 175 the Court said the following about the departure of a decision-maker from the decision of a Classification Grievance Committee:

... In the case at hand, the Deputy Head chose to disagree with the conclusion reached by the Committee. That is certainly his prerogative although it is not often the case as acknowledged by the respondent. Hence it is possible for the decision of the Deputy Head to fall within the range of outcomes which are possible and acceptable because they are defensible in respect of the facts and

the law. However, one will expect that such departure will be justified in order to meet the standard of reasonableness. This decision under review did not reach the necessary standard.

...

In a case like this one, the reasons given to depart from a well-articulated recommendation must be intelligible, in the sense that they "are able to be understood" (The Canadian Oxford Dictionary, 2001, sub verbo, "intelligible"). With great respect, the decision does not have that measure of intelligibility. It seems to contemplate statements made with respect to degrees 7 and 6 as if they related to degrees 6 and 5. If that is not what the decision actually meant, the respondent has been incapable of enlightening the Court either by providing an alternate meaning. The respondent also seems to rely on "the intention behind ... the position" in order to take the analysis outside of the job description that is at the heart of the grievance adjudication. Finally it faults the Committee for not having considered the organizational context, where it would appear that the Committee considered that context. If the Deputy Head disagreed with the findings on that account, he did not express where his disagreement lies. At the end of the day, this reviewing court is left without understanding "why the tribunal made its decision" (*N.L.N.U.*, *supra*, para 16).

[97] I also refer to the decision in *Ross v. Canada (Minister of Justice)* (2014), 453 F.T.R. 56

where the Court said the following:

Mr. Pringle was the Minister's delegate to conduct the investigation under s 696.2(3) of the Code. It was open to the Minister not to accept Mr. Pringle's advice and views in making the ultimate decision. However, in light of his departure from Mr. Pringle's advice, to meet the standard of reasonableness the Minister was under a heightened duty to explain the reasons for his disagreement. [citations omitted]

[98] I refer, as well, to the decision in *Séguin v. Canada (Attorney General)*, 2021 FC 45

where the Court said the following:

Finally, reasonableness review is concerned with context: what constitutes a reasonable decision "will always depend on the

constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov* at para 90). In instances such as these, where a Deputy Head chooses to depart from the recommendations of the CGC, such a departure must be justified in light of the CGC's expertise (*Wilkinson 1* at paras 20, 40; see also *Wilkinson v. Canada (Attorney General)*, 2020 FCA 223 (F.C.A.) at paras 19-21).

[99] In the present case, the Applicant does not challenge the creation or substance of the Policy. It challenges the decision that was made under the Policy.

[100] I agree with the Applicant the decision does not show appreciation of the facts. I note the comments of the Minister at page 1 of the decision:

While I do understand that there were a number of administrative difficulties with staff turnover and a new computer system, there is no evidence to suggest that any effort was made to contact DFO between 2016 and 2019 for assistance in renewing the licences.

[101] This observation of the Minister is troubling. It suggests a lack of understanding of the Applicant's evidence, its circumstances, and the recommendation of both the RLAC and the AFLAB.

[102] The Respondent argued that administrative decision-makers seek consistency in their decisions.

[103] In my opinion, such consistency does not appear here, considering that the situation of Mr. Brown and his company was treated differently. There is merit in the Applicant's submissions about apparent arbitrariness.

[104] The Applicant pleads a breach of procedural fairness arising from the fact that the CTR contained two memoranda prepared within the Department that were not disclosed to it.

[105] The first memorandum was forwarded to the RDG following the decision of the RLAC. It is included in the materials relating to the appeal from the RLAC to the AFLAB. The second memorandum was sent to the Minister by the Deputy Minister after the decision of the AFLAB.

[106] According to the CTR, the second memorandum was reviewed by the Minister when she made the decision.

[107] I am not persuaded by the Applicant's submissions that the non-disclosure to it of the two departmental memoranda gives rise to a breach of procedural fairness.

[108] I refer to the decision in *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504, where the Supreme Court of Canada said the following at paragraph 40:

In determining the content of procedural fairness a balance must be struck. Administering a "fair" process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on "erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion" (Brown and Evans, at p. 7-3; see also D. J. Mullan, *Administrative Law* (2001), at p. 178).

[109] In *Violator no. 10 v. Canada (Attorney General)*, 2018 FCA 150, Justice de Montigny (as he then was) said the following at paragraphs 40-43:

[40] The appellant's first argument in its written representations was that the deputy director had not conducted an independent

examination of the file and simply fully adopted and blindly approved the recommendation of a senior officer of FINTRAC. It claims that the deputy director thus abdicated her role and left it to a subordinate to make the decision that she alone had the authority to make.

[41] The judge was correct to reject that allegation. The Supreme Court has long recognized that administrative decision-makers are not required to personally perform all of the tasks conferred upon them by the legislation, and that they may delegate to administrative staff certain tasks upon which informed decision-making necessarily depends, such as the gathering and analyzing of evidence: see *The Queen v. Harrison*, 1976 CanLII 3 (SCC), [1977] 1 S.C.R. 238 at pages 245-246, 66 D.L.R. (3d) 660 [Harrison]. This was precisely the situation in the Supreme Court's decision in *Baker*, where a senior immigration officer had made the impugned decision on the Minister's behalf on the basis of notes that a subordinate immigration officer had given him.

[42] In a modern and complex state like ours, as the Supreme Court reiterated more than forty years ago in *Harrison*, it is unreasonable to expect that the person designated in the legislation to perform certain duties will perform all of them personally. Such a requirement would cause chaos, lead to interminable delays and be inefficient. Justice Rothstein (then of the Federal Court) stated the following in *Armstrong v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 1994 CanLII 3459 (FC), [1994] 2 FC 356 at paragraph 59, 73 F.T.R. 81 (affirmed by this Court in 1998 CanLII 9041 (FCA), [1998] 2 FC 666):

Fourth, it is not realistic for the Commissioner to make appeal decisions in discharge matters without delegating to his subordinates some of the work involved in preparing the material in a manner to enable him to expeditiously perform his function. In this case, Sgt. Swann states, in her affidavit, that she spent approximately 250 hours reviewing and preparing the résumé. It is to be expected that the Commissioner of the RCMP would require such assistance, it not being practical for him to expend that amount of time reviewing the material in discharge, grievance or disciplinary matters appealed to him. Such delegation does not, of itself, imply that the Commissioner did not put his mind, independently, to the decision-making process.

[43] What is essential is that the person designated to make a decision or his or her delegate personally consider the file and adopt the recommendations that have been made. In other words,

the decision-maker designated in the legislation is always responsible for making the final decision after obtaining sufficient knowledge of all aspects of the issue. That is precisely what the deputy director did in this case.

[110] The discussion above is apposite to the present case.

[111] If departmental memoranda were to be circulated to interested persons or parties before a Court, it is easy to imagine a continuing round of submissions and counter-submissions. That is undesirable in the interests of the administration of the laws of Canada and in the administration of policies created under those laws.

[112] I am not persuaded that there was a breach of procedural fairness resulting here from the transmission of those memoranda and the Minister's consideration of them.

[113] I note that in the present case, a Confidential "Advice" was prepared for the Minister by Mr. McKinnon. I also note that Mr. McKinnon considered the "pros and cons" of various factors, and ultimately recommended that the licenses be reissued.

[114] This recommendation is consistent with the recommendations of both the RLAC and the AFLAB. The Minister did not explain why she did not follow those recommendations. She was not bound to follow them but in my opinion, and consistent with relevant jurisprudence, her failure to address them renders her decision unreasonable, having regard to the legal context, that is the Act.

[115] If a decision as to the existence of “extenuating circumstance” was wholly in the hands of the Department, the availability of the appeal process would be rendered nugatory.

V. CONCLUSION

[116] In the result, the application for judicial review will be granted. The decision of the Minister does not meet the applicable standard of review, that is reasonableness. It is not justified, transparent, and intelligible. The Minister failed to grasp the evidence about the circumstances of the Applicant and unjustifiably failed to follow the recommendation of the AFLAB, without explaining why.

[117] The Applicant shall have its costs. The parties are encouraged to seek agreement on costs.

JUDGMENT IN T-2608-22

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of November 8, 2022 is set aside and the matter is remitted to the Minister for redetermination. The Applicant shall have its costs.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2608-22

STYLE OF CAUSE: HELSHIRON FISHERIES LTD. v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: OCTOBER 22, 2024

REASONS AND JUDGMENT: HENEGHAN J.

DATED: APRIL 22, 2025

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