Federal Court Cour fédérale

Date: 20170505

Docket: T-138-16

Citation: 2017 FC 459

Ottawa, Ontario, May 05, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KIRBY ELSON

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

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[1] This is an application for judicial review of a decision by the Minister of Fisheries and Oceans, accepting the recommendation of the Atlantic Fisheries Licence Appeal Board ("Appeal Board"), and denying the Applicant's appeal in which he sought to be granted an exemption from the Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries policy ("PIIFCAF Policy" or "Policy"). As a result, the Applicant was no longer eligible to have the fishing licences held by him reissued. This application is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

Background

[2] The *Department of Fisheries and Oceans Act*, RSC 1985, c F-15 established the Department of Fisheries and Oceans ("DFO") and sets out the powers, duties and functions of the Minister of that department. These extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other federal department, board or agency, relating to the sea coast and inland fisheries, fishing and recreational harbours, hydrography and marine sciences, and the coordination of policies and programs of the federal government respecting oceans (s 4(1)). Pursuant to s 7 of the *Fisheries Act*, RSC 1985, c F-14 ("*Fisheries Act*") the

Minister may, in his absolute discretion, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

[3] Over the years, the DFO has established various policies pertaining to management of the fishery. One of these is the *Commercial Fisheries Licencing Policy for Eastern Canada*, 1996 ("1996 Policy") which has been revised over time but remains in effect. The 1996 Policy describes a fishing licence as an instrument by which the Minister, pursuant to his or her discretionary authority under the *Fisheries Act*, grants permission to a person to harvest certain species of fish, subject to the conditions attached to the licence. This is not a permanent permission and terminates upon expiry of the licence. The licence holder is essentially given a limited privilege, rather than any kind of absolute or permanent right or property. Generally speaking, all fishing licences must be renewed, or "replaced", annually.

[4] Incorporated within the 1996 Policy are the Owner-Operator Policy and the Fleet Separation Policy. The Fleet Separation Policy was introduced in 1979 to separate the fish harvesting and fish processing sectors of the industry. Under that policy, new fishing licences for fisheries pursued by vessels of less than 65' in length would not be issued to corporations, including those involved in the processing sector of the industry. Under the Owner-Operator Policy, which was introduced in the 1970s, licences would be issued in the name of an individual fisher, licence holders were required to fish their licences personally, and were limited to holding one licence per species.

[5] During consultations arising from the 1999 Atlantic Fisheries Policy Review ("AFPR"), concerns were expressed by members of the inshore fleet that the Fleet Separation and Owner-Operator Policies were being undermined by "trust agreements". In November 2003, the Minister announced his intent to release a discussion document which would form the basis of public consultations concerning trust agreements and the Owner-Operator and Fleet Separation Policies. A news release indicated that the DFO would examine all options, including the possibility of regulations, to deal with the trust agreements which were counter to DFO policy. A discussion paper entitled *Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries* followed. It noted that a fishing licence reflects a privilege to fish, which is granted annually at the absolute discretion of the Minister pursuant to the *Fisheries Act*. This is a limited permission to fish constrained by the conditions of the licence. When the licence expires, the privilege to fish terminates. The paper noted that some licences issued to individuals had become the subject of trust agreements which are entered into between the licence holder and a fish processor or other third party. The trust agreements are private contracts, which are binding on the parties to them and often direct the use of the licence by the processor or other third party. Where a licence is the subject of such a trust agreement, the beneficial interest in it is transferred to another party and the legal title remains vested in the licence holder as a bare trustee. Consultation on the discussion paper followed, as did the issuance of *A Policy Framework for the Management of Fisheries on Canada's Atlantic Coast*.

[6] Ultimately, in April 2007, the PIIFCAF Policy was introduced by the Minister who stated that its goal was to strengthen the existing Owner-Operator and Fleet Separation Policies to ensure that inshore fish harvesters remained independent and that the benefits of fishing licences

flowed to the fishers and to Atlantic coastal communities. In the policy statement section, the Policy states that it strengthens the Owner-Operator and Fleet Separation Policies by addressing issues concerning "Controlling Agreements" (trust agreements), a term which it defines. The stated objectives of the PIIFCAF Policy are to reaffirm the importance of maintaining an independent and economically viable inshore fleet; strengthen the application of the Owner-Operator and Fleet Separation Policies; ensure that the benefits of fishing licences flow to the fish harvester and the coastal community; and, assist fish harvesters to retain control of their fishing enterprises. The Policy created the "Independent Core" category as the new eligibility criteria for the receipt of new or replacement vessel-based fishing licences in the Atlantic Canada inshore sector after April 12, 2007. The Independent Core category is available to inshore fish harvesters who are not parties to controlling agreements.

[7] The PIIFCAF Policy states that heads of Core Enterprises, who are not a party to a controlling agreement with respect to any inshore vessel based fishing licences issued in their name, will be eligible to obtain the Independent Core category by filing a declaration stating that they are not a party to a controlling agreement. Declarations were required to be filed by March 31, 2008 and thereafter each time a fish harvester requested a new or replacement inshore vessel-based licence. Licence holders who were a party to a controlling agreement had seven years, until April 12, 2014, within which to comply with the PIIFCAF Policy. Those who did not do so would not be eligible to be categorized as Independent Core and, therefore, would not be eligible to be issued new or replacement licences.

[8] In 2007, the DFO sent an information package to all inshore licence holders to whom the PIIFCAF Policy applied. In February 2008, a second package was sent, to address questions that had been raised, and extending the deadline for the filing of declarations to March 31, 2008.

[9] The Applicant was a party to a controlling agreement with Labrador Sea Products Inc. and Quinlan Brothers Limited. Accordingly, on March 25, 2008, he filed the required declaration with the DFO.

[10] On December 3, 2009, the DFO sent the Applicant a letter advising him that, because he was a party to a controlling agreement, he did not qualify as an Independent Core fish harvester, which categorization was subject to review at any time should the DFO become aware of additional information having an impact on his eligibility. He was advised that he could continue to fish the licences that he held until April 12, 2014, that he could request replacement licences but would not be eligible to receive new or replacement licences until the controlling agreement was terminated, or brought into compliance with PIIFCAF Policy, and that he had the right to appeal the categorization decision. On October 18, 2013, the Applicant received a further letter from the DFO to the same effect.

[11] On March 18, 2014, the DFO sent registered letters to those licence holders who were still in controlling agreements, again reminding them of the PIIFCAF Policy deadline of April 12, 2014, urging them to terminate or amend their controlling agreements to bring them in line with the PIIFCAF Policy, and to file a new declaration to that effect so that they would be eligible for licence renewal. The letter also advised that fishers would have an opportunity to

appeal a decision to deny the renewal of their licences if they remained in a controlling agreement after April 12, 2014. To participate in the appeal, all relevant information, including their controlling agreement was to be submitted to the DFO within 30 days from the time their request to have their licences renewed was denied. The letter stated that the Minister had instructed the Appeal Board to examine controlling agreements submitted for review to determine if there was, in fact, a violation of the Owner-Operator and Fleet Separation Policies that the PIIFCAF Policy was designed to protect. The delivery of the letter was signed for by the Applicant's spouse. A press release to similar effect was issued by the Minister on March 20, 2014.

[12] In early April 2014, the DFO contacted the Applicant and advised him that if he applied for a renewal of his licences prior to April 12, 2014 they would be issued to him for the 2014 season. The Applicant did so and was duly issued the licences. In the fall of 2014, he was again contacted directly by the DFO and advised that his licences would not be renewed in 2015 if he was still subject to the controlling agreement.

[13] On December 31, 2014, the Applicant wrote to the Minister asking for an exemption to the PIIFCAF Policy for his enterprise and that he be given the opportunity to make out a case for such an exemption.

[14] By letter of March 12, 2015, the then Minister of Fisheries and Oceans, Minister Shea, responded stating that, under PIIFCAF, any licences deemed to be in a controlling agreement as of April 12, 2014 would not be eligible for renewal and that the DFO would not be considering

any exceptions to the PIIFCAF Policy. The Minister advised that if the Applicant wished to appeal a non-renewal decision by the DFO he may do so through the Appeal Board and, that upon receipt of an appeal request, a fishing licence may be reissued for an interim period during the appeal process. The Minister requested that he confirm in writing within 30 days if he wished to appeal. The Minister also noted that if the Applicant were to terminate his controlling agreement during the appeal process, his situation would be reassessed at that time.

[15] The Applicant appealed the non-renewal decision to the Appeal Board by a letter to the Minister dated April 10, 2015 and his licences were renewed for 2015.

[16] On June 12, 2015, the DFO faxed a 14-page appeal package, including an appeal case summary, to the Applicant by way of his spouse. On August 28, 2015, an updated package was provided to the Applicant's counsel. On October 21, 2015, the Applicant's counsel provided written submissions and a copy of the Applicant's controlling agreement to the Appeal Board. The hearing was held on the same date at which time the Applicant's counsel made oral submissions.

[17] In its report to the Minister, the Appeal Board outlined the PIIFCAF Policy, the Owner-Operator Policy, the Fleet Separation Policy, and the background facts. It noted the submissions of the Applicant's counsel which included that: the Applicant was seeking an exemption to the PIIFCAF Policy; exiting his controlling agreement may have a significant cost; he may lose his enterprise; the PIIFCAF Policy is an irrational and ineffective policy that will cause financial hardship and that it has been grappled with but rejected in other jurisdictions; it does not

appreciate a fisher who holds a quota but does not have financial assistance; if a fisher is located in Labrador, without an agreement he cannot sell his catch; and, the Policy ties the hands of fishers, limits flexibility and financing and, therefore, makes it more expensive for fishers to operate their enterprise. The Appeal Board stated that it had advised counsel that a discussion of other jurisdictions was beyond its mandate. It asked counsel to put a dollar value on the claimed financial hardship for this to be considered as extenuating circumstances as all fishers are in the same situation, but noted that counsel was unable to do so. The Appeal Board found that the Applicant had been treated fairly in accordance with the DFO Controlling Agreement Policy [*sic*] and had not demonstrated a valid extenuating circumstance to justify upholding the appeal. It recommended that the appeal be denied. On December 18, 2015, in a Memorandum for the Minister, the Associate Deputy Minister recommended that the Appeal Board recommendation be accepted.

[18] By letter to the Applicant dated December 23, 2015, Minister Tootoo denied the appeal.

Decision Under Review

[19] The relevant portion of Minister Tootoo's decision letter of December 23, 2015 ("decision") states:

> This letter is in response to your appeal concerning the licences held in your name that remain subject to a controlling agreement, despite the eligibility requirement provided for by the policy on Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries (PIIFCAF).
>
> The hearing of the Atlantic Fisheries Licence Appeal Board occurred on October 21, 2015. The report of the Atlantic Fisheries Licence Appeal Board, which contains its recommendation, has been submitted to me for my consideration.

> Having considered all relevant information, I have decided to deny the appeal. Therefore, you will not be provided with an exemption to the PIIFCAF policy.
>
> Accordingly, you will no longer be eligible to have the licences reissued to you for the 2016 fishing season and beyond.

Issues

[20] The Applicant identifies the issues as:

(1) Whether the Minister unlawfully fettered his discretion by applying the PIIFCAF Policy to the Applicant without considering his individual circumstances;

(2) Whether the Minister prejudged the Applicant's case; and

(3) Whether the PIIFCAF is *ultra vires* the jurisdiction of Parliament pursuant to s 91(12) of the Constitution Act, 1867, such that the Minister cannot rely upon it for the decision.

[21] The Respondent identifies the issues as:

(1) What is the standard of review?

(2) Was the Minister's decision based on relevant considerations?

(3) Did the Minister reasonably exercise his discretion?

(4) Did the Minister have an open mind?

[22] In my view the issues can be framed as follows:

(1) Which decision(s) is (are) subject to judicial review?

(2) Was the Minister's decision based on relevant considerations?

(3) Did the Minister reasonably exercise, or did he fetter, his discretion?

(4) Did the Minister have an open mind?

(5) What is the appropriate remedy?

Standard of Review

[23] The Applicant did not make written submissions regarding the standard of review but at the hearing before me submitted that the reasonableness standard applied to the issue of the fettering of discretion. The Respondent submits the standard of review is reasonableness and that the Minister's decisions on issuing commercial fishing licences are highly discretionary and are entitled to deference (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 20-25 ("*Stemijon*"); *Malcolm v Canada (Minister of Fisheries and Oceans)*, 2014 FCA 130 at paras 32-35 ("*Malcolm*"); *Boogaard v Canada (Attorney General)*, 2014 FC 1113 at paras 66-68 ("*Boogaard FC*"), reversed by the FCA on other grounds, 2015 FCA 150 ("*Boogaard FCA*")).

[24] I agree that the Minister's decision concerning the issuance of commercial fishing licences is discretionary and subject to a standard of review of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 ("*Dunsmuir")*; *Boogaard FC* at paras 66-68; *Ralph v Canada (Attorney General)*, 2009 FC 1274 at paras 21-22; *Assoc des crevettiers acadiens du Golfe inc c Canada (Procureur general)*, 2011 FC 305 at paras 56-57.

[25] While there has been some uncertainty regarding the appropriate standard of review where the fettering of discretion is at issue, the Federal Court of Appeal has held that, post-*Dunsmuir*, the fettering of discretion should be reviewed on the reasonableness standard. Further, that the fettering of discretion is always outside the range of possible, acceptable

outcomes, and is therefore *per se* unreasonable (*Stemijon* at paras 20-25; *Gordon v Canada (Attorney General)*, 2016 FC 643 at para 27 ("*Gordon*")).

[26] In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

[27] Issues of procedural fairness are reviewed on the correctness standard (*Mission Institute v Khela*, 2014 SCC 24 at para 79; *Canada v Khosa (Citizenship and Immigration)*, 2009 SCC 12 at para 43).

Issue 1: Which decision(s) is (are) subject to judicial review?

[28] The Applicant submits that he seeks judicial review of a decision by the Minister which he submits is comprised of two letters, dated March 12, 2015 and December 23, 2015, written by Minister Shea and Minister Tootoo, respectively, refusing to renew the Applicant's fishing licences. The Applicant did not provide written submissions as to why the Court should consider both letters as one decision, but at the hearing of this matter submitted that whether the letters were treated as one decision or the letter of Minister Tootoo was considered to be the decision under review, made no difference for the purpose of the hearing and that both decisions were made without the Minister exercising his or her discretion.

[29] The Respondent submits that the decision subject to judicial review in this matter is the decision by Minister Tootoo dated December 23, 2015 (Rule 302 of the *Federal Courts Rules,* SOR/98-106; *Pieters v Canada (Attorney General)*, 2004 FC 342 at para 4 ("*Pieters*")).

[30] Rule 302 of the *Federal Courts Rules* provides that, unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought. Put otherwise, only one decision can be challenged on judicial review unless the Court orders otherwise which may be the case where the decisions at issue are closely linked and may be considered as a continuing course of conduct (*Council of the Innu of Ekuanitshit v Canada (Fisheries and Oceans)*, 2015 FC 1298). In this matter, by letter of March 12, 2015, Minister Shea advised that licences deemed to be in a controlling agreement as of April 12, 2014 are not eligible for renewal and that the DFO would not be considering any exemptions to the PIIFCAF Policy, but advised that the Applicant could appeal a non-renewal decision through the Appeal Board. The Applicant did appeal, taking the position that the Minister acted unfairly by applying the PIIFCAF Policy without considering whether his personal circumstances justified the exemption he had sought. The Appeal Board made a recommendation to Minister Tootoo who, by letter dated December 23, 2015, denied the appeal and, accordingly, declined to provide an exemption to the PIIFCAF Policy and stated that the Applicant was no longer eligible to have his licences reissued to him.

[31] This Court has previously held that where a decision under review results from an appeal, the Court should only review the appellate judgment, the original decision is not before the Court (*Pieters* at para 4 citing *Unrau v Canada (Attorney General)*, [2000] FCJ No 1434 (Fed TD);

also see *Lessard-Gauvin v Canada (Attorney General),* 2016 FC 227 at para 10; *Gun v Piikani First Nation*, 2014 FC 908 at para 32). Accordingly, in my view, only the December 23, 2015 is subject to judicial review in this matter.

Issue 2: Was the Minister's decision based on relevant considerations?

Applicant's Position

[32] The Applicant submits that the Minister's decision relied upon the PIIFCAF Policy which trenches upon on provincial jurisdiction under section 92(13) and (16) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 ("*Constitution Act, 1867*"). More specifically, the Applicant asserts that the Minister could not base his decision on a policy that would be *ultra vires* Parliament if it was enacted as legislation. The Policy was, therefore, an irrelevant, unconstitutional consideration (*Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, [2003] 1 SCR 539 at para 172 ("*Canadian Union of Public Employees (CUPE)*")).

[33] The Applicant submits that the PIIFCAF Policy is, in pith and substance, a regulation of contracts. It is social and economic legislation unrelated to protecting the fishery. Accordingly, it is not a valid exercise of the federal fisheries power pursuant to section 91(12) of the *Constitution Act, 1867* (*Slaight Communications v Davidson*, [1989] 1 SCR 1038 at para 90, *per* Lamer J, dissenting but not on this point (see para 9) ("*Slaight Communications*"); *Doré v Barreau du Quebec*, 2012 SCC 12 ("*Doré*")). Further, that the *Fisheries Act* must be interpreted in a manner consistent with the *Constitution Act, 1867* (*R v McKay*, [1965] SCR 798 at 803-804

("*McKay*"); *Castillo v Castillo*, 2005 SCC 83 at para 30 ("*Castillo*")) such that the Minister's power to issue licences under s 7 does not authorize decisions on the basis of the PIIFCAF Policy.

[34] The Applicant submits that s 91(12) relates to the fishery as a resource, but does not extend to ancillary activities related to that industry, such as contracts between processors and harvesters (*R v Roberts*, 1882 CarswellNat 7 (SCC) at para 36 ("*Roberts*"). Accordingly, s 91(12) does not authorize PIIFCAF for three reasons. First, s 91(12) does not give Parliament jurisdiction to regulate fish processors as this is a matter for the Provincial governments under s 92(13) (*Reference re: Fisheries Act*, 1914 (Can), [1930] AC 111 at para 20 ("*Reference re: Fisheries Act*")) and is not necessarily incidental to s 91(12) (*Reference re: Fisheries Act* at paras 23-25). Second, s 92(12) does not give the Minister power to regulate the economic relationships that surround the fishery, including contracts between fish processors and fish harvesters, which are matters of Provincial competence (*British Columbia Packers Ltd v Canada (Labour Relations Board)*, 1974 CarswellNat 132F (FCTD) at paras 1-3 ("*BC Packers*") nor to regulate the economic relationships between the owners of fishing vessels and the crews of those vessels (*Mark Fishing Co v UFAW*, 1972 CarswellBC 95 (BCCA) at paras 7-13, 18-42). And, finally, the valid exercise of s 91(12) requires a connection to the fishery as a resource and the PIIFCAF Policy has no such connection (*Fowler v The Queen*, [1980] 2 SCR 213; *Northwest Falling Contractors Ltd v The Queen*, [1980] 2 SCR 292; *Ward v Canada (Attorney General)*, 2002 SCC 17 at paras 20-24, 34-36, 41-49 ("*Ward*")). The Applicant submits that there is no evidence that the PIIFCAF Policy has any impact for fish stocks or conservation.

Respondent's Position

[35] The Respondent submits the PIIFCAF Policy is authorized by the *Fisheries Act*. Parliament's power over "sea coasts and inland fisheries" pursuant to s 91(12) is broad and includes managing fisheries to achieve socio-economic objectives (*Ward* at paras 2, 34, 41; *Comeau's Sea Foods v Canada*, [1997] 1 SCR 12 at para 37 ("*Comeau's Sea Foods*"); *Gulf Trollers Assn v Canada (Minister of Fisheries and Oceans)*, [1986] FCJ No 705, 32 DLR (4th) 737 at para 16 ("*Gulf Trollers*"); *MacKinnon v Canada*, [1987] 1 FC 490 at paras 16-17, 23-24 ("*MacKinnon*"); *Carpenter Fishing Corp v Canada*, [1998] 2 FC 548 (FCA) at paras 34-40 ("*Carpenter Fishing*")). Federal fisheries power extends to managing the fisheries on social, economic or other grounds "either in conjunction with steps taken to conserve, protect, harvest the resource or simply to carry out social, cultural or economic goals or policies" (*Gulf Trollers* at para 16) and is not confined to conserving fish stocks, but also extends to the management and control of the fisheries as a public resource, which has many aspects, including economic considerations (*Ward* at paras 2, 34, 41; *Comeau's Sea Foods* at para 37).

[36] Further, the Courts have consistently held that the *Fisheries Act* gives the Minister wide discretion to manage fisheries in the public interest, including taking into account social and economic factors in managing and allocating a fishery resource (*Tucker v Canada*, [2000] FCJ No 1868 at para 18 ("*Tucker*"), aff'd 2001 FCA 384; *Malcolm* at para 52; *Carpenter Fishing* at paras 34-35, 40; *Association des Senneurs du Golf Inc v Canada (Minister of Fisheries)* (1999), 175 FTR 25, 94 ACWS (3d) 774 at para 25 ("*Association des Senneurs*"), aff'd 2001 FCA 276; *Canada (Attorney General v Arsenault*, 2009 FCA 300 at paras 40, 57 ("*Arsenault*")). The

Minister's absolute discretion to issue licences under s 7 of the *Fisheries Act* is consonant with the overall policy of the *Fisheries Act* that Canada's fisheries are a common property resource that the Minister has a duty to manage, conserve and develop in the public interest (*Comeau's Sea Foods* at paras 37, 46; *Area Twenty Three Snow Crab Fisher's Assn v Canada (Attorney General)*, 2005 FC 1190 at paras 19-20; *Campbell v Canada (Attorney General)*, 2006 FC 510 at para 19 ("*Campbell*")).

[37] The Respondent submits that the PIIFCAF Policy is consistent with the wide ambit of permissible purposes of the *Fisheries Act*. It works in conjunction with other policies to achieve the identifiable and acceptable socio-economic objectives of supporting a diverse Atlantic fishery, avoiding market concentration, and maximizing the economic benefits of the resources for participants in isolated rural fishing communities (*Tucker* at para 18). Conversely, controlling agreements are deliberately designed to circumvent licencing policies. They constitute a "mischief" resulting in individual fish harvesters losing control over their licences and shifting the benefits of the resource away from individual fish harvesters and the isolated coastal communities that rely on it to fish processors. The existence of controlling agreements, and their effects, is a relevant factor for the Minister to consider in issuing licences to fish as authorized by s 91(12) of the *Constitution Act, 1867* and the *Fisheries Act*.

[38] The Respondent also submits that a policy cannot be challenged based on the division of powers (*Timberwest Forest Corp v Canada*, 2007 FCA 389 at para 3 ("*Timberwest FCA*"); *Timberwest Forest Corp v Canada*, 2007 FC 148 at para 102 ("*Timberwest FC*"); *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 89). The PIIFCAF

Policy is not a legislative instrument; it is a non-binding policy serving to guide the Minister's exercise of his lawful discretion to issue commercial inshore fishing licences. As such, it lacks any legal force by which it could intrude on provincial legislative jurisdiction (*Campbell* at paras 18, 45). The constitutional validity of an administrative policy like PIIFCAF is reviewable only on the ground that its enabling statute is unconstitutional, and here the Applicant has not challenged the *Fisheries Act*. Without such a challenge, a division of powers analysis is inapplicable to the PIIFCAF Policy. Further, there is no meaningful distinction between asserting that the *Fisheries Act* must be interpreted (i.e., read down) to provide for only "constitutionally valid" policies and making a more straightforward claim that the PIIFCAF Policy itself is unconstitutional.

[39] The Respondent submits that in the alternative and in any event, the pith and substance of the PIIFCAF Policy is management of the inshore fishery, which falls under s 91(12). While the Policy incidentally touches on contracts, it is not unconstitutional or outside the scope of federal authority as a result (*Timberwest FC* at paras 103-114). This was demonstrated by the Supreme Court of Canada in *Ward* (*Ward* at para 40; *MacKinnon* at paras 9, 17, 24). Similarly, the PIIFCAF Policy is one policy factor that exists within the context of a broader licencing scheme that is concerned with the overall management and control of the Atlantic inshore fishery. While the PIIFCAF Policy references controlling agreements, in substance it deals with the control of licences, which is in the Minister's purview in managing the fishery and controlling access to the resource (*Comeau's Sea Foods* at para 37; *Ward* at para 49).

[40] The Respondent submits that the Minister has the widest possible discretion with respect to issuing licences, which extends to the considerations the Minster chooses to take into account as appropriate in making licencing decisions. Deference is owed to the decision-maker's choice of relevant considerations (*Comeau's Sea Foods* at paras 37, 46). Here, the Minister has determined that keeping control of licences with individual licence holders is important and there is no basis for the Court to interfere with the Minister's assessment that the existence of controlling agreements, which hand control over licences to third parties, is a relevant licencing consideration.

Analysis

[41] The relevant legislative provisions are set out below for ease of reference.

Constitution Act, 1867

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next	91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du

hereinafter enumerated; that is to say,	parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :
…	…
12. Sea Coast and Inland Fisheries.	Les pêcheries des côtes de la mer et de l'intérieur.
…	…
92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :
…	…
13. Property and Civil Rights in the Province.	La propriété et les droits civils dans la province;
…	…
16. Generally all Matters of a merely local or private Nature in the Province.	Généralement toutes les matières d'une nature purement locale ou privée dans la province.

Fisheries Act

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

Department of Fisheries and Oceans Act

4 (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to	4 (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés :
(a) sea coast and inland fisheries;	a) à la pêche côtière et à la pêche dans les eaux internes;
(b) fishing and recreational harbours;	b) aux ports de pêche et de plaisance;
(c) hydrography and marine sciences; and	c) à l'hydrographie et aux sciences de la mer;
(d) the coordination of the policies and programs of the Government of Canada respecting oceans.	d) à la coordination des plans et programmes du gouvernement fédéral touchant aux océans.
(2) The powers, duties and functions of the Minister also extend to and include such other matters, relating to oceans and over which Parliament has jurisdiction, as are by law assigned to the Minister.	(2) Les pouvoirs et fonctions du ministre s'étendent en outre aux domaines de compétence du Parlement liés aux océans et qui lui sont attribués de droit.

[42] In my view, the starting point for an analysis of whether the Minister's decision was based on relevant considerations is the 2002 decision of the Supreme Court of Canada in *Ward*, which addresses both the scope of federal fisheries powers and the duties of the Minister as well as the application of the "pith and substance" analysis to a fisheries related matter.

[43] In *Ward*, the applicant held a commercial licence issued to him under the *Fisheries Act* which permitted him to harvest hooded and harp seals. Section 27 of the *Marine Mammal Regulations* prohibited the sale, trade or barter of young harp (whitecoats) and hooded (bluebacks) seals. The applicant was charged with selling pelts contrary to the regulation and argued that s 27 was *ultra vires* Parliament.

[44] The Supreme Court of Canada held that s 27 was *intra vires* Parliament under its fisheries powers. The purpose of the provision was to control the killing of bluebacks and whitecoats by prohibiting their sale, making it largely useless to harvest them. Parliament's object was to regulate the seal fishery by eliminating the commercial hunting of whitecoats and bluebacks while allowing for limited harvesting for non-commercial purposes. The prohibition existed in the context of a scheme concerned with the overall "management and control" of the marine fisheries resource. It was not directed at controlling commerce or property but rather was designed to curtail a hunt that was damaging the economic viability of the sealing industry and the fisheries resource in general. The Court held that, while the method chosen to curtail the commercial harvest of bluebacks and whitecoats may have been imperfect, efficiency was not a valid consideration in the pith and substance analysis. Further, to argue that because the legislative measure was a prohibition on sale, it must in pith and substance be concerned with the regulation of sale, confused the purpose of s 27 with the means chosen to achieve it. Viewed in the context of the legislation as a whole and the legislative history, there was nothing to suggest that Parliament was trying to regulate the local market for trade of seal and seal products. Section 27 was in pith and substance concerned with the management of the Canadian fishery and fell within federal fisheries power which is not confined to conserving fish stocks, but

extends more broadly to maintenance and preservation of the fishery as a whole, including its economic value.

[45] The Supreme Court stated that, although broad, fisheries power is not unlimited, Parliament must respect the provincial power over property and civil rights. Whether a matter best conforms to a subject within federal or provincial jurisdiction cannot be determined by drawing a line between federal and provincial powers on the basis of conservation or sale. The activity at stake must be examined to determine whether the matter regulated is related in pith and substance to the federal fisheries power or the provincial power over property and civil rights. As s 27 was vitally connected to protecting the economic of the Canadian fishery as a whole, it was a valid federal measure. That result fully respected the provinces' constitutional right to control property and civil rights.

[46] The Supreme Court undertook a thorough review of the jurisprudence concerning the scope of the federal fisheries power, including several of its older decisions which are relied upon by the Applicant in this matter, and concluded:

> 34 First, the preponderance of authority suggests that the fisheries power is not confined to conservation, nor to pre-sale activities, but extends more broadly to maintenance and preservation of the fishery as a whole, including its economic value. In *The Queen v. Robertson* (1882), 6 S.C.R. 52, Ritchie C.J. described the fisheries power as extending "to subjects affecting the fisheries generally, tending to their regulation, protection and preservation". Accordingly, Parliament's power extended to "all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth" (pp. 120-21).
>
> 35 In *Reference re Certain Sections of the Fisheries Act*, 1914, [1928] S.C.R. 457 (aff'd [1930] A.C. 111 (P.C.)), Newcombe J. cited, at p. 472, the definition of a fishery given in *Patterson on the*

Fishery Laws (1863), at p. 1, as "the right of catching fish in the sea, or in a particular stream of water". But he went on to cite the broader "leading definition" from J. A. H. Murray's *A New English Dictionary* (1888), defining fishery in terms of the "business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water". Davey C.J.B.C., in *Mark Fishing Co. v. United Fishermen & Allied Workers' Union* (1972), 24 D.L.R. (3d) 585 (B.C.C.A.), said of this: "The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found, and the right is exercised" (p. 592). See also *International Fund for Animal Welfare, Inc. v. Canada*, [1987] 1 F.C. 244 (T.D.) (division of powers issue aff'd [1989] 1 F.C. 335 (C.A.)).

36 The theme that the fisheries power refers to the resource was affirmed by this Court, *per* Laskin C.J. (dissenting, but not on this point) in *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, who wrote, at p. 495, that the federal fisheries power "is concerned with the protection and preservation of fisheries as a public resource", extending even to the "suppression of an owner's right of utilization".

37 Again, in *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292, Martland J., speaking for the Court, recognized that the fisheries power involved legislating in relation to fisheries as a resource (at p. 298):

> . . . federal legislative jurisdiction under s. 91.12 of the *British North America Act* is not a mere authority to legislate in relation to "fish" in the technical sense of the word. The judgments in this Court and in the Privy Council have construed "fisheries" as meaning something in the nature of a resource.

38 More recently, in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, Major J. noted that the Minister's duty under the *Fisheries Act* extends beyond conservation to management and development of the fishery for the benefit of the public, stating (at para. 37):

> Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43).

39 In *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93 (rev'g [1984] 2 F.C. 398 (T.D.)), the Federal Court of Appeal directly confronted whether the federal fisheries power is confined to conservation of the fish stock. At issue were federal regulations for closing times that favoured sports fishers over commercial fishers. At trial, Collier J. held that the fisheries power did not extend to the general management and control of the fisheries for the benefit of Canadians beyond mere protection and preservation of the resource. The Federal Court of Appeal reversed the decision. Marceau J.A. expressed the view that "**Parliament may manage the fishery on social, economic or other grounds, either in conjunction with steps taken to conserve, protect, harvest the reserve or simply to carry out social, cultural or economic goals and policies**" (p. 106).

40 Moreover, the courts have rejected the view that the federal power extends only to management of fisheries in their natural state and terminates prior to the point of sale. In *British Columbia Packers Ltd. v. Canada Labour Relations Board*, [1976] 1 F.C. 375 (C.A.) (appeal to S.C.C. dismissed on other grounds, [1978] 2 S.C.R. 97), Jackett C.J. remarked that the fisheries power does not extend to the "making of laws in relation to things reasonably incidental to carrying on a fishing business, such as labour relations and disposition of the products of the business, when such things do not in themselves fall within the concept of 'fisheries'" (p. 385 (emphasis deleted)). However, it is clear that aspects of sale that are necessarily incidental to the exercise of the fisheries power fall within federal jurisdiction: see *R. v. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158 (C.A.); *R. v. Saul* (1984), 10 D.L.R. (4th) 736 (B.C.S.C.); *R. v. Twin* (1985), 23 C.C.C. (3d) 33 (Alta. C.A.). The rationale is that the federal government may limit sales in order to prevent injurious exploitation of the resource. It therefore appears that no bright line can be drawn at the point of sale for the purposes of defining the scope of the federal fisheries power.

41 **These cases put beyond doubt that the fisheries power includes not only conservation and protection, but also the general "regulation" of the fisheries, including their management and control**. They recognize that "fisheries" under s. 91(12) of the *Constitution Act, 1867* refers to the fisheries as a resource; "a source of national or provincial wealth" (*Robertson*, *supra*, at p. 121); a "common property resource" to be managed for the good of all Canadians (*Comeau's Sea Foods*, *supra*, at para. 37). **The fisheries resource includes the animals that inhabit the seas. But it also embraces commercial and economic interests,**

> **aboriginal rights and interests, and the public interest in sport and recreation.**
>
> …
>
> 43 Thus we have before us two broad powers, one federal, one provincial. In such cases, bright jurisdictional lines are elusive. Whether a matter best conforms to a subject within federal jurisdiction on the one hand, or provincial jurisdiction on the other, can only be determined by examining the activity at stake. Measures that in pith and substance go to the maintenance and preservation of fisheries fall under federal power. By contrast, measures that in pith and substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights.
>
> 44 The cases bear this out. Measures whose essence went to the regulation of fish processing and labour relations in the fishery have been held to fall outside the federal power. On the other hand, measures primarily related to the regulation of the fisheries resource but incidentally touching the sale of fish have been upheld as valid federal legislation.
>
> (Emphasis added)

(Also see *Association des Senneurs* at para 25; aff'd 2001 FCA 276 , where this Court stated that "the Minister has the power to manage fishing in accordance with social, economic or other factors"; *Gulf Trollers* at paras 16-17; *Malcolm* at para 52).

[47] In *Tucker*, Justice Rothstein, then of this Court, held that the policy of the *Fisheries Act* and the considerations that are relevant to the exercise of the Minister's discretion under s 7 of the Act were those set out in *Comeau's Sea Food*. Specifically, that under the *Fisheries Act* it is the duty of the Minister to manage the fisheries. Licencing to restrict entry into a commercial fishery and to limit the number of fishermen and vessels was an instrument or device available to the Minister to carry out such management (at para 17). And, having regard to the Minister's

duty to manage the fishery and the "unlimited breadth of his section 7 discretion in respect of licencing" there was nothing unreasonable about the Minister's refusal to allow the plaintiff the opportunity to utilize both an inshore and offshore licence at the same time (at para 18).

[48] In *Comeau's Sea Foods*, the question was whether the Minister, having authorized the granting of fishing licences, had the authority to revoke that authorization. The Supreme Court of Canada held that:

> [36] It is my opinion that the Minister's discretion under s. 7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, no regulations currently being applicable. The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith. The result is an administrative scheme based primarily on the discretion of the Minister: see *Thomson v. Minister of Fisheries and Oceans*, F.C.T.D., No. T-113-84, February 29, 1984.
>
> [37] This interpretation of the breadth of the Minister's discretion is consonant with the overall policy of the *Fisheries Act*. Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). Licencing is a tool in the arsenal of powers available to the Minister under the *Fisheries Act* to manage fisheries. It restricts the entry into the commercial fishery, it limits the numbers of fishermen, vessels, gear and other aspects of commercial fishery.

[49] The Supreme Court also found that the Minister's wide discretion must be interpreted in light of the need to respond to immediate policy concerns affecting the fishery (at para 46). In that case, the Minister was not exercising his legislative function but was revoking an authorization in response to what he felt were pressing and immediate concerns in the lobster fishery.

[50] In *Carpenter Fishing*, this Court found that the imposition of a quota policy, as opposed to the granting of a specific licence, is a discretionary decision in the nature of policy or legislative action. And, so long as the Minster does not fetter his discretion by treating the guidelines as binding upon him, he may validly and properly indicate the kind of considerations by which he will be guided as a general rule when allocating quotas. These discretionary policy guidelines are not subject to judicial review, save for the (*Maple Lodge Farms Ltd v Canada,* [1982] 2 SCR 2 ("*Maple Lodge Farms*")) exceptions: bad faith, non-conformity with the principles of natural justice where their application is required by statute, and reliance placed upon considerations that are irrelevant and extraneous to the statutory purpose (at para 28). When addressing irrelevant purposes, the Court stated that permissible purposes for actions under the *Fisheries Act* are interpreted in a particularly broad way, citing *Gulf Trollers* at p 106, *Comeau's Sea Foods* at pp 25-26 and s 4(1) of the *Department of Fisheries and Oceans Act*, and concluded:

> 37 It follows that when examining the exercise by the Minister of his powers, duties, functions and discretion in relation to the establishment and implementation of a fishing quota policy, courts should recognize, and give effect to, the avowed intent of Parliament and of the Governor in Council to confer to the Minister the widest possible freedom to manoeuvre. It is only when actions of the Minister otherwise authorized by the *Fisheries Act* are clearly beyond the broad purposes permitted under the Act that the Courts should intervene.

[51] What can be taken from the above jurisprudence is, first, that the Parliament's powers under s 91(12) are broad. The fisheries are a common property resource and Parliament may properly manage and control that resource. This is not limited to conservation of the fish stocks but includes management of the fishery on social, environmental or other grounds, either in conjunction with steps taken to conserve, protect or harvest the resource or simply to carry out

social, cultural or economic goals or policies. Further, it is the Minister's duty to manage the fishery on behalf of Canadians and in the public interest, which includes licencing. The Minister's absolute discretion in licencing, pursuant to s 7 of the *Fisheries Act*, permits him or her to validly consider social, cultural or economic goals or policies when deciding whether or not to issue fishing licences.

[52] In the context of this matter, the Minister's statement introducing the PIIFCAF Policy indicated that the Minister strongly believed that an independent inshore commercial fishing fleet was an important element of an economically prosperous Atlantic Canada and that the Policy underscored the government's commitment to building a foundation of economic strength for Atlantic coastal communities. Its goal was stated to be to strengthen the existing Owner-Operator and Fleet Separation Policies to ensure that fish harvesters remain independent and that the benefits of fishing licences flow to the fishers and Atlantic Canada communities. This is also reflected in the stated PIIFCAF objectives.

[53] The PIIFCAF Policy itself states that, during the Atlantic Fisheries Policy Review, inshore fish harvesters repeatedly noted that controlling agreements were undermining existing licencing policies, including the Owner-Operator and Fleet Separation Policies. The PIIFCAF Policy strengthens those policies by addressing issues concerning controlling agreements and ensures that those who are benefitting from the privilege of the licence are those who are actively engaged in the fishery.

[54] Accordingly, in my view, the purpose of the PIIFCAF Policy clearly falls within Parliament's broad powers to manage the fishery. Further, it was an entirely relevant consideration of the Minister in exercising his discretion as to whether to issue a fishing licence, pursuant to the authority conferred on him by s 7 of the *Fisheries Act*, in that it engages social and economic factors in managing the fishery. The jurisprudence above clearly establishes that these are permissible factors for the Minister to take into consideration.

[55] The Applicant, however, takes the position that the PIIFCAF Policy was an irrelevant, unconstitutional consideration because the PIIFCAF Policy would be *ultra vires* if it was enacted as legislation. In this regard, the Applicant cites paragraph 172 of *Canadian Union of Public Employees (CUPE)* at para 172 as standing for the principle that the Minister could not base his decision on irrelevant considerations.

[56] I would first note that the PIIFCAF Policy is just that, policy. It was not enacted as a regulation or as legislation. Therefore, it cannot be subject to a division of powers challenge as being *ultra vires*. In *Timberwest FC*, the plaintiff challenged the validity of a federal scheme controlling the export of logs on the basis that the scheme, which was promulgated under a policy statement, was not authorized by the relevant federal legislation and was unconstitutional as being an attempt by the federal government to regulate in areas of provincial jurisdiction. The plaintiff was not questioning a decision made by the Minister as to whether or not to grant an export permit, but questioned the validity of a policy issued by the Minister. This Court held that "[i]n our constitutional system, laws are considered unconstitutional for one reason or another, not policies. The plaintiff has not challenged the legislative provisions dealing with the issuance

of export permits" (at para 102). The Federal Court of Appeal upheld the decision and stated that it is not the role of the courts to determine the constitutionality of policies and noted that the appellant had not challenged the validity of any provision of the relevant act (*Timberwest FCA* at para 3).

[57] Further, paragraph 172 of *Canadian Union of Public Employees (CUPE)* is found in the portion of the Supreme Court of Canada decision considering the exercise of discretion based on the weighing of considerations relevant to the object of a statute's administration, referencing case law, then considering that in relation to the test of patent unreasonableness on the facts of that case. In that context it stated that "[t]he principle that a statutory decision maker is required to take into consideration relevant criteria, as well as to exclude from consideration irrelevant criteria, has been reaffirmed on numerous occasions." The paragraph goes on to provide an example of a case in which it was found to be an error that a decision-maker failed to take into account highly relevant considerations in reaching the decision. It says nothing regarding the inability of the Minister to rely on a policy that would be *ultra vires* Parliament if it was enacted as legislation. The Applicant provides no further support for that statement, and in my view, it is without merit.

[58] The Applicant also submits that the PIIFCAF Policy is, in pith and substance, the regulation of contracts, being social and economic legislation unrelated to the protection of the fishery itself. Thus, it is not a valid exercise of federal fisheries powers pursuant to s 91(12) of the *Constitution Act, 1867*. In my view, as will be discussed below, a pith and substance analysis has no application to this matter. Further, the PIIFCAF Policy is related to the fishery. As is

clear from the above jurisprudence, the broad authority conferred on the Minister by section 7 of the *Fisheries Act* engages social and economic factors in managing the fishery, which is what is encompassed by the PIIFCAF Policy, and is not restricted to the protecting of the fishery itself as the Applicant submits. And while the Applicant references *Slaight Communications* and *Doré* in support of his position, in my view they are of no assistance. In those cases the issue was whether the administrative decision-makers exercised their statutory discretion in accordance with *Charter* (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*Charter*")) protections, which is not at issue in this matter.

[59] The Applicant also submits that the *Fisheries Act* should be "interpreted in a manner consistent with the Constitution" and, as such, the Minister's power to issue licences under s 7 does not authorize decisions on the basis of the PIIFCAF Policy. In this regard the Applicant references *McKay* and *Castillo* as well as a quote from David Phillip Jones & Anne S de Villars, *Principles of Administrative Law*, 6th ed (Edmonton: Carswell, 2014) ("Phillip & de Villars"). However, those references support only the principle that legislation should be interpreted in a way consistent with the Constitution, they go no further and do not address the interpretation of legislation in the context of policy asserted to exceed Parliament's powers.

[60] The reference quoted in *Castillo* reads as follows:

> 2.4 *The Presumption Against Extra Territorial Effect*
>
> 30 The legislative jurisdiction of the provinces is limited to matters "[i]n each Province" by the wording of s. 92 of the *Constitution Act, 1867*. Unless otherwise explicitly or implicitly provided, legislatures are presumed to respect the territorial limits of their legislative powers: Côté, at pp. 200-203. If possible,

> legislation should be construed in a manner consistent with this presumed intent. Similarly, it is now accepted that where legislation is open to more than one meaning, it should be interpreted so as to make it consistent with the Constitution: *McKay v. The Queen*, [1965] S.C.R. 798, at p. 803; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078.

[61] Similarly, the quote from Phillip & de Villars pertains to a discussion of the differences between the Canadian and British systems of government when challenging government actions. When describing federalism, the division of legislative powers and the determination of whether legislation is unconstitutional, Phillip & de Villars states at pp 28-29:

> …When courts characterize legislation for constitutional purposes they do so on the basis of its overall essential nature - its so-called "pith and substance" - and disregard its lesser "incidental" characteristic. The courts have the duty to determine whether particular legislation is unconstitutional, and they cannot be deprived of this power by procedural devices.
>
> It logically follows that neither the Federal Parliament nor a Provincial Legislature may attempt to enact legislation which purport to delegate powers which are not assigned to it under the Constitution. Thus, the validity of delegated legislation or of any other form of delegated powers depends upon the constitutional validity of the parent Act…
>
> (footnotes omitted)

[62] It is difficult to see how these references support the Applicant's assertion that the Minister is precluded from considering the PIIFCAF Policy in refusing to issue licences, because, in the Applicant's view, the PIIFCAF Policy falls outside federal fisheries powers and therefore is an irrelevant consideration. What they support is that legislation can be challenged on the basis that it is *ultra vires* the Constitution, but the Applicant in this case has not challenged s 7 of the *Fisheries Act*.

[63] Indeed, in its Notice of Constitutional Question, filed pursuant to s 57(1) of the *Federal Courts Act*, RSC 1985, c F-7 the Applicant asserts that one of the basis for bringing the application for judicial review was that the Minister "relied upon constitutionally impermissible considerations" as the existence of controlling agreements is a matter of property and civil rights in the province divorced from the subject matter of the fisheries power in s 92(12) of the *Constitution Act, 1867*. The Applicant described the legal basis for the constitutional question as follows:

> 7. Section 7 of the *Fisheries Act* does not authorize the Minister to make licencing decisions on the basis of the existence of a Controlling Agreement between a fish harvester and a fish processor. That is a matter which is in pith and substance in relation to contracts, and thus not a valid exercise of s. 91(12) of the *Constitution Act, 1867* (the "**Fisheries Powers**"). PIIFCAF governs the economic relations ships between the fish harvesters and fish processors, and is aimed at preserving the independence of the harvesting sector and the economic interests of certain isolated rural communities. It is based on considerations which, if enacted by Parliament, would be *ultra vires* Federal jurisdictions.
>
> 8. Significantly, ***PIIFCAF is not a regulation, and the Applicant is not challenging the constitutionality of PIIFCAF as a regulation. Therefore it is the Applicant's Position that this Notice of Constitutional Question is not required, but he is filing this Notice out of an abundance of caution.***
>
> 9. Put simply, the Federal Fisheries Power can only be exercised when there is a constitutionally valid connection to the subject matter of s. 92(12), being the fishery as a resource. PIIFCAF governs contractual relationships that are unconnected with those matters.
>
> 10. The *Fisheries Act* should be interpreted in a constitutional manner, and, as such, did not authorize the Minister to reach this Decision on the basis of PIIFCAF.
>
> (emphasis in original)

[64] I fail to see how, if the constitutionality of a policy is not subject to challenge, the Applicant can attack a discretionary decision of the Minister on the basis that the policy upon which it was based was, in essence, unconstitutional. In my view, in the absence of a challenge to s 7 of the *Fisheries Act*, the Applicant's approach cannot succeed. And, even if the Applicant had challenged s 7 of the *Fisheries Act,* in this case the Minister's authority was not exceeded, because, as noted above, the Minister can take into consideration economic and social factors when making policy and licencing decisions.

[65] In summary, while it is beyond question that the Minister's authority exercised under section 7 of the *Fisheries Act* must fall within Parliament's s 91(12) powers, the Applicant's submission that the Minister cannot base his decision on a policy that would be *ultra vires* Parliament if it was enacted as legislation and that the PIIFCAF Policy, as such, was an irrelevant unconstitutional consideration, is not supported by jurisprudence. The Applicant provides no authority that the Minister's considerations must, in and of themselves, be constitutional.

[66] Although I have found that the PIIFCAF Policy is not subject to a division of powers challenge, even if I am incorrect, in my view the PIIFCAF Policy in pith and substance is a valid exercise of the federal fisheries power pursuant to s 91(12) of the *Constitution Act, 1867*.

[67] The approach for a pith and substance analysis was described by the Supreme Court of Canada in *Fédération des producteurs de volailles du Québec v Pelland*, [2005] 1 SCR 292 (SCC):

20 The requisite approach was recently discussed by LeBel J. in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at paras. 53-54, a case involving provisions of the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187:

> A pith and substance analysis looks at both (1) the purpose of the legislation as well as (2) its effect. First, to determine the purpose of the legislation, the Court may look at both intrinsic evidence, such as purpose clauses, or extrinsic evidence, such as Hansard or the minutes of parliamentary committees.
>
> Second, in looking at the effect of the legislation, the Court may consider both its legal effect and its practical effect. In other words, the Court looks to see, first, what effect flows directly from the provisions of the statute itself; then, second, what "side" effects flow from the application of the statute which are not direct effects of the provisions of the statute itself: see *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 482‑83. Iacobucci J. provided some examples of how this would work in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 23:
>
>> The effects of the legislation may also be relevant to the validity of the legislation in so far as they reveal its pith and substance. For example, in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, the Court struck down a municipal by‑law that prohibited leafleting because it had been applied so as to suppress the religious views of Jehovah's Witnesses. Similarly, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, the Privy Council struck down a law imposing a tax on banks because the effects of the tax were so severe that the true purpose of the law could only be in relation to banking, not taxation. <u>However, merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law.</u> [Emphasis added.]

> (See also P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at § 15.5(d))

[68] In *Ward*, in the context of a challenge for fisheries related regulation, the Supreme Court of Canada stated:

> 17 The first task in the pith and substance analysis is to determine the pith and substance or essential character of the law. What is the true meaning or dominant feature of the impugned legislation? This is resolved by looking at the purpose and the legal effect of the regulation or law: see *Reference re Firearms Act*, *supra*, at para. 16. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was regulating the fishery, or venturing into the provincial area of property and civil rights. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law: see *Reference re Firearms Act*, *supra*, at paras. 17-18; *Morgentaler*, *supra*, at pp. 482-83. The effects can also reveal whether a law is "colourable", i.e. does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction?: see *Morgentaler*, *supra*, at p. 496. In oral argument, Ward expressly made clear that he is not challenging the law on the basis of colourability.
>
> 18 The pith and substance analysis is not technical or formalistic: see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 15-12. It is essentially a matter of interpretation. The court looks at the words used in the impugned legislation as well as the background and circumstances surrounding its enactment: see *Morgentaler*, *supra*, at p. 483 ; *Reference re Firearms Act*, *supra*, at para. 17. In conducting this analysis, the court should not be concerned with the efficacy of the law or whether it achieves the legislature's goals: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 44, per La Forest J.; *Reference re Firearms Act*, *supra*, at para. 18.
>
> 19 Section 27 of the *Regulations*, read alone, is simply a prohibition of sale, trade or barter, suggesting it might fall within the provincial rather than federal domain. However, we cannot stop at this point. We must go further. What is the purpose of s. 27, and what is its effect? How does it fit into the regulatory scheme

> as a whole? The question is not ***whether*** the Regulations prohibit the sale so much as *why* it is prohibited.

[69] The Supreme Court went on to find in *Ward* that the purpose was clear from the Regulations as a whole and the legislative history. Section 27 of the regulations was intended to control the killing of bluebacks and whitecoats, by prohibiting their sale, as the reaction to the harvesting of these seal pups destroyed the traditional seal markets and was threatening markets for Canadian fish products abroad. The Court found that the prohibition on sale was not directed to controlling commerce, but to preventing the harvesting of those seals. Situating s 27 in its context supported the view that it was neither directed at property nor at trade, but at curtailing the commercial hunting of bluebacks and whitecoats and that the prohibition existed in the context of a scheme that was concerned with the overall management and control of the marine fisheries resource:

> 24 I conclude that Parliament's object was to regulate the seal fishery by eliminating the commercial hunting of whitecoats and bluebacks through a prohibition on sale, while at the same time allowing for limited harvesting of these animals for non-commercial purposes. Stated another way, the "mischief" that Parliament sought to remedy was the large-scale commercial hunting of whitecoats and bluebacks. This was done to preserve the economic viability of not only the seal fishery, but the Canadian fisheries in general.

[70] As to the effects of the legislation:

> 25 Turning to the effects of the legislation, s. 27 affects the legal rights of its subjects by prohibiting the sale of whitecoats and bluebacks that have otherwise been legally harvested. Ward submits that the legal effect of s. 27 is to regulate the property and processing of a harvested seal product. The argument amounts to saying that because the legislative measure is a prohibition on sale, it must be in pith and substance concerned with the regulation of sale. This confuses the purpose of the legislation with the means

> used to carry out that purpose. Viewed in the context of the legislation as a whole and the legislative history, there is nothing to suggest that Parliament was trying to regulate the local market for trade of seals and seal products. Ward's argument that s. 27 is directed at regulating an already processed product because the seals are skinned and the meat preserved on the vessel similarly confuses the purpose of s. 27 with the means chosen to achieve it.
>
> …
>
> 28 I conclude that the s. 27 prohibition on sale is essentially concerned with curtailing the commercial hunting of whitecoats and bluebacks for the economic protection of the fisheries resource. As such, it is in pith and substance concerned with the management of the Canadian fishery.

[71] In my view, the reasons and result of the pith and substance analysis of the impugned regulatory provision in *Ward* are directly on point if the PIIFCAF Policy were subject to that analysis, which, as I have stated above, I do not believe to be the case.

[72] The purpose of the PIIFCAF Policy, as it clearly explained and is seen from the record which sets out the history leading up to the enactment of the Policy, was to ensure that inshore fish harvesters remained independent and that the benefits of the fishing licences flowed to the fishers and coastal communities which rely upon them. To achieve this object, the Policy put in place an Independent Core category as the new eligibility criteria for inshore fish harvesters who are the head of a Core Enterprise. To be eligible to have their licences renewed after 2014, those fishers would have to exit their controlling agreements or to amend them so as to be in compliance with the Policy requirements. This was done because the Minister had determined that controlling agreements, which were devised to defeat the existing licencing policies, resulted in negative socio-economic consequences for coastal communities. To remedy this 'mischief' the Minister implemented the PIIFCAF Policy, a companion to existing policies, which is aimed

at fish harvesters and achieves its purpose by eliminate controlling agreements by tying them to licence eligibility criteria. Viewed in context, it is clear that the PIIFCAF Policy is not directed at the regulation of the fish processing industry or contracts. It is intended for the proper management and control of the fishery.

[73] The direct effect of the PIIFCAF Policy is that an individual fish harvester licence holder, or head of a Core Enterprise, who continues to be a party to a controlling agreement is not eligible for a licence renewal. The broader effect of the Policy is that fish processing corporations are prevented from exerting licence control in the inshore fishing industry. The PIIFCAF Policy only deals with the eligibility criteria for licences, it does not prevent licence holders from entering into contracts, obtaining financing, using their licence as collateral, supplying their catch to whomever they wish or otherwise organizing their business affairs as they see fit. It does not frustrate contracts. It is not concerned with the regulation of the economic relationships that surround the fishery, including contracts between fish processors and fish harvesters. The Policy is aimed at a broader purpose. The fact that the PIIFCAF Policy incidentally touches on contracts does not result in a finding that it is *ultra vires* the jurisdiction of Parliament, if a policy could be challenged in that regard. I also do not accept the Applicant's submission that the PIIFCAF Policy must have connection to fish stocks or conservation in order to be a valid exercise of s 91(12). *Ward* and other jurisprudence noted above make it clear that the fisheries resource includes commercial and economic interests. The scope of the fisheries power is broad, and in my view, the management of the inshore fishery is a valid matter authorized by s 91(12).

[74] Accordingly, while I do not believe the analysis to be applicable, if it is, then the pith and substance of the PIIFCAF Policy is the management of the inshore fishery and protecting the economy of coastal communities who depend on the resource. This is a valid exercise of s 91(12) powers, and it does not trench upon s 92(13) provincial powers concerning property and civil rights or s 92(16) matters of a local or private nature in the province.

[75] In conclusion, for the reasons above it is my view that the existence of controlling agreements and the PIIFCAF Policy, which aims to eliminate such agreements by way of licence eligibility requirements, is a relevant factor for the Minister to consider in issuing licences to fish under section 7 of the *Fisheries Act*.

Issue 3: Did the Minister reasonably exercise, or did he fetter, his discretion?

Applicant's Position

[76] The Applicant submits the decision is unreasonable because the Minister fettered his absolute discretion by treating the PIIFCAF Policy as mandatory and failing to consider the Applicant's individual circumstances (*Telecommunications Workers Union v Canada* (CRTC), [1995] 2 SCR 781 at para 37; *Stemijon* at paras 20-25, 28, 43, 60; *Canada (MNR) v JP Morgan Asset Management (Canada) Inc*, [2014] 2 FCR 557 (CA) at paras 72-73). Further, the Minister cannot fetter his discretion by treating guidelines as binding upon him on him (*Maple Lodge Farms* at p 6-7), but must consider the evidence in whole (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at paras 32, 60 ("*Kanthasamy*")).

[77] Section 7 of the *Fisheries Act* grants the Minister "absolute discretion" in issuing licences. This broadest discretion is subject only the requirements of natural justice (*Saulnier v Royal Bank of Canada*, [2008] SCR 166 at paras 33, 39, 48 ("*Saulnier*")) and requires the Minister to base his or her decision on relevant considerations, avoid arbitrariness, and act in good faith (*Comeau's Sea Foods* at paras 22, 36-37, 39, 46, 49). A Minister cannot convert a policy into a regulation by treating it as binding (*Tucker* at para 19; *Carpenter Fishing* at paras 28, 29, 35, 37; *Saulnier* at para 24).

[78] The Applicant submits that in this matter the Minister fettered his discretion for three reasons. First, the PIIFCAF Policy itself purports to create mandatory requirements for individual fish harvesters as it requires that all heads of Core Enterprises file declarations that they are not in a controlling agreement every time they request a licence and that they will not be issued a licence if they fail to meet the Independent Core eligibility requirement. The PIIFCAF Policy also provides that licence holders who remain a party to a controlling agreement will not be eligible to be issued a licence. Moreover, the PIIFCAF Policy declaration form describes itself as mandatory in that any fish harvester seeking to be categorized as Independent Core or seeking to be issued a replacement or new licence, must declare whether he or she is a party to a controlling agreement.

[79] The thrust of the Policy as a whole is mandatory in nature; it contains no indication that the particular circumstances of the case must be considered nor does it provide criteria for determining whether or not discretion is to be exercised (*Ha v Canada (Minister of Citizenship & Immigration)*, 2004 FCA 49 at paras 74-75 ("*Ha*")).The PIIFCAF Policy thereby operated as a

fetter on the Minister's discretion. And, although the Policy states that it is not binding on the Minister and does not fetter his or her discretion, the Applicant submits that this reference pertains only to fishing fleets, and not individual fish harvesters, because the identified exemptions concern only fleets. The PIIFCAF Policy contains no exemptions in relation to individual fish harvesters and the only flexibility it offered for individual fish harvesters expired on March 31, 2009 (s 10).

[80] The Applicant further submits that in a discussion document entitled "Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries", the DFO conceded that the PIIFCAF policy could not be implemented as a regulation because prohibiting parties from entering a contract or dictating the terms of a contract would interfere with private financial transactions and fall outside DFO's jurisdiction. Because of this, the PIIFCAF Policy is enforced indirectly through the Minister's "absolute discretion" under s 7 of the *Fisheries Act*.

[81] Second, the Applicant submits that the PIIFCAF Policy permits no exemptions for individual fish harvesters. This is demonstrated, beyond the PIIFCAF Policy itself, by statements of the Minister in a 2014 radio interview, an information package provided to licence holders when the PIIFCAF Policy was released, statements made by the Minister's affiant, Mr. Morley Knight ("Knight"), Regional Director General, Maritimes Region at the DFO, during cross-examination, and statements made by Mr. Gabriel Gregory ("Gregory") (management consultant who provides consulting services to the seafood industry in Atlantic Canada), and Mr. Derek Butler ("Butler") (Executive Director and Chair of the Board of the Association of Seafood Producers) each of whom filed an affidavit in support of the Applicant's application for

judicial review. On cross examination, Knight gave evidence that he was not aware of any exemption to the PIIFCAF Policy ever being granted. The Applicant submits that in *Ha* (at para 77), the Federal Court of Appeal relied on a similar lack of evidence that the decision maker had ever departed from a policy preventing legal counsel from attending visa officer interviews to find that his discretion had been fettered. This is in contrast to *Thamotharem v Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198 at paras 79, 82, 88 ("*Thamotharem*") where the Federal Court of Appeal found that there was evidence to show that the decision makers had exercised their discretion to vary the order of questioning in cases they considered as exceptional, deviating from the guideline and, accordingly, that there was no fettering of their discretion.

[82] Third, the Applicant submits that the PIIFCAF Policy was applied in an inflexible manner without regard to the Applicant's individual circumstances. Correspondence dated December 3, 2009 from the Regional Director General at the DFO to the Applicant stated that he would not be eligible to receive new or replacement licences until his controlling agreement was terminated or brought in line with the PIIFCAF Policy. Further, the Applicant's request for an exemption was rejected by Minister Shea by letter dated March 12, 2015, which stated that the DFO would not be considering any exemptions to the PIIFCAF Policy and that his only recourse was an appeal to the Appeal Board of a non-renewal decision. Following the appeal, the December 23, 2015 decision of Minister Tootoo refers to "the eligibility requirement provided for by the policy on" PIIFCAF. The Minister does not refer to the discretion vested in him by section 7(1) of the *Fisheries Act*; the only foundation identified for his decision being the PIIFCAF Policy eligibility requirement.

[83] Further, the Minister also failed to address any of the explanations given by the Applicant to the Appeal Board when seeking an exemption. The Applicant refers to *Stemijon* in which the Federal Court of Appeal found the Minister improperly fettered his discretion by giving similarly deficient reasons in his decision (at paras 28-32, 38, 43).

[84] The Applicant submits that the Appeal Board recommendation must be read together with the Minister's own reasons. The Appeal Board report simply recites the procedural history of the appeal and the arguments before it and then makes a bald recommendation that the appeal be denied, it provides no reasons why the Applicant's circumstances do not justify an exemption. The Appeal Board must give reasons why the evidence does not justify departing from ministerial policy (*Ralph v Canada (Attorney General)*, 2010 FCA 256 at para 27 ("*Ralph*")).

Respondent's Position

[85] The Respondent submits that the Minister did not fetter his discretion by applying the PIIFCAF Policy in the Applicant's case. The Applicant's individual circumstances were considered and there is no evidence that the PIIFCAF Policy was applied inflexibly or exclusive of other relevant considerations. The Applicant had not provided any information concerning his circumstances at any time prior to his appeal before the Appeal Board. The Appeal Board sought and received some evidence of the Applicant's circumstances but the Applicant failed to provide details of the actual hardship he claimed he would experience or to differentiate himself from other individual harvesters. The Appeal Board concluded that the limited evidence did not demonstrate a valid extenuating circumstance to justify upholding the appeal. The Minister

considered the Appeal Board's report and recommendation, which referred to the Applicant's particular circumstances, when he denied his appeal.

[86] The Respondent submits that the record establishes that the Minister's decision was not based on a blind application of the PIIFCAF Policy. The Minister considered a variety of information including: the wider context of licencing policies for the inshore fleet in Atlantic Canada; the fisheries management concerns and the concerns of fish harvesters which the policy aimed to address; the role of the Appeal Board in relation to the Minister's authority to make licencing decisions under the *Fisheries Act*; the Applicant's situation and the potential implications for him of applying the PIIFCAF Policy; and, the broader policy implications of a decision to grant or deny the appeal, including unfairness to other fish harvesters who met the eligibility criteria. This distinguishes the facts from *Stemijon*. Nor was it necessary for the Minister to fully explain every factor that led to his decision; the absence of perfect or comprehensive reasons is not a basis for setting aside a decision on a reasonableness review (*Newfoundland and Labrador Nurses Assn v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-18 ("*Newfoundland Nurses*"); *Alberta (Information and Privacy Commission) v Alberta Teacher's Association*, 2011 SCC 61 at para 54 ("*Alberta Teachers*").

[87] The Respondent also submits that the PIIFCAF Policy expressly contemplates exemptions being made in extenuating circumstances (s 8, 10 and Annex 1) and that the Minister has granted exemptions from the Policy, specifically for fleets. There was no evidence that granting the Applicant an exemption would somehow be consistent with the Minster's objectives, which is distinguishable from the circumstances surrounding the fleet exemptions.

Thus, to arbitrarily exempt him would have served to perpetuate the dual mischief of a concentration of control over licence by non-licence holder and a flow of the benefits of the inshore fishery away from coastal communities. The Respondent states that the Applicant is the only individual licence holder who applied for an exemption. It is because no other exemptions have been requested that none have been granted, thus this is not situation such as in *Ha* (see also *Med-Emerg International Inc v Canada (Public Works and Government Services)*, 2006 FCA 147 at para 56).

[88] Finally, the Respondent submits that none of the Applicant's other arguments amount to evidence that the Minister fettered his discretion in this case. Requiring licence holders to declare if their licences were subject to controlling agreements was not a fettering of the Minister's discretion. The collection of information, for example place of residence, is routine to determine fish harvesters' eligibility for particular licences. Further, comments purportedly made by DFO officials who did not decide the Applicant's case are irrelevant and inadmissible, they were not in the record before the Minister when he made the decision. Nor can the Minister's decision making authority be fettered by his predecessor (*HMTK v Dominion of Canada Postage Stamp Vending Company Limited,* [1930] SCR 500 at 506; *Doucette v Canada*, 2015 FC 734 at paras 115-119 ("*Doucette*"); *Pacific National Investments Ltd v Victoria (City)*, 2000 SCC 64 at paras 71-74; *Happy Adventure Sea Products (1991) Ltd v Newfoundland and Labrador (Minister of Fisheries and Aquaculture)*, 2006 NLCA 61 at paras 24-26 ("*Happy Adventure Sea Products*")). The Minister's broad licencing discretion is a matter of public policy which would be undermined should a Minister be estopped from the exercise of that discretion by the representations of his or her predecessors. If the law were otherwise, the

Minister's ability to respond to current socio-economic concerns in the fishing industry would be severely curtailed (*Doucette* at para 119; *St. Anthony Seafoods Limited Partnership v Newfoundland and Labrador (Minister of Fisheries and Aquaculture)*, 2004 NLCA 59 at para 81).

Analysis

[89] In *Maple Lodge Farms*, the Minister of Economic Development, responsible for Industry, Trade and Commerce refused to issue an import permit, pursuant to the *Export and Import Permits Act*, RSC 1970, c E-17, to import a product included on an import control list, notwithstanding the ministerial guidelines dealing with the matter. The Supreme Court of Canada held that the Minister could properly and lawfully formulate general requirements for the granting of import permits, but those guidelines could not confine the discretion afforded to him under s 8 of the Act. The Court held the Minister had properly exercised his discretion and stated at pages 6 and 7:

> It is clear, then, in my view, that the Minister has been accorded a discretion under s. 8 of the Act. The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; . . . does not fetter the exercise of that discretion. The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. dealt with this question at some length and said, at p. 513:

> The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville* [1965] 1 O.R. 259).

In any case, the words employed in s. 8 do not necessarily fetter the discretion. The use of the expression "a permit will normally be issued" is by no means equivalent to the words 'a permit will necessarily be issued'. They impose no requirement for the issue of a permit.

In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere….

[90] The opposite outcome is demonstrated in *Stemijon*. There, pursuant to s 220(3.1) of the *Income Tax Act*, the Minister had discretion to grant relief against penalties and interest. Justice Stratas stated that the scope of the Minister's discretion under that section is determined by examining the words setting out the discretion, the other sections of the Act which may provide

context, and the purposes underlying the section and the Act itself. That examination revealed that the scope of the Minister's discretion was broader than the three specific scenarios for taxpayer relief found in a relevant Information Circular. However, the Minister's decision letter made no reference to the scope of his discretion under the Act. Rather, it utilized the wording of the scenarios found in the Information Circular when describing his discretion. Justice Stratas concluded that those words showed that the Minister was limiting his consideration to those circumstances and was not considering the broad terms of s 220(3.1) of the *Income Tax Act*:

> 31 Alone, reference to a policy statement, such as the Information Circular, is not necessarily a cause for concern. Often administrative decision-makers use policy statements to guide their decision-making. As I mention at the end of these reasons, such use is acceptable and helpful, within limits. But many administrative decision-makers are careful to note those limits - policy statements can only be a guide, and, in the end, it is the governing law that must be interpreted and applied. In his decision letter, however, the Minister did not note any limits on his use of the Information Circular.

[91] Amongst other points, Justice Stratas noted that the Minister, in his decision letter, also stated that the appellants sought relief on the basis of administrative oversight but that the explanations and justifications offered by them in that regard were not addressed in the letter. Further, the Minister's reference to Taxpayer Relief Provisions in denying the relief sought was the title of the Information Circular. And, while Justice Stratas agreed that the reasons in the decision letter should not be considered in isolation, he found that although the Minister had a broad record before him, his decision letter showed no awareness that he could go beyond the Information Circular nor that he had regard to key portions of the record, being the explanations and justifications in letters sent by the applicants. In those circumstances, resort to the record to explain why the Minister decided as he did was not possible.

[92] Finally, I would note *Gordon*. In that case, Justice Mactavish concluded, based on the reasons of a Minister's delegate, that the delegate believed she was bound by a guideline regarding the amount of taxpayer relief she could grant. However, there was no statutory basis to support that conclusion and the discretionary power granted by s 281.1(1) of the *Excise Tax Act*, RSC 1985, C E-15 was broad enough to allow the Minister to grant all of the relief requested. In determining that the delegate had fettered her discretion, Justice Mactavish stated:

> [29] While decision-makers are permitted to consider, and indeed, base their decisions on administrative guidelines, a decision-maker will fetter their discretion if they treat a guideline as binding: *Waycobah First Nation v. Canada (Attorney General)*, 2011 FCA 191, [2011] G.S.T.C. 95 (F.C.A.) at para. 28, (2011), 421 N.R. 193 (F.C.A.). Administrative guidelines do not have the force of law. They therefore cannot be relied on in a way that limits the discretion conferred on a decision-maker by statute: *Stemijon Investments*, above, at para. 60.

[93] Against this backdrop I will now address the Applicant's submissions.

(1) Mandatory Requirements

[94] Here the Applicant submits that the Minister fettered his discretion on the basis that the PIIFCAF Policy provides mandatory requirements. In that regard, I note that in *Maple Lodge Farms*, the Supreme Court of Canada stated that it will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. In this case, the PIIFCAF Policy states that it is a policy which guides, but is not binding on, the Minister and does not fetter his or her discretion to issue licences granted under s 7 of the *Fisheries Act*. It contains a policy statement indicating that it promotes a commercial fishery in Atlantic Canada with a strong independent inshore sector and includes a comprehensive approach to assist fish

harvesters to retain control of their enterprises, enhance access to capital from traditional lending institutions and maintain the wealth generated from fish harvesting in coastal communities. As noted above, it describes the concern of the Minister that controlling agreements were undermining many licencing policies, including the Fleet Separation and Owner-Operator Polices, sets out its objectives, and introduces the creation of the Independent Core category as the new eligibility criteria for the receipt of new or replacement licences. The PIIFCAF Policy also describes how it will be implemented and the eligibility implications for licence holders who remained in controlling agreements after April 12, 2014.

[95] The PIIFCAF Policy revolves around licence eligibility. It clearly advises fish harvesters that the use of controlling agreements is contrary to existing DFO licencing policy and the steps the Minister intends to take to address this. That is, that fish harvesters must demonstrate that they are not parties to controlling agreements in order to be eligible to be categorized as Independent Core so as to renew their licences.

[96] The Policy also states that decisions as to categorization assessment can be appealed through the DFO Atlantic Fisheries Licence Appeal System pursuant to s 34(1) of the existing Commercial Fisheries Licencing Policy for Eastern Canada. It contains a policy exemption provision whereby fleets may be exempted if they meet criteria set out in Annex I. There is no policy exemption for individual fish harvesters. However, under the heading policy flexibility, the policy states that under extenuating circumstances, to support PIIFCAF, transitional operator privileges were authorized for licence holders who declared to be in a controlling agreement.

These privileges were valid to March 31, 2009 in order to permit those licence holders to participate in fishing activity on another vessel or to pursue alternative employment activities.

[97] Thus, the Minister is indicating to fish harvesters the general policy that will guide the Minister's discretion in issuing fishing licences. In my view, the fact that the Policy contains mandatory requirements does not establish that it acts a fetter on the Minister's discretion.

[98] For example, while fish harvesters were required to file declarations, and must continue to do so whenever new or replacement inshore vessel-based licences are sought, the declaration served to provide the Minister with the information necessary to assess whether the eligibility criteria had been met. The Respondent submits that this type of policy requirement is not exceptional, noting that subsection 8(1) of the *Fishery (General) Regulations*, SOR/93-53 states that the Minister may require an applicant for a document to submit information, in addition to that included in the application, as may reasonably be regarded as relevant and a statutory declaration verifying the information given in the application or information submitted. Further, applicants for licences are routinely required to establish eligibility by the submission of supporting documents, such as confirming residency pursuant to section 18 of the 1996 Policy.

[99] I would similarly note that s 16(7) of the 1996 Policy, concerning changes of licence holders, also states that new entrants must meet specified eligibility criteria. Thus, the use of policies to set out licencing eligibility criteria is also not a new practice.

[100] In my view, an operational requirement within the PIIFCAF Policy requiring fish harvesters to provide eligibility information for assessment does not establish that the Minister viewed the PIIFCAF Policy as binding upon him. Moreover, the PIIFCAF Policy itself clearly states that it does not fetter the Minister's discretion. The statement that "PIIFCAF is a policy which guides the Minister. It is not binding on the Minister nor does it fetter his/her discretion to issue licences granted under section 7 of the *Fisheries Act*" is found in section 1, policy statement, of the PIIFCAF Policy. Contrary to the Applicant's submissions, it is not tied to the fleet exemption provision.

[101] As noted above, in *Maple Lodge Farms*, the Supreme Court of Canada found that it was not improper or unlawful for the Minister to state in policy guidelines general requirements for the granting of import permits. In this matter, the PIIFCAF Policy indicates the eligibility criteria for the receipt of new or replacement inshore vessel-based licences. In my view, setting out the eligibility criteria themselves in the PIIFCAF Policy is not improper or unlawful nor is stipulating what must be provided in order for that eligibility to be assessed. These operation aspects are distinct from a circumstance where guidelines or policy are treated as binding to the exclusion of other valid or relevant considerations. As discussed below, it is in that latter case that the exercise of a Minister's discretion is improperly fettered.

[102] The Applicant further submits that in a discussion document entitled "Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries", the DFO conceded that the PIIFCAF Policy could not be implemented as a regulation because prohibiting parties from entering a contract or dictating the terms of a contract would interfere with private financial

transactions and fall outside DFO's jurisdiction. Because of this, the PIIFCAF Policy is enforced indirectly through the Minister's "absolute discretion" under s 7 of the *Fisheries Act*. I would first note that the referenced document does not support the Applicant's contention but merely recognizes that DFO's competence to regulate trust agreements would have to be tied to fisheries management. Nor is there any evidence in the record to support this assertion which, in my view, is of no merit.

(2) Exemptions and Consideration of Individual Circumstances

[103] Similarly, I am not convinced that the fact that the Minister chose not to provide for individual harvester exemptions from the PIIFCAF Policy establishes a fettering of his discretion. The Minister was entitled to structure the Policy in a manner that served its objectives. Again it is not improper or unlawful for the Minister to formulate and to state general requirements which will underlie for his or her decisions (*Maple Lodge Farms*).

[104] Nor am I convinced that the Minister applied the PIIFCAF Policy in an inflexible way. The Policy provided for an appeal process by which fish harvesters had the opportunity to appeal decisions relating to the categorization assessment through the DFO Atlantic Fisheries Licence Appeal System, pursuant to s 34(1) of the *1996 Policy*, which states as follows:

> **34 Access to Appeal Process**
>
> (1) Persons who are not satisfied with decision regarding licencing taken by DFO officials have the right of appeal. Only eligible inshore fishers who file a written request within three years of a department licencing decision or a change in policy have access to the Fisheries Licence Appeal System.
>
> **35 Appeal System (Structure)**

(1) The Department Appeal Committee structure is as described in Annex V.

(2) The role of the *Regional Licencing Appeal Committee* is to review all pertinent information and recommend to the Reginal Director General that an appellant's request will be approved or denied.

(3) Appellants will be notified in writing of the time and location of their appeal hearing.

(4) An appellant has the right to appear in person and/or to be represented by another person at all appeal levels.

(5) An appellant will be notified in writing as to the outcome of the appeal hearing.

(6) If the decision of the Regional Director General is negative, the appellants will be informed of the details respecting how an appeal may be made to the Atlantic Fisheries Licence Appeal Board.

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

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

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

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

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

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

(e) Where the Board recommends making an exception to a policy, practice or procedure in an individual case, the

Board will provide full rational for its recommendation to the Minister;

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

(8) Notwithstanding subsection (7), the Minister may refer to the Board any decision he may wish to have reviewed. (AR 52)

[105] In this matter, the Applicant filed his declaration on March 25, 2008 and confirmed that he was a party to a controlling agreement. He was reminded by letters of December 3, 2009 and October 18, 2013 that he had the right to appeal the categorization decision. The Applicant did not appeal the categorization decision which is not surprising as he does not assert that he is not a party to a controlling agreement or that his agreement does not fall within the definition of a Controlling Agreement set out in the PIIFCAF Policy.

[106] On March 18, 2014, the Applicant was sent a registered letter again urging him to terminate his controlling agreement or to amend it to bring it into line with the PIIFCAF Policy. He was also advised at that time that he would have an opportunity to appeal a decision to deny a renewal of his licences if he remained in a controlling agreement after April 12, 2014. That letter specifically stated that to participate in the appeal, the Applicant would need to submit "all relevant information, including your Controlling Agreement". Further, that the Minister had instructed the Appeal Board to examine controlling agreements submitted for review to determine if there was a violation of the Owner-Operator and Fleet Separation Policies that the PIIFCAF Policy was designed to protect. In a March 20, 2014 statement, the Minister addressed the background to the PIIFCAF Policy and noted that the seven year period during which fishers were to terminate or revise their controlling agreements was almost up and that the initiative had

been very successful. The Minister stated that a small percentage of inshore fishermen were still in controlling agreements and cautioned that on April 12, 2014, anyone who was still in a controlling agreement would not have their licence renewed. However, as with all licencing decisions made by the DFO, fishermen who could not renew their licence would have an opportunity to appeal, and repeated the instructions she had given to the Appeal Board.

[107] The Applicant remained in his controlling agreement. In early 2014, he was directly contacted by DFO and told that if he applied for a renewal before April 12, 2014, his licence would be issued for the 2014 season. The Applicant did this, and was issued a licence for the 2014 season.

[108] On December 31, 2014, the Applicant wrote to the then Minister of Fisheries and Oceans, Minister Shea, and asked for an exemption to the PIIFCAF Policy, although the Policy made no provision for individual harvester exemptions, and that he be given the opportunity to make out his case for such an exemption. The Minister responded on March 12, 2015 advising that the DFO would not be considering any exemptions to the PIIFCAF Policy but that the Applicant could appeal a non-renewal decision by the DFO through the Appeal Board. As indicated above, the DFO provided the Applicant with an appeal case package. In describing the nature of the appeal, the summary stated that the Applicant was requesting to continue operating his fishing enterprise while in a controlling agreement and that the Minister's office granted appeals to the Appeal Board "to allow harvesters the opportunity to prove their existing controlling agreement is not contrary to owner operator and fleet separation policies". It also noted that the Applicant "wishes to appeal the cancellation decision as set out in a letter from the department dated March

12, 2015". The summary describes the relevant policies and the background facts including that the Applicant had written to the Minister requesting an exemption from the PIIFCAF Policy and had been advised that there were no exemptions, "but he was granted an appeal on this basis".

[109] There were various communications back and forth between the DFO and the Applicant or his counsel concerning the format and date of the appeal and, by letter of May 15, 2015, the DFO advised that while the appeal process typically begins with a hearing before the Regional Licencing Appeal Committee that the Minister, due to the sensitive and complex nature of the PIIFCAF Policy, had requested that all PIIFCAF hearings go directly to the Appeal Board. It also advised that, as per the Applicant's request, his licence would be reinstated and would remain in effect until his appeal had been heard and decided at which time the situation would be reassessed. By letter of May 22, 2015, the DFO provided a hearing place and date and stated "Please ensure that you bring with you to the hearing or provide to the Committee, any information and copies of documents which you feel that the Committee should examine in considering in your case." and included a copy of "A Guide to the Atlantic Fisheries Licence Appeal Process". The Guide notes, among other things, that the reasons for appealing a decision must relate to an alleged incorrect application of the licencing policies, extenuating circumstances or a change in policy, and that any documents or relevant information which the appellant feels should be examined by the Appeal Board should be provided.

[110] An updated summary was provided to the Applicant's counsel by letter dated August 28, 2015, which included all correspondence on the Applicant's file. By letter of August 4, 2015 from DFO to the Applicant's counsel the DFO again explained that the Minister had requested

that all PIIFCAF Policy hearings go directly to the Appeal Board and "For clarity, the Minister, in her absolute discretion, has asked AFLAB (the Appeal Board) to hear PIIFCAF appeals as a matter of priority". The letter also stated that the appeal package sent to the Applicant and to counsel contained the key documents that the DFO felt were relevant to the appeal and added "Should you feel there are additional documents which are germane to the appeal you are encouraged to bring them and discuss their relevance with the Board". The letter also explained the appeal was a policy appeal process and not a strictly legal proceeding and described the process which included that the appellant could present any perspectives he or she may have to support their position and that the Appeal Board may direct questions to them or the DFO representative for clarification or further information. Further, the letter stated that the appeal is normally intended to be done in a manner that would ensure fish harvesters feel comfortable and participate fully. There was no mechanism for the formal calling of witnesses or the use of sworn statements, subpoenas or formal cross-examination. Written presentations could be prepared before the appeal, but must be presented at the appeal. The DFO stated that it recognized that this was a very significant issue for the Applicant.

[111] Ultimately, the Applicant's counsel provided written submissions dated October 21, 2015. The content of that letter is significant because it frames the issues as seen by the Applicant. Therein counsel stated that the Applicant felt that he "was not treated fairly by the Minister. The Minister said that she would not consider any exceptions to the PIIFCAF policy, and did not take into account the circumstances of his particular case". Counsel stated that the Minister must consider each case on its own merits because this was only fair and because s 7 of the *Fisheries Act* granted her absolute discretion to make licencing decisions. Counsel stated

that this meant that the Minister could not create a general policy and then fail to consider each case on its own merits due to the policy. The letter went on to state that it was unfair to apply the PIIFCAF Policy without considering the Applicant's particular circumstances, which justified an exemption for the three reasons set out.

[112] First, that it would be difficult for the Applicant to exit his controlling agreement, a redacted copy of which was provided. The fish processors with whom the Applicant was in agreement with provided a vessel, crew and support, and financed the licence. The Applicant depended on the relationship for his livelihood and without it would "lack the licence funding, vessel, employees, connections, suppliers and capital required to continue to fish on his own". Counsel submitted that it may not be possible for the Applicant to obtain his own vessel and that he may not have the ability to run a fish harvesting business without the support from the controlling agreement, which provided him with security in his operations and was necessary if he was to continue fishing. Second, that the Applicant's licence conditions required him to sell his catch in Labrador and that there was practically only one fish processor in Labrador and therefore no competitive market. Selling his catch for a reduced price would make it harder for him to earn a sufficient return to run his enterprise, while a controlling agreement would reduce that risk as the processor could spread the costs and risks widely, which the Applicant could not. Third, the controlling agreement did not present a threat to the inshore fishery. The application of the PIIFCAF Policy to the Applicant was not necessary to protect the Atlantic fishery and was really a restriction on his right to enter agreements for no good fishery-related reason. The letter concludes that the controlling agreement was important to the Applicant and caused no harm to the industry and that it was unfair to deny his licence renewal without considering his particular

circumstances and requested that the Appeal Board recommend that the Minister reverse her decision.

[113] As noted above, the Appeal Board's report sent to the Minister set out the PIIFCAF Policy, Owner-Operator and Fleet Separation Policies, the background facts which acknowledged the letter from the Applicant's counsel and his oral submissions, and, that the Applicant, who did not attend the hearing, was seeking an exemption to the PIIFCAF Policy. The report summarized the oral submissions of the Applicant's counsel at the hearing, being that exiting the controlling agreement may have a significant cost; that the Applicant may lose his enterprise as a result; that the PIIFCAF Policy is irrational and ineffective and will cause financial hardship and that it has been grappled with but rejected in other jurisdictions; that the PIIFCAF Policy does not appreciate a fisher who holds a quota, but does not have financial assistance; that because the Applicant is located in Labrador, without an agreement he cannot sell his catch; and, that the Policy ties the hands of fishers, limits flexibility and financing and, therefore, makes it more expensive for fishers to operate their enterprise. The Appeal Board described its response being that discussion of other jurisdictions was beyond its mandate and that it had asked counsel to put a dollar value on the claimed financial hardship, in order for this to be considered as extenuating circumstances as all fishers are in the same situation, but that counsel could not do so. The Appeal Board found that the Applicant had been treated fairly in accordance with the DFO Controlling Agreement Policy [*sic*] and had not demonstrated a valid extenuating circumstance to justify upholding the appeal. It recommended that the appeal be denied.

[114] The Associate Deputy Minister prepared a Memorandum for the Minister concerning the recommendation of the Appeal Board. This described the Appeal Board as an arm's length appeal board, established by the Minister. It attached a background document concerning the Appeal Board which states that under the *Fisheries Act*, the Minster is authorized to decide upon matters pertaining to the issuance of commercial fishing licences and that the Minster had established the Pacific and Atlantic appeal boards as the last administrative level of appeal for commercial fish harvesters dissatisfied with departmental licencing decisions. The background document further states that the Appeal Board makes recommendations to the Minister on the disposition of licencing appeals by determining if an appellant was treated appropriately, in accordance with licencing policies, practices and procedures, or whether extenuating circumstances existed which would warrant accommodation on the part of the DFO. The Memorandum to the Minister went on to summarize the background to the appeal and the Appeal Board's decision, and recommended that it be accepted. The Memorandum stated that failure to do so would be seen by the inshore fleet as the DFO no longer supporting the PIIFCAF Policy, and that individual licence holders who removed themselves from controlling agreements and complied with the Policy, often at considerable expense, may have strong reactions to that outcome.

[115] The Minister of Fisheries and Oceans, Minister Tootoo, by letter dated December 23, 2015, advised the Applicant that the Appeal Board report had been submitted to him for his consideration. Having considered all of the relevant information he had decided to deny the appeal. Therefore, the Applicant would not be provided with an exemption to the PIIFCAF

Policy. Accordingly, he would no longer be eligible to have his licences reissued for the 2016 fishing season and beyond.

[116] As I have stated above, it was open to the Minister not to include within the PIIFCAF Policy exemptions for individual harvesters. It was within his discretion to omit such exemptions as contrary to the Policy objections. There is nothing improper in establishing criteria to meet policy objectives. This is not, in and of itself, evidence of fettering of his discretion. And, significantly, even in the absence of policy exemptions, in this matter the Applicant was afforded an appeal of the decision not to reissue his licences. His submission on appeal was that he had been treated unfairly because his individual circumstances had not been considered. In my view, the appeal provided the Applicant with the opportunity that he requested, which enabled him to put forward his individual circumstances to be assessed by the Appeal Board to determine whether they comprised extenuating circumstances that would justify the exemption that he sought. Thus, the Minister did not fetter his discretion, as the Applicant's submits, by specifically treating the PIIFCAF Policy as binding upon him in the absence of individual exemptions or other flexibility. Rather, an appeal mechanism was provided and the Minister considered all of the information that the Applicant put forward in support of his appeal.

[117] However, the Applicant did not attend at the hearing and he provided no supporting evidence as to why his circumstances were extenuating, despite the letters from the DFO to the Applicant and his counsel advising him to do so. The only document submitted was his controlling agreement.

[118] Although the Applicant's counsel in his submissions asserted that the Applicant may not be able to afford to operate his enterprise without the controlling agreement, no financial or other information was submitted in support of that submission. There was no evidence, for example, that the Applicant had approached a Recognized Financial Institution ("RFI"), a term defined in the PIIFCAF Policy as including Canadian financial institutions as defined in the *Bank Act*, the Business Development Bank of Canada, the Export Development Bank or provincial loan boards, in an effort to obtain financing in the absence of the controlling agreement, and had been denied. There was no financial evidence of his current income or his sources of income.

[119] I note here, in passing, that the definition of Controlling Agreement excludes agreements between the licence holder and a RFI if there is no third party involved or any co-signor, guarantor or other surety involved that does not control or influence the licence holder's decision to submit a request to the DFO for the issuance of a "replacement" licence to another fish harvester. The PIIFCAF Policy, through a Notice and Acknowledgement System, also provides a measure of security provided to lenders.

[120] At the hearing, the Appeal Board reasonably asked that the Applicant put a dollar value on the claimed financial hardship in order for this to be considered as an extenuating circumstance, as all fishers being in the same situation. His counsel said that he could not provide a dollar value. When appearing before me, the Applicant submitted that this was an unreasonable request as he could not provide information that would form a comparison of his financial situation to that of others. This may be true, but the Appeal Board did not ask for comparative financial information and, in my view, as it was the Applicant who claimed that he

was unfairly treated because his individual circumstances had not been considered, the onus fell squarely on him to provide information supporting his asserted financial hardship when he was given the opportunity to do so. It was not sufficient to simply claim that he may not be able to continue with his enterprise without a controlling agreement. The remainder of the Applicant's submission to the Appeal Board simply disagreed with the Policy and the necessity for it. In my view, based on what had been placed before it, the Appeal Board reasonably found that the Applicant had been treated fairly and that he "had not demonstrated a valid extenuating circumstance".

[121] I note that in his affidavit filed in support of this judicial review (which was not before the Appeal Board or the Minister when making his decision), the Applicant stated that he had been a fisher for over 50 years. He had been a party to a controlling agreement since 2003. In it he confirms that through the controlling agreement he is provided with funds to acquire licences, a vessel, vessel insurance, maintenance, and a crew. In return, he lands and sells all of his fish at the corporation's direction and agrees not to apply to transfer his licence without its consent. He states that without the controlling agreement he would not have the money or financial backing to acquire a vessel, would not have the connections or resources to maintain a crew and vessel, or the funds to obtain licences.

[122] When cross examined on his affidavit, he confirmed that he made no attempt to terminate or amend his controlling agreement with Labrador Sea Products, Inc. and Quinlan Brothers Limited. Further, that it was those processors who directed him to write a April 10, 2014 letter to the DFO saying that he was working on an agreement to get out of the controlling agreement

in the hope that an extension to the licences would be granted if DFO thought he was working on terminating the agreement. Similarly, the making of the request to the Minister for an exemption to the PIIFCAF Policy was done at the direction of the processors and was conducted with their assistance. The Applicant confirmed that at the appeal hearing, through his counsel, he had an opportunity to present his individual circumstances to the Appeal Board. Further, the Applicant admitted that he made no inquiries or looked into other ways of financing his enterprise between 2007 and 2015, but stated that he could not afford to go through a bank. He stated that he was not aware of any fish harvesters having exited controlling agreements, nor was he aware of the Notice and Acknowledgement System put in place by the PIIFCAF Policy, or that the Eagle River Credit Union in Cartwright, Labrador participates in the program. He also confirmed that there was one processor in Labrador that he could sell to, the Labrador Union Fisherman Shrimp Company, and that the price for crab and other species is set or accepted by a price setting panel established by the Province and that fish harvesters are involved in negotiating the prices which apply everywhere in the Province. Thus, a buyer could not pay a fish harvester less for their crab than the set price. Accordingly, even without a controlling agreement, a buyer could not pay him less for the catch than the negotiated price.

[123] While the Applicant’s affidavit was not before the Appeal Board or the Minister, I have set out some of its content and his evidence on cross examination because it confirms that in the Applicant’s view his personal circumstances were presented to the Appeal Board; it contradicts the suggestion before the Appeal Board that he could not sell his catch in Labrador or that he would have to do so at a lower price; it establishes that the Applicant did not try to get out of or amend his controlling agreement; and, confirms that he did not attempt to obtain financing from

a RFI. What the Applicant's evidence does establish, with absolute clarity, is that with respect to the licences which had been issued to him but were subject to the controlling agreement, he was a place holder only. The beneficial interest in fishing enterprise was wholly held and operated by the fish processors who were parties to that agreement. Indeed, even in the event of the Applicant's death, his estate was compelled to transfer his licences and the fishing enterprise to a designate of the fish processors at their request. The Applicant's spouse was, for this purpose, a party to the controlling agreement.

[124] I do not accept the submission of the Applicant, made at the hearing before me, to the effect that the Appeal Board hearing was unfair because he did not know the criteria he had to meet, unlike a fleet seeking an exemption, in order to obtain an exemption. The PIIFCAF Policy did not provide for individual exemptions and the Applicant had been advised that he would not be issued one. However, he appealed on the basis that he was unfairly treated because his individual circumstances had not been considered. That circumstance was undue financial hardship. Accordingly, the Applicant cannot reasonably assert that because of a lack of exemption criteria in the Policy he was unfairly treated because he did not know the case he had to meet. Similarly, the Appeal Board advised him to provide any relevant documentation. He chose only to provide the controlling agreement. It is not reasonable to now argue that the Appeal Board should have guessed what his individual circumstance was and directed him as to what information he should submit in support of this at his appeal.

[125] It is also of note that the evidence of Knight was that after the initial declarations were received in March 2008, DFO's records indicated that 737 licence holders in Eastern Canada

declared being party to a controlling agreement. By April 25, 2014, only 46 licence holders in the Eastern Canada inshore fishery were still subject to controlling agreements. Only two licence holders sought to appeal DFO decisions not to re-issue their licences, one of these appeals was not pursued. By the summer of 2015, the Applicant was the only licence holder still remaining in a controlling agreement who invoked the appeal process and asked for an exemption to the PIIFCAF Policy. As a result, while the Applicant points out that Knight gave evidence that he was not aware that any exemption to the PIIFCAF Policy had ever been granted and that *Ha* demonstrates that a lack of evidence of a decision maker ever departing from a policy was indicative of a fettering of discretion, *Ha* has no application in these circumstances as only one exemption has ever been requested.

[126] In sum, for the reasons set out above, I do not accept the Applicant's submissions that the Minister's discretion was fettered because the PIIFCAF Policy purports to create mandatory requirements, because the Minister did not consider the Applicant's individual circumstances, or, because of the absence of exemptions or flexibility for individual fish harvesters in the PIIFCAF Policy.

[127] I find that the Applicant was treated fairly and that the appeal process itself was fair. The PIIFCAF Policy provided the Applicant, like all inshore fish harvesters, seven years to remove himself from his controlling agreement or to amend it so that it was in compliance with that policy; the DFO communicated the Policy to all fishers clearly and repeatedly; the DFO contacted the Applicant directly and even suggested to him that he apply to renew his licences before April 12, 2014 so that they could be issued to him permitting him to fish for the remainder

of that year, which he did and they were; and, he was afforded an appeal to address his claim of extenuating circumstances justifying an exemption from the Policy and his licences were re-issued to him during the appeal process.

(3) Decision letter / s 7 of the *Fisheries Act*

[128] In his decision letter the Minister made no reference to s 7 of the *Fisheries Act*. He stated that his letter was in response to the Applicant's appeal concerning the licences held in his name that remained subject to a controlling agreement, "despite the eligibility requirement provided for by the policy on Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries (PIIFCAF)". The Minister stated that the Appeal Board had held a hearing of the matter and that its report and recommendation were submitted for his consideration. The letter concludes:

> Having considered all relevant information, I have decided to deny the appeal. Therefore, you will not be provided with an exemption to the PIIFCAF policy.
>
> Accordingly, you will no longer be eligible to have the licences reissued to you for the 2016 fishing season and beyond.

[129] The Minster was not required to give detailed reasons or to explicitly refer to the Applicant's submissions at the Appeal Hearing as to why he should be granted an exemption (see *Atco Lumber Ltd v Kootenay Boundary (Regional District)*, 2014 BCSC 524 at para 61; *Newfoundland Nurses* at paras 18-20; *Mitchell v Canada (Attorney General),* 2015 FC 1117 at para 31).

[130] The difficulty here is that the Minister links his decision to deny the appeal, and thereby refusing to grant an exemption under the PIIFCAF Policy, to the issuance of a fishing licence. More specifically, the decision does not identify any considerations other than the PIIFCAF Policy, suggesting that the Minister was limiting his consideration of the issuance of the fishing licences to whether the Applicant was provided an exemption to the PIIFCAF Policy eligibility requirements, rather than relying upon his absolute discretion.

[131] As to the Minister's consideration of "all relevant information", the record before me contains the certificate of Kevin Stringer, Senior Assistant Deputy Minister, Ecosystems and Fisheries Management, DFO, as to the documents that were before the Minister when the decision was made. This was comprised of the December 18, 2015 Memorandum for the Minister with four attachments: a document entitled Atlantic Fisheries and Pacific Region Licence Appeal Boards, which describes the establishment and role of the appeal boards; a document entitled Background: Licencing Policy in Atlantic Canada and Quebec's Inshore Fleet; the Appeal Board Report to the Minister and recommendation in this matter, which included the October 21, 2015 written submissions of the Applicant's counsel to the Appeal Board, the March 12, 2015 letter to the Applicant from then Minister of Fisheries and Oceans, Minister Shea, and the redacted controlling agreement; and, the Minister's decision letter of December 23, 2015. This material focuses on the PIIFCAF Policy and the factual background. The Atlantic Fisheries and Pacific Region Licence Appeal Boards document notes that under the *Fisheries Act* the Minister is authorized to decide on matters pertaining to the issuance of commercial fishing licences but goes no further; its focus is on the role of the appeal boards. The only reference to section 7 of the *Fisheries Act* is found in the letter from the Applicant's counsel. It asserted that

the Minister must consider each case on its own merits because this is only fair and because s 7 grants the Minister absolute discretion to make licencing decisions, which counsel asserted meant that the Minister could not create a general policy and then fail to consider each case on its merits due to the policy.

[132] Further, prior jurisprudence of this Court has confirmed that while it is the decision of the Minister that is under review, if the Appeal Board's recommendation is adopted by the Minister, as it was in this case, the Appeal Board's decision is "inexorably linked" to the Minister's decision in the sense that the Appeal Board's decision forms one of the bases for the exercise of ministerial discretion (*Ralph* at para 14). Accordingly, the reasons in the decision letter should not be examined in isolation. In *Stemijon*, Justice Stratas held that "[r]easons can sometimes be understood by appreciating the record that was placed before the administrative decision-maker" (at para 37, citing *Vancouver International Airport Authority v PSAC*, 2010 FCA 158 at para 17).

[133] The Respondent submits that the Minister considered a variety of information which distinguishes the matter, on its facts, from *Stemijon*. I note, however, at the trial level decision of *Stemijon* (*Stemijon Investments Ltd v Canada (Attorney General)*, 2010 FC 893), the applicant had argued that the Minister ignored factors other than the scenarios provided in the tax relief guidelines. The Court did not accept this submission based on the record, which included the request for a second review, the 2009 taxpayer relief report, the CRA's International Tax Directorate's communiqué regarding Penalties Under Foreign Reporting Requirements, and the information circular concerning taxpayer relief. The trial judge found that the 2009 taxpayer relief report contained a review of the initial request for relief and that the scope of the review in

the report went beyond the three scenarios provided for in the taxpayer relief provisions of the Information Circular. Given the extent of the information before him, the trial judge found that the Minister's delegate had considered the taxpayer relief beyond the three scenarios given in the guidelines and, therefore, did not fetter his discretion. However, the Federal Court of Appeal, in overturning the Federal Court decision, found that while the record showed that the Minister had a broad record before him, his decision letter showed no awareness that he could go beyond the information circular. Based on the Federal Court of Appeal's decision, the information in the record that was before the Minister in this case does not cure his apparent consideration of only the PIIFCAF Policy. Moreover, the record in this case is not broad and does not assist in demonstrating that the Minister considered factors other than the PIIFCAF Policy.

[134] In that regard Justice Stratas also stated:

> [56] Whether the reasons are cut and pasted from a previous letter, are slightly modified from a previous letter or have to be drafted from scratch, the final product issued to the applicant for relief under subsection 220(3.1) of the Act should show an awareness of the scope of the available discretion under the Act, offer brief reasons why relief could or could not be given in the particular circumstances, and meaningfully address the arguments made that have a chance of success. If the reasons do not deal with one or more of these matters - something that can happen through careless or unthinking use of a form letter or stock language - the decision may not pass muster under the standard of review of reasonableness.

[135] I accept the Respondent's submissions that it was appropriate for the Minister to rely on the PIIFCAF Policy as indicated in *Maple Lodge Farms*, *Stemijon*, and *Gordon* discussed above. However, in this case the concern is that the Minister's decision letter failed to acknowledge the source and breadth of his broad discretion under section 7 of the *Fisheries Act*, referring only to

the PIIFCAF Policy. He thereby fettered his discretion by not also considering that it was open to him to afford the relief sought other than by way of the PIIFCAF Policy and the appeal process.

Issue 4: Did the Minister have an open mind?

Applicant's Position

[136] The Applicant submits that the Minister and the DFO had made up their minds that there would be no exceptions to the PIIFCAF Policy long before the Applicant's case and, as such, the process which led to the decision was procedurally unfair and gives rise to a reasonable apprehension of bias. All administrative bodies owe a duty of fairness and are required to maintain an open mind and be free of bias (*Newfoundland Telephone Co v Newfoundland (Public Utilities Board)*, [1992] 1 SCR 623 at paras 21-22 ("*Newfoundland Telephone*"); *Old St Boniface Residence Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 paras 78, 94 ("*Old St Boniface*"); *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 SCR 624 ("*Imperial Oil*")).

[137] The Applicant also submits that the facts of this case give rise to a reasonable apprehension of basis on that basis that the Minister had pre-judged the case. These include that: prior to the Appeal Board hearing Minister Shea advised that the DFO would not be considering any exceptions to the PIIFCAF Policy; the Minister and DFO officials repeatedly stated that there would be no exceptions to the PIIFCAF Policy; DFO documents provided to fish harvesters about the PIIFCAF Policy described it in mandatory terms with no exceptions; and, letters to the

Applicant from DFO described PIIFCAF as an absolute rule and the DFO told him he had to cancel his controlling agreement.

[138] The Applicant also asserts that there was a "procedural irregularity" in this case. Specifically, the Appeal Board typically hears appeals from licencing decisions by DFO officials, which would be appealed first to a regional board, and then to the Appeal Board, which would make a recommendation to the Minister. In this case, the Appeal Board heard an appeal from the Minister's own decision. The Applicant submits that the Appeal Board unsurprisingly rejected the Applicant's appeal as it was an appeal from the Minister's own decision, the Appeal Board reports to and is appointed by the Minister, has no statutory security of tenure, and was told by Minister Shea that the DFO would "not be considering any exceptions" to the PIIFCAF Policy.

Respondent's Position

[139] The Respondent submits that the Minister's decision was highly discretionary and took the public interest into account, accordingly, the applicable standard of impartiality is whether the Minister had a closed mind, not the strict reasonable apprehension of bias standard (*Canada (Attorney General) v Pelletier)*, 2008 FCA 1 at para 55 ("*Pelletier*"); *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631 at pp 660-661 ("*Idziak*"); *Imperial Oil* at paras 34-39). The onus is on the Applicant to establish that there is a prejudgment of the matter to the extent that any representations at variance with the view which has been adopted would be futile (*Old St Boniface* at para 94). Here, the Applicant presented no evidence that his personal circumstances and arguments were futile in the decision making process.

[140] The Appeal Board members were attuned to the arguments and evidence presented on behalf of the Applicant and the Minister reviewed its recommendation and all of the relevant information prior to reaching his decision not to grant an exemption (*Glaxo Wellcome Plc v Canada (Minister of National Revenue)*, [1998] 4 FC 439 (CA) at para 18). The Respondent submits that the Minister was not bound by the specific language of the PIIFCAF Policy, the statements of DFO officials or the positions taken by the previous Minister (*Carpenter Fishing* at para 37; *Arsenault* at paras 42-43; *Doucette* at paras 115-119) and that these are not relevant to the issue of whether the Minister who actually made the decision prejudged the Applicant's case. Moreover, the Appeal Board made an independent recommendation and there was no evidence that this was dictated or influenced by any DFO or government officials. Nor does the Minister always agree with Appeal Board recommendations (*Doucette*).

[141] The Respondent submits that given the multiple opportunities the Applicant was given to make his case and how the decision-making process unfolded, a reasonably informed bystander would conclude that in reaching the decision the Minister considered the Applicant's request with an open mind, free of bias and relied on relevant factors.

Analysis

[142] The applicable test to determine whether an administrative decision-maker is biased will vary depending on the nature of the decision-making body (*Newfoundland Telephone Co*; *Pelletier* at paras 48-55).

[143] In *Idziak*, the Supreme Court of Canada considered an allegation of Ministerial bias in the context of extradition proceedings, and stated at pp 660-661:

> The appellant next raised the argument that in the particular circumstances of this case, the reasonably informed person could have had a reasonable apprehension of bias by the Minister against the appellant. The determination of bias in a specific case will depend upon the characterization of the decision-maker's function. Administrative decision-making covers a broad spectrum. At the adjudicative end of the spectrum, the appropriate test is: could a reasonably informed bystander reasonably perceive bias on the part of the adjudicator? At the opposite end of the *continuum*, that is to say the legislative end of the spectrum, the test is: has the decision-maker pre-judged the matter to such an extent that any representations to the contrary would be futile? See *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 638.

[144] In *Old St Boniface*, the Supreme Court of Canada was concerned with the functions of a municipal council and addressed the applicable test and burden of proof (at p 1197) as follows:

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

[145] In *Pelletier*, the Federal Court of Appeal reviewed the jurisprudence when determining the standard to be applied to a Minister's decision to terminate an at pleasure appointment and concluded that the trial judge had erred in applying the reasonable apprehension of bias test, stating:

> [55] In the case at bar, no legislation restrains the powers of the appropriate Minister. What we have is a decision of cabinet, taken at the discretionary instigation of a Minister, aimed at removing a person appointed during pleasure (a person whose status is, by definition, precarious). This is, without question, a "policy making discretionary" administrative decision (to use the words of LeBel J. in *Imperial Oil Ltd.*), which attracts, at best, a standard of impartiality of a closed mind. (see *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, [2000] F.C.J. No. 1946 (FCA) at para. 36).

[146] In this case, the Minister's decision was highly discretionary, was not constrained by statute, and was based on policy considerations which took the public interest into account. Accordingly, the applicable standard of impartiality in this case is whether the Minister had a closed mind and the onus is on the Applicant to establish that there was prejudgment to the extent that any representations at variance with the Minister's view would be futile. For the following reasons, in my view, the Applicant has not met his burden and has failed to establish that the Minister's mind was closed.

[147] The Applicant submits that Minister Shea's letter of March 12, 2015, declining the Applicant's request for an exemption to the PIIFCAF Policy, demonstrates that Minister Tootoo had pre-judged the case. Further, the Applicant submits that statements made by the Minister Tootoo's predecessors and DFO officials emphasizing that there would be no exceptions to the PIIFCAF Policy are also indicative of a closed mind. However, as addressed above, the decision

under review is Minister Tootoo's decision dated December 23, 2015. In *Doucette*, this Court found that the prior Minister's statements did not fetter the discretion of successive Ministers:

> [116] In *Andrews* at paragraph 83, the Newfoundland Court of Appeal stated:
>
> > To summarize, the above decisions support several conclusions. First, where, pursuant to legislation, a minister is authorized to exercise discretion in the public interest, that discretion may not be constrained for future use or fettered either directly or indirectly, unless the legislation otherwise provides. Indirect fettering includes exposing the minister or government to liability for damages or payment of compensation for failure to exercise the discretion in a particular way. Despite the apparent harshness of the result, an agreement, implied undertaking or representation having the effect of fettering the minister's authority is unenforceable and damages are not available. Nonetheless, the minister must act in good faith, not arbitrarily, and must not base his or her decision on considerations irrelevant or extraneous to the statutory purpose. Finally, while damages are not available, a claim for unjust enrichment may be permitted.
>
> [117] In *St Anthony Seafoods Limited Partnership v Newfoundland and Labrador (Minister of Fisheries and Aquaculture)*, 2004 NLCA 59, [2004] NJ No 336 (leave to appeal to Supreme Court of Canada denied), the Newfoundland and Labrador Court of Appeal stated at paragraph 81:
>
> > I therefore conclude that the *Fish Inspection Act* clearly states, as a matter of public policy, that the Minister has a broad discretion in respect of processing licences which is to be exercised from time to time as the Minister determines. That policy would be undermined if a Minister were estopped from the exercise of that discretion by representations of his or her predecessors as the ability of the Minister to respond to current socio-economic concerns in the fishing industry could be severely circumscribed.
>
> [118] Although this decision is related to the *Fish Inspection Act*, the same can be said of section 7 of the *Fisheries Act*. In *Comeau*,

> the Supreme Court concluded that section 7 of the Act gave the Minister an absolute discretion either to issue or authorize to be issued fishing licences.
>
> [119] Based on the above, Minister Shea could not fetter her discretion or the discretion of Minister Ashfield.

[148] Accordingly, Minister Shea's letter of March 12, 2015, previous statements by Minister Tootoo's predecessor, or DFO officials regarding the PIIFCAF Policy cannot serve to fetter the Minister's discretion and is not evidence that Minister Tootoo prejudged the matter (also see *Happy Adventure Sea Products* at paras 23-27).

[149] The Applicant also submits that the DFO documents provided to fish harvesters, including the Applicant, described the PIIFCAF Policy in mandatory terms, with no exceptions. However, as discussed above, the PIIFCAF Policy explicitly states that it is not binding on the Minister in making decisions regarding licences under section 7 of the *Fisheries Act*. While the Minister fettered his discretion in this case by referring only to the PIIFCAF Policy in his decision and not referring to his absolute discretion pursuant to section 7 of the *Fisheries Act*, I do not agree that the mandatory terms in the PIIFCAF Policy, discussed above, or DFO documents describing the Policy, demonstrate that there was a prejudgment of the matter on the Minister's part.

[150] Finally, the Applicant alleges that the Appeal Board rejected his appeal as it was an appeal from the Minister's own decision, the Appeal Board reports to the Minister, is appointed by the Minister, and was told by the Minister that the department would not be considering any exceptions to the PIIFCAF Policy. As addressed above, s 34 of the 1996 Policy describes access

to the appeal process which is open to any person dissatisfied with licencing decisions taken by DFO officials and s 35 sets out the appeal system/structure. While it is correct that typically appeals are heard first by the Regional Licencing Appeal Committee, which reports to the Regional Director for a decision and that the Appeal Board only hears appeals of negative decisions by the Regional Licencing Appeal Committee, s 35(8) states that the Minister may refer to the Appeal Board any decisions he or she may wish to have reviewed. That was what occurred in this case. The Applicant was advised of this by letter from the DFO dated May 15, 2015 as was his counsel by letter from the DFO dated August 28, 2015. In my view, there was no procedural irregularity in this regard as asserted by the Applicant. Moreover, the Appeal Board considered whether the Applicant was treated fairly and if extenuating circumstances existed to support a deviation or exemption from the Policy and determined that they did not.

[151] Further, the Applicant is not challenging the decision of the Appeal Board, which as an administrative board was dealing with a matter of policy, would also be subject to the open mind standard (*Newfoundland Telephone* at pp 638-639, 641-642) nor is there any suggestion or evidence that the members of the Appeal Board made statements or otherwise demonstrated a closed mind in reaching their recommendation. Nor was Minister Tootoo bound by the recommendation of the Appeal Board (*Doucette*).

[152] In conclusion, I am not satisfied that the Applicant has met its burden in demonstrating that Minister Tootoo prejudged the matter to the extent that representations at variance with the adopted view would be futile.

Issue 5: What is the appropriate remedy?

[153] In *Stemijon*, the Federal Court of Appeal found that a "decision that is the product of a fettered discretion must *per se* be unreasonable." However, despite that finding, the Federal Court of Appeal did not return the matter to the Minister. Justice Stratas found that relief was discretionary and, in the particular circumstances of that case, no practical end would be accomplished by setting aside the Minister's decision and returning the matter back to him for redetermination. The Minister could not reasonably grant relief on the facts before him.

[154] Recently, in *Maple Lodge Farms Ltd v Canadian Food Inspection Agency*, 2017 FCA 45 ("*Maple Lodge 2017*"), the Federal Court of Appeal addressed the remedial discretion of courts on judicial review. It found that the tribunal in that matter had erred by adopting and applying the incorrect standards of liability, however, this was not the end of the matter:

> [47] A reviewing court's consideration of a judicial review consists of up to three analytical stages: resolving any preliminary and procedural issues, reviewing the substantive and procedural merits of the administrator's decision and finally, if necessary, considering whether remedies should be granted and, if so, which ones: *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 473 N.R. 283 at paras. 28-30.
>
> [48] In this case, at the remedial stage, Maple Lodge Farms asks us to quash the Tribunal's decision and remit it to the Tribunal for determination. However, in judicial reviews, remedies are discretionary: see, most recently, the Supreme Court's decision in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.
>
> [49] If the circumstances in this case are such that we should exercise our discretion against quashing the Tribunal's decision and remitting it to the Tribunal for redetermination, then the Tribunal's decision will stand and the application for judicial review will be dismissed.

> [50] In my view, for the following reasons, these circumstances are present here.
>
> [51] *MiningWatch Canada* encourages reviewing courts at the remedial stage, among other things, to consider whether quashing the administrative decision-maker's decision and remitting it to the administrative decision-maker for redetermination would serve any practical or legal purpose. Where the reviewing court concludes that in any redetermination the administrative decision-maker could not reasonably reach a different outcome on the facts and the law, the decision should not be quashed: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710; *Robbins v. Canada (Attorney General)*, 2017 FCA 24. This well-established principle resonates well with the modern-day need that pointless proceedings be avoided and decision-making resources be allocated to where they serve some use: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.
>
> [52] In considering this, reviewing courts must exercise caution and should resolve any doubt in favour of quashing the decision and sending the matter back for redetermination: *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326 at 361. This is because in applications for judicial review, the job of the reviewing court normally is not to delve into the merits, i.e., find the facts, find the law and apply the law to the facts. Instead, this is the job of the administrative decision-maker, here the Tribunal: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189 at para. 23; *Association of Universities and Colleges of Canada v. Canadian Copyright Licencing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297 at paras. 16-19.
>
> [53] In my view, this is a case where no purpose would be served by quashing the Tribunal's decision and having it redetermine the matter.

[155] The Federal Court of Appeal found that the tribunal's previous findings of fact were separate from and unaffected by its legal error and, therefore, applying the law to the facts the tribunal could only reasonably reach one conclusion on re-determination. The Federal Court of Appeal therefore exercised its remedial discretion against quashing the decision and remitting the matter for redetermination.

[156] In this matter, it is abundantly clear from the record before me that the objective of the PIIFCAF Policy was to address the deliberate circumvention, by way of the proliferation of trust agreements (controlling agreements), of the Owner-Operator and Fleet Separation Policies. This was achieved by the implementation of the Independent Core eligibility requirements.

[157] It is not disputed that the Applicant did not terminate his controlling agreement, nor did he amend it so as to bring it into compliance with the Policy. He therefore did not meet the eligibility requirements.

[158] And, as I have set out in detail above, the individual circumstances of the Applicant were put forward by his counsel and considered by the Appeal Board. The Applicant did not provide financial or other information in support of his claim that the financial hardship he would suffer by exiting his controlling agreement justified an exemption from the PIIFCAF Policy.

[159] Given this, it was clearly open to the Minister to refuse to issue licences to the Applicant based on the Minster's consideration of the PIIFCAF Policy and in his absolute discretion pursuant to s 7 of the *Fisheries Act*.

[160] Although I have found that the Minister fettered his discretion by not demonstrating in his letter to the Applicant that he had not restricted his decision to a consideration of the PIIFCAF Policy, but had also considered the breadth of his discretion under s 7 of the *Fisheries Act* in reaching his decision, I am also of the view that, in these circumstances, the Minister

could not reasonably have reached a different decision even on the basis of and despite his broad s 7 discretion.

[161] In that regard, the Minister, in his decision, specifically referred to the Appeal Board's decision. When appearing before the Appeal Board the Applicant failed to provide support for his request to be granted an exemption to the PIIFCAF Policy based on financial hardship. The Appeal Board found that the Applicant had been treated fairly and had not demonstrated a valid extenuating circumstance to justify upholding the appeal. The Minister accepted the Appeal Board's recommendation and denied the appeal. In the result, the Applicant did not meet, and was not exempted from, the eligibility criteria set out in the PIIFCAF Policy.

[162] In my view, on a redetermination of this matter, the Minister could not reasonably reach a different outcome on the facts and law when exercising his s 7 discretion. Accordingly, in these circumstances, no purpose would be served by quashing the decision and returning it to the Minister. Therefore, I am exercising my discretion and declining to so.

Costs

[163] Given my findings above, there will be no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. There shall be no order as to costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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