Federal Court  Cour fédérale

Date: 20210708

Dockets: T-271-20
T-582-20
T-583-20

Citation: 2021 FC 727

Ottawa, Ontario, July 8, 2021

PRESENT: The Honourable Madam Justice Strickland

Docket: T-271-20

BETWEEN:

TREVOR MUNROE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

ANTHONY VEINOT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-582-20

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Respondent

JUDGMENT AND REASONS

[1] Mr. Munroe and Mr. Veinot each brought applications for judicial review (T-271-20 and T-339-20, respectively) challenging the Department of Fisheries and Ocean's [DFO] decision to change the quota allocation calculation for Group X, a group of Nova Scotia groundfish licence holders established pursuant to the *Operational Guidelines for Community Management Scotia-*

Fundy Fixed Gear Less than 45' Sector Maritimes Region, dated December 1998 [Operational Guidelines]. Those applications for judicial review were subsequently consolidated (T-271-20). The same Applicants also each separately brought an application for judicial review of decisions by community management boards [CMBs or Boards], which Boards are established pursuant to the Operational Guidelines. Mr. Munroe challenged a CMB decision declining to agree to his request to transfer his licence and its catch history to another CMB (T-582-20). Mr. Veinot challenged the decision of a CMB not to hold a meeting to consider his request for membership (T-583-20).

[2] Given the commonality of the parties, their counsel, much of the background facts and the considerable overlap of issues and evidence, the consolidated matter of T-271-20 was heard on June 16, 2021. On June 17, 2021, at counsels' suggestion, T-582-20 and T-583-20 were argued together. The reasons below address each of these three applications for judicial review.

General Factual Background

[3] The Applicants are both Nova Scotia fishermen who hold groundfish licences. Mr. Munroe obtained his licence (# 101220) on May 16, 2018 when DFO approved a request by the existing licence holder that DFO issue the licence as a replacement licence to another eligible fisherman, Mr. Munroe. Mr. Veinot similarly acquired his licence (#102309) on March 23, 2017. Both licences pertain to the "Fixed Gear less than 45' groundfish fleet for the Maritimes Region" [FG<45' Fleet], being an inshore, owner operated fleet of vessels of less than 45' in length engaged in the groundfish fishery.

[4] It is common ground that this fishery operates under a community management system initially established by the Operational Guidelines. It is also common ground that the Operational Guidelines have not been revised or updated since 1998 and do not necessarily reflect the evolution of the community management system over the last 25 years.

[5] Currently, and in a nutshell, under the community management system all FG<45' Fleet licences issued by DFO to licence holders are "associated with" one of seven identified geographic community groups. Within the seven community groups, there are ten CMBs. The geographic community group designations by DFO are based on its records of the registration, as of December 31, 1996, of the home port of the licence holder at that time. Licence holders must either join the CMB which governs the community group associated with their licence or, they can join what DFO calls "Group X", which is managed by DFO. Group X is available to those licence holders who do not want, or who are not eligible, to join a CMB.

[6] DFO does not issue individual quotas, quota allocations or catch limits to the fishing licences of individual licence holders in the FG<45' Fleet. Rather, DFO determines the total allowable catch [TAC] for groundfish stocks for each season and, from the TAC, distributes a quota allocation to each fleet based on "percentage shares". From the FG<45' Fleet TAC allocation, DFO sub-distributes a quota allocation to each CMB, also based on percentage shares. DFO determines the percentage share of the quota allocation for a given groundfish stock for each CMB by:

- determining the average catch history from 1986 – 1993 (reference period) for each licence holder in a CMB;

- the average catch histories of all licence holders in that CMB are added together to create the total average catch history for that CMB; and
- the total average catch history for each CMB is then divided by the total average catch history for all of the CMBs, resulting in a percentage share for each CMB.

[7] A CMB's percentage amount generally remains the same each year, however, the tonnage allocated to a CMB changes depending on the annual TAC, which fluctuates.

[8] This community management system operates on a competitive fishery model in that each licence holder in a community group competitively fishes against the others in that group until the quota allocation for their CMB for that stock for that season is reached.

Factual Background – Group X Quota Allocation

[9] Until 2020, the quota allocation for Group X was calculated using a similar methodology as for the CMBs. DFO determined how much of the catch history of the subject licence(s) (in the reference period) contributed to the percentage share of the CMB associated with that licence(s) for each groundfish stock. If the licence holder opted in to Group X, DFO then reallocated this amount of quota, adjusted to the TAC, to Group X. Group X's quota allocations are also fished competitively by all members of that group.

[10] In both 2018 and 2019 Mr. Munroe opted to fish his licence through Group X, instead of the CMB associated with his licence, ENS 4vSW [ENS CMB]. Compared to others in ENS CMB, his licence had a high halibut catch history associated with it. When Mr. Munroe opted into Group X, that catch history was allocated by DFO to Group X for the purpose of its quota

allocation. Mr. Munroe's fishing through Group X had the effect of transferring approximately 4.5% of ENS CMB's catch history to Group X.

[11] In 2019, Mr. Veinot also joined Group X. The record indicates that the catch history associated with his licence is very small. Mr. Veinot and Mr. Munroe were the only two members of that group.

[12] In October 2018, concerns were raised by the ENS CMB representative at a meeting of the Scotia-Fundy Fixed Gear Groundfish Advisory Committee [FGAC] about the ability of a single licence holder with a large catch history to cause the reallocation of a significant portion of quota to Group X. The FGAC is an advisory committee established by DFO to make recommendations to DFO about various issues relating to fixed gear groundfish management. The FGAC is composed of representatives from DFO, each CMB, provincial government representatives, and Indigenous representatives. The allocation formula for Group X was discussed at FGAC meetings held in March 2019 and May 2019.

[13] At an October 24, 2019 meeting the Chair, Ms. Penny Doherty, DFO, noted the recommendation of a FGAC working group that 5% of a licence holder's catch history for each stock be used as a limit when calculating Group X quota, however, that DFO senior management felt that the 5% was arbitrary and lacked justification. Ms. Doherty made an alternate proposal, a Group X quota cap using the average catch per licence for each stock. This was revisited at a November 14, 2019 meeting where the FGAC recommended that the average catch per licence

(in 1986-1993, the reference period), per CMB for each stock, prorated to the annual quota, be utilized as a cap when calculating Group X's quota.

[14] On November 26, 2019, Ms. Doherty advised Group X, being the Applicants, of FGAC's recommendation. Ms. Doherty also invited the Applicants to make submissions about the potential change. Mr. Munroe's lawyer provided a letter opposing the changes on December 10, 2019.

[15] On January 24, 2020, the Director, Regional Resource Management, DFO, recommended that the Regional Director of Fisheries Management approve the described change to the Group X quota calculation. The recommendation and considerations were set out in a "Memorandum For the Regional Director, Change to Group X Quota Calculation (For Decision)" [Memorandum]. The Regional Director concurred with the recommendation.

[16] On January 30, 2020, Ms. Doherty communicated this change by email to the Applicants who were, at that time, the sole members of Group X.

[17] Mr. Munroe filed his Notice of Application in matter T-271-20 on February 21, 2020, and Mr. Veinot filed his Notice of Application in matter T-339-20 on March 4, 2020, both challenging the January 30, 2020 letter from Ms. Doherty. By order dated August 28, 2020, the matters were, pursuant to Rule 105(a) of the *Federal Courts Rules*, SOR/98-106, consolidated and they have proceeded together under T-271-20.

Legislative Scheme

***Department of Fisheries and Oceans Act*, RSC 1985, c F-15**

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

> **(a)** sea coast and inland fisheries;
>
> **(b)** fishing and recreational harbours;
>
> **(c)** hydrography and marine sciences; and
>
> **(d)** the coordination of the policies and programs of the Government of Canada respecting oceans.

***Fisheries Act*, RSC 1985, c F-14 [*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.

43 (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

> **(a)** respecting the proper management and control of the seacoast and inland fisheries, including for social, economic or cultural purposes;
>
> **….**
>
> **(c)** respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;
>
> **(d)** respecting the operation of fishing vessels;
>
> **…..**
>
> **(f)** respecting the issuance, suspension and cancellation of licences and leases, including….

> **(g)** respecting the terms and conditions under which a licence and lease may be issued;
>
> **(g.01)** respecting the use and control of the rights and privileges under a lease or licence issued under this Act, including the prohibition on the transfer of the use and control of those rights and privileges except under prescribed conditions;
>
> **….**
>
> **(l)** prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this Act and providing for the carrying out of those powers and duties;
>
> **(m)** if a close time, fishing quota or limit on the size or weight of fish or fishing gear or equipment has been fixed in respect of an area under the regulations, authorizing persons referred to in paragraph (l) to vary the close time, fishing quota or limit or fishing gear or equipment in respect of that area or any portion of that area;
>
> **….**
>
> **(p)** prescribing anything that is required or authorized by this Act to be prescribed.

(2) The Governor in Council may make regulations establishing conditions for the exercise of the Minister's power to make regulations under subsection (3).

***Fishery (General) Regulations*, SOR/93-53**

22 (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition that is not inconsistent with these Regulations or any of the Regulations listed in subsection 3(4) and in particular, but not restricting the generality of the foregoing, may specify conditions respecting any of the following matters:

> **(a)** the species of fish and quantities thereof that are permitted to be taken or transported;
>
> **….**

> **(c)** the waters in which fishing is permitted to be carried out;

Operational Guidelines for Community Management Scotia-Fundy Fixed Gear Less than 45' Sector Maritimes Region

[18] Although they do not say so, the Operational Guidelines are presumably made pursuant to the Minister of Fisheries and Ocean's power to manage fisheries as set out in s 4(1) of the *Department of Fisheries and Oceans Act*, RSC 1985, c F-15.

[19] The Operational Guidelines are not law. The Respondent's evidence is that although changes have been made to the policies in the Operational Guidelines, the Guidelines themselves have not been updated since they were issued in 1998.

[20] The sections most relevant to these matters are:

> **Community Management Conservation Harvesting Plans**
>
> Authority
>
> The common policies and principles of community management are primarily established through the SF Fixed Gear Committee making recommendations to DFO for implementation. Under the current Acts and Regulation, no power or authority is delegated to the different community boards, as the legislative authority rests with the Minister. Under the current system, the management boards submit their specific fishing plans, which are then approved and implemented by DFO provided they do not conflict with existing legislation and fulfill conservation requirements. A fleet CHP for all FG<45' is developed and all management boards must adhere to this Plan. In addition to this generic CHP, the FG<45' Community CHP can contains [*sic*] additional management measures such as seasonal quotas, trip limits, and sanctions that <u>not enforced</u> by DFO. Most groups also require members to sign waivers that authorizes DFO to send the weekly catch report by individual licence holders to the indicated management board fore

review. This allows management boards to ensure that participants in their groups respect the management measures set out in their plan.

DFO assigns the quotas to the approved geographic community management groups based on the support and recommendations of the FG<45'Committee. Any sub-allocations and seasonal quotas are implemented based on the recommendations of a specific management board through a community CHP. The management boards are then required to monitor the quota available to any specific groups within their community….

…

Movement of Licence Holders Between Communities

Although each licence is designated for quota and management purposes as being registered in one of the seven geographic communities this does not affect the present policy of re-issuing a licence to another individual at the request of the original licence holder. Each licence holder however, should be aware of the quota or fishing implications. The community designation is based on the registration of the home port of the licence holder according to DFO records of December 31, 1996. As such, any individual that had a groundfish licence re-issued to them, is subject to the initial community plan where this licence is registered unless a community change can be negotiated between the different community management boards.

The policies adopted by the FG<45' Committee do allow for licence holders to change from one geographic community designation to another provided the two boards involved are in agreement. The movement of a licence involves one community either gaining or losing a licence and this has both quota and effort implications. Currently the two management boards have to support the change in community designation as well approve the amount of quota that is to be transferred and advise DFO. The different management boards do not have to adhere to any specific quota formula, but to date when licence holders have changed communities, the home port community has only agreed to transfer quota in an amount equal to or less than the percentage share attributed to that licence without any share of the quota percentage defined as unidentified. If there is no agreement, the new licence holder will then have to choose to fish under the plan of the original board or choose to remain in Group X.

> **Community Designation and Access to Stock Areas**
>
> …
>
> The Community designation and area that the licence is eligible to fish will be permanently attached to the GRO [groundfish licence number] and will not change upon any transfer to another individual. Following a licence transfer, a new licence holder will be bound by community and fishing area designation unless the community management boards involved agree to an amendment.
>
> **MANAGEMENT BOARDS**
>
> Terms of reference and an operating process to be developed by the FG<45' Committee, with the aim of establishing a transparent process that provides the Minister the assurance that a particular management board clearly represents the licence holders in a specific area and that the views recommended by the management board clearly represent the majority position within a community.

T-271-20

Decision Under Review

[21] The January 30, 2020 email from Ms. Doherty states as follows:

> From: Doherty, Penny …..
> Sent: January 30, 2020 4:08 PM
>
> Hi Group X,
>
> This email is to inform you that DFO will be implementing a maximum catch limit for Group X as of 2020/21. Currently, the catch limit in Group X is the sum of the 1986-93 catch history (1997-2006 for 4X5 Atlantic halibut) on a percentage basis, of the licence holders who choose to opt into Group X. Moving forward as of 2020/21, the average catch of each stock per licence holder based on catch history and updated for the annual quota will be used as a maximum catch limit per licence holder that is added to the quota allocation to be fished competitively in Group X. Shelburne Board will be exempt from this approach. The yellow highlighted columns in the attached document indicate the maximum catch limit per stock per licence holder (based on

> 2019/20 quota) that would be added to the overall Group X catch limit, depending on which Management Board the licence is associated with. Note that the catch limit for 4X5 Atlantic halibut applies to all licence holders with 4X5 halibut catch history regardless of Management Board. For example, the catch limit per licence holder (2019/20) to be added to Group X to be fished competitively would be a maximum of 0.27 t – 1.36 t of halibut.
>
> Please refer to the attached document for examples of how the catch limit will be applied. If you have any questions, please don't hesitate to contact me.
>
> Cheers, Penny
>
> Penny Doherty
> Senior Advisor / Fisheries Management
> Fisheries and Oceans Canada/Government of Canada

[22] I note that it is apparent from the content of the Certified Tribunal Record [CTR] that the decision to change the Group X quota allocation was made by the Regional Director on January 24, 2020. However, as the Applicants explained, they did not receive the Memorandum until the CTR was filed after, and in response to, their applications for judicial review.

[23] In effect, the Regional Director's decision was summarized and communicated to them by way of the January 30, 2020 email from Ms. Doherty.

Issues

[24] In my view, the issues as identified by the parties can be reframed as follows:

1. Is the decision legislative/policy in nature or is it administrative?
2. If it is a policy decision, was it: based on irrelevant or erroneous considerations, arbitrary, or made in bad faith and therefore unreasonable?
3. If it is an administrative decision, is it reasonable?

Issue 1: Is the decision legislative/policy in nature or is it administrative?

Applicants' submissions

[25] The Applicants submit that what lies at the core of whether a decision is considered legislative or administrative is to whom it applies. Legislative decisions are of general application and are not related to a particular case or based on facts pertaining to specific individuals. In that regard, when characterizing a decision as legislative or administrative in nature, substance supersedes form (citing *Homex Realty & Development Co v Wyoming (Village)*, [1980] 2 SCR 1011). The Applicants submit that in this matter, the decision under review is administrative because it had specific application to, and targeted, the Applicants. More specifically, the decision targeted Mr. Munroe, his licence and its associated catch history. The Applicants submit that the decision would not have been made had Mr. Munroe not joined Group X and it is entirely based on a particular case and individual. There was no related policy amendment to the Operational Guidelines. Rather, DFO made an administrative decision, contained in an email, because other fishers were unhappy with the quota reallocation resulting from Mr. Munroe deciding to join Group X.

[26] The Applicants submit that administrative decisions, such as this one, are subject to reasonableness review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). In the alternative, if the decision is considered a legislative or policy decision, then it is to be reviewed to determine if it was made in bad faith, contrary to the principles of natural justice, as arbitrary, or for purposes irrelevant to the enabling statute (citing *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 36 [*Comeau*];

Maloney v Shubenacadie Indian Band, 2014 FC 129 at para 57; and, *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 at para 7 [*Maple Lodge*]).

Respondent's submissions

[27] The Respondent submits that the decision to limit the quota allocation for Group X is a policy decision. It submits that the Federal Court of Appeal has repeatedly found that decisions regarding quota allocations and the management of the fisheries are discretionary policy matters and not administrative decisions (citing *Carpenter Fishing v. Canada*, [1998] 2 FC 548 [*Carpenter*]; *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 at para 34 [*Malcolm*]; *Mainville v Canada (Attorney General)*, 2009 FCA 196 at para 5 [*Mainville*]; *Arsenault v Canada*, 2009 FCA 300 at para 41-42). Further, the decision affects anyone who chooses to fish, not only the Applicants. While the Operational Guidelines were changed as a result of the Applicants fishing in Group X, the change was not put in place to specifically target the Applicants. The Operational Guidelines were changed to address an unintended result in their application. The fact that the change affects the Applicants does not alter the nature or type of decision that was made.

[28] The Respondent submits that policy decisions can only be judicially reviewed on limited grounds: bad faith, non-conformity with the principles of natural justice and reliance on considerations that are extraneous or irrelevant to the statutory purpose (citing *Carpenter* at para 34; *Maple Lodge* at para 7). And, while the legality of a policy can be judicially challenged, its wisdom or soundness cannot (citing *Fortune Dairy Products Limited v Canada (Attorney General)*, 2020 FC 540 at paras 105-106 [*Fortune Dairy*]; *Moresby Explorers Ltd v Canada*

(Attorney General), 2007 FCA 273 at para 24 [*Moresby*]). Within that limited scope of review, discretionary policy decisions are reviewable on the reasonableness standard (*Vavilov*).

Analysis

[29] The decision under review is concerned with a change to the quota allocation for Group X. In my view, the jurisprudence is clear that decisions concerning fisheries quota allocations are in the nature of policy decisions.

[30] Fishing quota policies are not law. They are not binding or legally enforceable (*Campbell* at paras 18 – 22). And, as stated by the Federal Court of Appeal in *Carpenter* at para 28 "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. Policy guidelines outlining the general requirements for the granting of licences are not regulations; nor do they have the force of law".

[31] In *Malcolm* the Federal Court of Appeal held that the Minister of Fisheries had wide discretion to reallocate portions of TAC between various fishery sectors and:

> [32] The limited individual quota system put in place in the early 1990's as a result of the new ITQ system introduced at that time was challenged in the Federal courts, leading to the decision of our Court in *Carpenter Fishing*. In upholding that system as a valid policy decision of the Minister, and relying on *Maple Lodge Farms*, Décary J.A. noted in that case that the imposition of an individual quota system is a discretionary ministerial decision in the nature of a policy or legislative action that may only be disturbed on judicial review if it can be established that the decision was made in bad faith, did not conform with the principles of natural justice, or if reliance was placed upon considerations that are irrelevant or extraneous to the legislative purpose: *Carpenter Fishing* at paras. 28 and 37.

> [33] That approach to the judicial review of fisheries management decisions had been previously adopted by the Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 (*Comeau's Sea Foods*) at para. 36. It has also been affirmed by our Court post-*Dunsmuir*: *Mainville v. Canada (Attorney General)*, 2009 FCA 196, 398 N.R. 249 at para. 5; and *Arsenault* at paras. 38 to 42.
>
> [34] The decision of the Minister in this case is discretionary and in the nature of a policy action……

[32] The Applicants do not challenge this jurisprudence but submit that their situation is different because the decision to change the method of calculating the Group X quota targeted them. They submit that the decision was made because Mr. Munroe – the holder of a licence with a high catch history – opted into Group X.

[33] The Respondent acknowledges that the decision to make a policy change was a result of Mr. Munroe opting to fish in Group X. The Respondent filed the affidavit of Penny Doherty, affirmed on August 6, 2020 [Doherty Affidavit]. This describes Mr. Munroe's entry into Group X and states that in 2018 the ENS CMB was allocated 517.5t of Atlantic halibut quota and, when Mr. Munroe joined Group X, this meant that 23.3t of this quota was reallocated to Group X. In 2019, 27t of Atlantic halibut quota was similarly reallocated to Group X. Ms. Doherty states that these reallocations occurred because of "an unanticipated loophole in the quota allocation calculation policy at that time" and that:

> 23. The Applicant's decision to join Group X in 2018 and 2019 had a significant negative impact on licence holders in the ENS 4VsW Board by reducing the group's collective competitive Atlantic halibut quota allocation by approximately five per cent. The ENS 4VsW Board's Atlantic halibut quota was reduced to 518 t for 160 licence holders in 2018 and 601 t for 155 licence holders in 2019. It should be noted that each licence holder has an opportunity to fish a number of different groundfish stocks;

> however, Atlantic halibut is the most economically viable species to fish for the FG<45' fleet.
>
> 24. Group X was created for FG<45' fleet licence holders to fish outside the community management system. It was not DFO's intent that large amounts of quota would be reallocated from a Board's quota because of a licence holder's decision to join Group X. DFO was very concerned with the fact that if any licence holder with a large catch history associated with his licence joined Group X, a large quota reallocation would result because of the way the quota calculations were conducted at that time. A large reallocation of quota to Group X destabilizes DFO's objectives in managing the fishery.

[34] Thus, it is clear that the catalyst for the policy change to the Group X quota allocation calculation was Mr. Munroe joining Group X.

[35] However, I am not convinced that because the policy change arose as a result of the circumstance of Mr. Munroe, as the holder of a high catch history licence, joining Group X, that this changes the decision from policy or legislative in nature to administrative.

[36] In *Barry Group v Canada*, 2017 FC 1144 [*Barry Group*], Justice Southcott held that a decision to close the 2016 Atlantic mackerel fishery was legislative, not administrative in nature. There the applicants argued that the decision was administrative in nature because, of all of the participants in the commercial Atlantic mackerel fishery, they alone were affected by the closure. Thus, that decision was made in reference to a particular case and should be characterized as administrative (para 22). Following a review of the jurisprudence, Justice Southcott held "…the fact that a variation order of general application has a particular effect upon a particular participant or set of participants in the fishery, or affects some participants more than others,

does not in itself change the nature of that decision such that it can be characterized as an administrative act" (*Barry Group* at para 28).

[37] I agree with that view. In this case, the Regional Director, on the advice of the Director, Regional Resource Management, agreed to change the method for calculating the quota for Group X. While this change does impact the Applicants, it applies generally and uniformly to any licence holder who decides to fish in Group X and applies to all stocks that can be harvested by those licence holders. It does not apply specifically to the licences held by Mr. Munroe or Mr. Veinot. Rather, it creates and promulgates "a general rule of conduct without reference to a particular case" (*R. v Corcoran*, 181 Nfld & PEIR 341 at paras 12-15, 20-21; *Gulf Trollers Assn v Canada (Minister of Fisheries and Oceans)* [1987] 2 FC 93 (FCA) at p 743-44).

[38] Having found the decision to be a policy one, this leads to the question of the permissible scope of judicial review of a policy decision. Again, in my view, the law is clear on this issue.

[39] I have previously addressed this in *Elson v Canada (Attorney General),* 2017 FC 459 [*Elson*] (afff'd 2019 FCA 27):

> [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 CanLII 24 (SCC), [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.
>
> (emphasis added)

(See also; *Anglehart v Canada*, 2018 FCA 115 at paras 47-48 [*Anglehart*]; *Campbell* at para 21; *Carpenter* at para 28; *Barry Group* at para 30.)

[40] *Malcolm* (at paras 32-33) and the above jurisprudence make it clear that discretionary policies, such as quota allocations, are subject to judicial review only on the grounds of 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.

[41] In *Malcolm* the Federal Court of Appeal held that this limited scope of review is subject to the reasonableness standard of review:

> [34] The decision of the Minister in this case is discretionary and in the nature of a policy action. As a ministerial policy decision made under the *Fisheries Act*, it is amenable to judicial review under a standard of reasonableness discussed in *Dunsmuir*.

> The issue here is what does the standard of reasonableness require in these circumstances?
>
> [35] A discretionary policy decision that is made in bad faith or for considerations that are irrelevant or extraneous to the legislative purpose is unreasonable by that very fact. Such a decision can also be unreasonable if it is found to be irrational, incomprehensible or otherwise the result of an abuse of discretion. The ultimate question in judicially reviewing the Minister's decision in this case is to determine whether the decision falls within a range of reasonable outcomes having regard for both the context in which the decision was made and the fact that the decision itself involves policy matters in which a reviewing court should not interfere by substituting its own opinion to that of the Minister's. It is with these considerations in mind that the reasonableness of the Minister's decision should be determined.

[42] Similarly, in *Barry Group*, Justice Southcott noted that:

> [30] The parties agree that the applicable standard of review is reasonableness and that, in the context of decisions of a legislative nature, this standard requires consideration of whether the decision has been made in bad faith, without adherence to statutorily mandated natural justice, or based on factors irrelevant or extraneous to the statutory purpose (see *Maple Lodge Farms v Canada*, 1982 CanLII 24 (SCC), [1982] 2 SCR 2). I concur with this articulation of the standard to be applied by the Court in the present case.

[43] *Malcolm* predates the Supreme Court of Canada's decision in *Vavilov*. However, *Vavilov* does not address, and therefore does not alter, the scope of review of policy decisions. It does, however, direct how the reasonableness standard is to be applied, thereby impacting the latter part of paragraph 35 of *Malcolm*.

[44] The Supreme Court in *Vavilov* addressed what is required of a court when performing a reasonableness review (*Vavilov* at paras 73 to 142). It is not the role of a reviewing court, when

applying the reasonableness standard, to "ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem" (para 85). The reviewing court asks "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). Further, a reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker. The reasonableness standard requires that the reviewing court defer to such a decision (*Vavilov* at para 85).

[45] Thus, in my view, the current state of the law with respect to the standard of review for policy decisions is reflected in *Fortune Dairy* where Justice Kane held:

> [105] The jurisprudence establishes that a policy decision is owed a high degree of deference and will only be found unreasonable if made in bad faith, for considerations extraneous to the legislative purpose, or if it is irrational, incomprehensible or an abuse of discretion, (*Malcolm* at para 35). In *Vavilov*, the Supreme Court of Canada described a reasonable decision as one that is both internally coherent and justified in light of the legal and factual constraints, including the legislative scheme and purpose (at para 85).

[46] In sum, the decision to change the Group X quota allocation was a policy decision. As such, the scope or grounds for judicial review are limited to consideration of whether the decision has been made in bad faith, without adherence to statutorily mandated natural justice, or based on factors irrelevant or extraneous to the statutory purpose. And, that limited review is to be conducted on the reasonableness standard.

Issue 2: If it is a policy decision, was it based on irrelevant or erroneous considerations, arbitrary, or made in bad faith and therefore unreasonable?

Applicants' submissions

[47] The Applicants submit that the decision was arbitrary in process because it was made without reasonable objective justification and that it was arbitrary in outcome because it achieved the opposite result of what DFO claims it was intended to do. The Applicants submit that the decision was made in response to concerns from the FGAC that Mr. Munroe's fishing in Group X, and the consequent reallocation of quota, resulted in unfairness to other fishers. However, there was no unfairness because members of ENS CMB did not fish the quota available to them in the two relevant fishing seasons. Therefore, the FGAC's complaints had no objective basis. The Applicants submit that because DFO failed to consider this information its decision is not objectively justifiable, nor did it consider the impact of making Group X economically unviable. DFO followed an arbitrary process that effectively eliminated the Applicants' ability to fish through Group X.

[48] The Applicants also submit that the outcome of the decision was arbitrary because the change in calculation did not lead to more equitable distribution of economic benefits. While the halibut quota for Group X was drastically slashed and the Applicants' livelihood limited, there were no gains to any other community group or fisher.

[49] The Applicants assert that the decision was based on irrelevant or extraneous considerations. During DFO's discussions with the FGAC, it was repeatedly raised that changing

the Group X quota allocation should act as a deterrent to fishing outside a CMB. This was an irrelevant and extraneous consideration. Group X was never meant to function as a deterrent, the Operational Guidelines and DFO's evidence make it clear that Group X exists for any fisher who is unable or unwilling to join a CMB. The Applicants also submit that FGAC's statements that Mr. Munroe fishing in Group X had a negative impact on the ENS CMB are irrelevant as they are not founded in fact.

[50] Finally, the Applicants submit that the decision was made in bad faith. The Applicants note that DFO informed them that the purpose of the change was to ensure the more equitable distribution of economic benefits. However, the actual purpose was to make fishing through Group X a deterrent and to force the Applicants to either fish through a CMB or give up fishing. The Applicants submit that these purposes are improper and that DFO was aware when it made the decision that the Applicants were unable or unwilling to join a CMB. The Applicants submit that a good faith decision would have ensured that the Applicants could make a living through fishing.

Respondent's submissions

[51] The Respondent submits that the exercise of the Minister's discretion is limited only by the requirements of natural justice. That is, the decision must be based on relevant considerations, not be arbitrary, and the decision must be made in good faith. Per *Malcolm*, a discretionary decision made in bad faith or for considerations irrelevant to the legislative purpose is unreasonable.

[52] The Respondent submits that the Applicants have not established that the change was made in bad faith or based on irrelevant or extraneous considerations. The Respondent notes that the Applicants were advised of the potential change and invited to make submissions. Further, the policy change was based on relevant considerations – concerns with facilitating community management and maintaining equitable distribution of economic benefits – as demonstrated by the Memorandum. The decision was also consistent with the purposes of the *Fisheries Act* and its policy on community management – to allocate quota to community groups and CMBs taking into account socio-economic conditions. Further, the Respondent notes that there is no vested right to a quota.

Analysis

[53] There is no doubt that the Minister has broad authority to manage the fisheries in the public interest, and that this broad authority attracts deference on judicial review.

[54] For example, in *Malcolm*, the Court stated:

> [52] As I have already noted, the Minister has broad authority and discretion under the *Fisheries Act* to manage the fisheries in the public interest. As found by our Court in *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, 1986 CanLII 4034 (FCA), [1987] 2 F.C. 93 at p. 106, and confirmed by the British Columbia Court of Appeal *in R. v. Huovinen*, 2000 BCCA 427, 188 D.L.R. (4th) 28 at para. 24, and by the Supreme Court of Canada in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569 at paras. 39 to 41, the Minister may, among other factors, take into account social and economic factors in managing and allocating a fishery resource.
>
> [53] As further found by our Court in *Arsenault* at para. 43, and as further discussed above, the Minister is not bound by the policy decisions of his predecessors, and he may make new decisions and change existing policies so as to respond, notably, to developing

> social and economic considerations. Nor is the Minister bound to provide compensation to the affected fishers when reallocating the TAC or reducing a quota: *Arsenault* at para. 57, *Kimoto*.

[55] The Federal Court of Appeal in *Canada (Attorney General) v Robinson*, 2021 FCA 39, in the context of a motion to stay the Federal Court's decision in the matter pending the appeal, stated:

> [27] I have considered the evidence before me in the context of the Minister's duties and powers under the Act. It is well established and undisputed that the Minister has a wide discretion to manage fisheries in the public interest, including taking into account social and economic factors in managing and allocating a fishery resource under the Act. (*Elson v. Canada (Attorney General)*, 2017 FC 459 at para. 51, aff'd 2019 FCA 27, leave to appeal to SCC refused 38584 (July 25, 2019) [*Elson FC*]).
>
> [28] Consequently, the Minister and her delegates at DFO manage, conserve and develop fisheries on behalf of all Canadians and for the public interest. Fisheries in Canada are a common property resource belonging to all Canadians. Licencing and authorizations to fish are tools in the arsenal of powers available to the Minister and DFO to manage fisheries. It is the duty of the Minister and DFO to exercise these powers and use these tools to manage fisheries on behalf of all Canadians and in the public interest to achieve the objectives in the Act.

[56] Thus, the Minister and her delegates have broad power to manage the fisheries including to carry out social, cultural or economic goals or policies. These are the broad legislative purposes against which to measure whether the decision was arbitrary, made for irrelevant purposes, or based on extraneous considerations.

[57] An arbitrary decision is "a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures" (*Black's Law Dictionary*, 11th edition). In other

words, a decision can be arbitrary if there is no rational connection between the underlying facts and the decision. The Applicants submit that the decision is arbitrary because there was no unfairness to other fishers. The community group associated with the ENS CMB did not fish their entire quota and therefore the change in Group X's quota calculation did not, in fact, lead to more equitable outcomes.

[58] In my view, this is not really an arbitrariness argument, it is a disagreement with DFO's reasoning. Further, the decision is not arbitrary because it is connected to the goal of ensuring the equitable distribution of economic benefits. While the Applicants assert that the community group did not fish its entire quota during the two fishing seasons that Mr. Munroe fished his licence through Group X, I agree with the Respondent that this is not determinative. That is because the change in Groups X's quota calculation is aimed at preventing the significant reallocation of quota, by an individual, negatively affecting an entire community group. While the community group under the ENS CMB did not fish their entire available quota in those two fishing seasons, the change in calculation is forward-looking and meant to address equitable *allocation* – not the actual amount fished. This means that the outcome of the change of policy was not arbitrary; it achieved the stated purpose of maintaining equitable distribution across community groups.

[59] Nor do I agree that the decision was made for extraneous or irrelevant purposes or in bad faith. The Applicants assert that while DFO claims that the purpose of the change was to promote equitable quota distribution, in fact it was intended to deter fishers from joining Group X. In my view, this is not supported by the record.

[60] The January 30, 2020 email communicating the change to the calculation of the Group X quota allocation does not indicate the purpose of the change. However, the Memorandum outlines that the FGAC expressed concerns about the significant amount of halibut quota that had been reallocated to Group X from the ENS CMB due to the existing method of calculating Group X quota and that this had a negative impact on that community group, to which the quota had been allocated in the past. The FGAC had recommended changing the quota allocation for Group X to limit the amount per licence holder that would be reallocated from a community group to Group X. The Memorandum sets out the background to the community group management system and how it functions. The analysis and considerations portion of the Memorandum notes that the proposed modification to the Group X quota calculation would be a change from the way quotas have been calculated for CMBs since 1997 and that the two licence holders currently in Group X could be impacted by a decision to change the calculation for 2020/2021 if they continued to opt into Group X. Further, that both licence holders had expressed strong opposition to the proposed change. The Memorandum states that although Group X was designed as an option for FG<45' Fleet licence holders to fish outside the community management system, it was not the intent that large amounts of quota would be reallocated from CMBs to Group X when licence holders joined Group X. Further, that "Limiting the quota reallocation per licence to a maximum of 0.271 – 1.361 of halibut for Group X quota calculation (with the exception of Shelburne Board) (TAB 2) retains the spirit and intent of community management and an equitable distribution of economic benefits across community groups". Further, that "Implementing the proposed Group X quota calculation change would close an unintended loophole in the FG<45' policy, ensure more equitable distribution of economic benefits and be more aligned with the spirit and intent of the community management approach".

[61] The Memorandum concludes by stating:

> A change to the Group X calculation is expected to have a positive impact on harvesting activities by any FG<45' communal commercial licence holders who fish under Community Management Boards given that less quota would be allocated to Group X, thus remaining available to harvesters fishing under a community plan.

[62] In my view, nothing in the Memorandum suggests that the purpose of the change is to deter fishers from opting into Group X. Rather, as the Respondent submits, the change was based on considerations that were relevant and consistent with the purposes of the *Fisheries Act* and DFO's policy on community management.

[63] The Applicants are correct that the FGAC meeting minutes show that ENS CMB representatives and other industry members held the view that Group X was intended to or should act as a deterrent to fishers opting into that group, and that such deterrence could be achieved by making a change in quota allocation to group X. Other FGAC members were of the view that Group X should no longer be an option. However, that Group X was intended to, or should be, a deterrent is not reflected in the Operational Guidelines. Rather, the Guidelines indicate that Group X is meant to be available for fishers who are ineligible or do not want to join a CMB. This purpose was noted by Ms. Doherty, as the chair, at the FGAC meetings.

[64] Thus, while deterrence may have been top of mind for some members of the FGAC, this does not establish that deterrence was DFO's purpose in making the change to the Group X quota calculation. Rather, the Regional Director made the decision based on the considerations and for the purposes set out in the Memorandum. That is, the purpose of the change is to

preserve the community management and the equitable distribution of quota allocations. The purpose of this change is in accordance with, and not extraneous to, the DFO's ability to manage fisheries in line with its social, cultural or economic goals.

[65] Finally, the Applicants have not established that the decision was made in bad faith. A decision made in bad faith is a decision made for a purpose not authorized by statute. It has also been equated to acting "dishonestly, maliciously, fraudulently or with mala fides" or manifesting serious misconduct bordering on the corrupt, while in other instances the term seems to have been given a meaning akin to arbitrariness (see *Morton v. Canada (Fisheries and Oceans)*, 2019 FC 143 at para 231 [*Morton 2019*]). The Applicants' decision to fish under Group X did trigger the quota calculation change, and the Applicants were impacted by the decision. As they note, before the policy change the annual Group X halibut quota (for 2018 and 2019) was just over 27 tonnes, whereas after the change it was just over 1.5 tonnes, representing a quota reduction of about 95%. However, this does not mean that the decision was made in bad faith.

[66] The Memorandum states that the policy change would close an "unintended loophole" in the Operational Guidelines, suggesting exploitation of the Operational Guidelines by fishers. In my view, the effect of a licence holder with a high catch history opting into Group X – and the resultant reallocation of a significant amount of quota to Group X – is better characterized as an unanticipated consequence of the original design of the Operational Guidelines. Specifically, that essentially the same method of quota calculation would apply to all CMBs and to Group X.

[67] This is reflected in the Memorandum, which states that in 2018/19, 23 tonnes of halibut was reallocated by DFO to Group X due to one licence holder opting into that group with a particularly large catch history for Atlantic halibut in area 4VsW. This was the first time there had been a halibut quota in Group X in 4VsW and was the largest quota in Group X for many years. The same occurred in 2019/2020. Thus, the policy change was driven by a new and unanticipated circumstance. As stated in *Malcolm*, the Minister "may make new decisions and change existing policies so as to respond, notably, to developing social and economic considerations. Nor is the Minister bound to provide compensation to the affected fishers when reallocating the TAC or reducing a quota" (*Malcolm* at para 53). I am not persuaded that the change was made in bad faith.

[68] Nor do I agree with the Applicants' submission that a good faith decision would have ensured that the Applicants could make a living through fishing. I acknowledge that, from a practical perspective, the new method of calculating quota, or quota cap, may make joining Group X economically unattractive – particularly for groundfish licence holders with a high catch history when there are few other Group X members. But Group X remains an option. Nor is an individual fisher's commercial interests determinative of policy decisions. As stated by the Federal Court of Appeal in *Anglehart*:

> [46] The appellants also greatly emphasized at the hearing that their commercial interests could be affected by the exercise of the Minister's discretion and that this can create entitlement to compensation. However, the Minister's discretion is with regard to the allocation of fishery resources and while in the fishing industry there is a commercial reality – in which DFO does not participate – the Minister's duty under the *Fisheries Act* is not to manage commercial interests but rather fishery resources, resources that are not infinite.

> [47] Of course, the Minister can consider certain social, economic and commercial factors in managing the fisheries (*Malcolm v. Canada (Fisheries and Oceans*), 2014 FCA 130, [2014] F.C.J. No. 499 (QL) at paragraphs 52–53) but is not obligated to do so. Moreover, there is nothing preventing the Minister from favouring one group of fishers over another in the exercise of his discretion (*Carpenter Fishing*). The Minister's colossal task of managing, developing and conserving the fisheries for all Canadians requires him to make strategic decisions that will inevitably have an impact on competing commercial interests. The Minister must react to varied concerns and occasionally make necessary adjustments to respond to new imposed realities. As previously noted, this was the case following the Supreme Court of Canada's decision in *Marshall*.

(Also see *Campbell* at para 44; *Malcolm* at paras 24, 53; *Giroux v Canada (Attorney General)*, 2016 FCA 299 at para 9.)

[69] Here the Applicants' opposition to the policy change was known to and considered by the Regional Director. The Memorandum recognized that the Applicants could be impacted by the proposed change if they continued to opt into Group X but also noted that the change would not impact the majority of FG<45' Fleet licence holders if they moved into Group X. Ultimately, DFO determined that the change would ensure a more equitable distribution of economic benefits and be more aligned with the spirit and intent of the community management approach. This discretionary decision was open to the Minister and does not demonstrate bad faith.

[70] In conclusion on this issue, the policy decision to change the calculation of the Group X quota allocation was not based on irrelevant or erroneous considerations, it was not arbitrary, nor was it made in bad faith. It was reasonable.

[71] Given this conclusion, it is not necessary to consider the third issue as the decision was not administrative.

T-582-20 (Munroe) and T-583-20 (Veinot)

Additional Factual Background

[72] Mr. Munroe's licence is associated with the 4VsW geographic community group and ENS CMB is the relevant Board. The ENS CMB is comprised of three community management boards who work together: the Guysborogh County Inshore Fishermen's Association 4VN, the Halifax West Commercial Fishermen's Association 4X, and the Eastern Shore Fishermen's Protective Association [ESFPA].

[73] In January 2019, the Mr. Munroe wrote to the ENS CMB, requesting that his licence, and its associated catch history, be transferred from the ESFPA to the Shelburne County Community Group. On February 28, 2019, the ENS CMB responded to the Applicant's request, stating that it did "not support releasing" the licence or catch history and that as "this is a community based fishery, where the opportunity to fish is equitable, we will not release quota to another community group". The letter states that the ENS CMB formally rejected the request.

[74] Mr. Munroe, through his previous counsel, wrote to DFO on April 25, 2019 requesting that DFO review the ENS CMB's decision. By letter dated June 11, 2019, Ms. Doherty replied, stating that as indicated in Mr. Munroe's licence conditions, licence #101220 is associated with the ENS community group. Further, that any quota based on catch history of that licence is under the management of the ENS CMB. Ms. Doherty stated that although licence holders are allowed to join other CMBs "it remains the decision of the Management Board (in this case ENS 4VsW) as to whether any quota could be released from the Board". She reproduced two paragraphs of

the Operational Guidelines indicating that currently the two management boards involved in such a request "have to support the change in community designations as well as approve the amount of quota that is to be transferred and advise DFO… If there is no agreement, the new licence holder will then have to choose to fish under the plan of the original board or chose to remain in Group X".

[75] On February 21, 2020, Mr. Munroe again wrote to ENS CMB requesting that it approve the transfer of his licence to the Shelburne County Community Board. On March 24, 2020, the ENS CMB responded that they would not support this request. Mr. Munroe seeks judicial review of that decision.

Decision Under Review

[76] The decision letter states as follows:

> Eastern Nova Scotia 4VsW Management Board
>
> P.O. Box 55
> Musquodoboit Harbour, NS B0J 2L0
> Office: 902-889-3185 Fax: 902-889-3403
>
> March 24, 2020
>
> Dear Mr. Munroe,
>
> This letter is in response to your email, dated February 21, 2020, requesting that the Eastern Nova Scotia 4VsW Management Board release your groundfish license (GRO 101220) to be transferred to the Shelburne County Community Group.
>
> This letter is to inform you that the 4VsW Management Board has come to a unanimous decision to not support releasing groundfish licence number 101220, or catch history to the Shelburne County

> Community Group. As this is a community-based fishery, where the opportunity to fish is equitable, we will not release quota to another community group.
>
> We are happy to continue serving you and your groundfish enterprise through the ENS 4VsW Management Board.
>
> Respectfully submitted on behalf of the ENS 4VsW Management Board, Lori Baker, ENS 4VsW Management Board Coordinator
>
> CC: Peter Connors, President ESFPA
> Donny Hart, President HWCFA
> Eugene O'Leary, President GCIFA

Issues T-582-20 and T-583-20

[77] The issues in T-582-20 and T-583-20 largely overlap. I will address them here in the context of Mr. Munroe's application but the issues and analysis will also apply to Mr. Veinot's application which I will address subsequently.

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

1. Is the ENS CMB a "federal board, commission or other tribunal" for the purposes of the *Federal Courts Act,* RSC 1985, c F-7 [*Federal Courts Act*]?
2. Is the ENS CMB's decision to deny Mr. Munroe a transfer of his licence and catch history to another CMB reviewable under s.18.1 of the *Federal Court's Act*?
3. If so, did the Minister improperly delegate authority to the ENS CMB?
4. If so, what is the appropriate standard of review for the ENS CMB decision?
5. Is the ENS CMB decision reasonable?

Issue 1: Is the ENS CMB a "federal board, commission or other tribunal" for the purposes of the *Federal Courts Act*?

Mr. Munroe's submissions

[79] Mr. Munroe (and Mr. Veinot in T-583-20) submit that the CMBs are federal decision makers because they exercise power expressly given to the Minister under the *Fisheries Act* and the *Fishery (General) Regulations*. The CMBs are exercising much of the Minister's mandate to control and regulate the fishery and the Minister has implicitly sub-delegated her authority.

[80] Mr. Munroe submits that whether a decision maker will constitute a federal board, commission or tribunal is determined by the two part test set out in *Anisman v Canada (Border Services Agency*), 2010 FCA 52 [*Anisman*]. First, the jurisdiction or power the body or person seeks to exercise must be determined and then the source or origin of that jurisdiction or power is identified. The source of power exercised is the main consideration.

[81] Mr. Munroe asserts that the power the ENS CMB is exercising is the power to deny the transfer of Mr. Munroe's licence from one CMB to another and that this power is an incidental aspect of the CMBs' more general authority to manage and operate fisheries and fishing licences.

[82] The Applicants both submit that the Minister has extensive power and wide discretion to manage fisheries in Canada stemming from the *Fisheries Act*, and that the *Fishery (General) Regulations* give the Minister the power to set licencing conditions, including setting licence quotas, the location of fishing, and when fishing is permitted. The Applicants submit that many

aspects of the Minister's statutory mandate are being exercised by the CMBs. In particular, the CMBs have the authority to accept or deny members, which directly impacts the quotas they are able to fish. CMBs also set internal and seasonal quotas as well as trip limits. The Applicants submit that these are all statutory powers given to the Minister and amount to the CMBs managing and controlling the fishery, as well as setting licence conditions.

[83] The Applicants submit that because the CMBs are responsible for the day-to-day management of the fishery, the Minister has sub-delegated her authority under the *Fisheries Act* and the *Fishery (General) Regulations*. While the CMBs do not operate pursuant to express legislative or regulatory delegation, they are making decisions that fall within the express authority of the Minister. The Applicants submit that the only source of power for the CMBs' decisions come from the *Fisheries Act* and the *Fishery (General) Regulations*.

[84] The Applicants also note that since it is unprofitable or unsustainable to fish under Group X, licence holders are forced to contract with a CMB in order to fish their licence and that this lack of choice indicates that the CMBs are exercising a power sourced in federal law and not contract.

Respondent's submissions

[85] The Respondent submits that the CMBs are not federal boards, commissions or tribunals, making reference to *Oceanex Inc v Canada (Transport)*, 2019 FCA 250 [*Oceanex*]. The Respondent notes that DFO manages the fishery in accordance with the roles and responsibilities outlined in the in *Department of Fisheries and Oceans Act* and that the Minister and her

delegates have broad authority in that regard, including issuing licences pursuant to s 7 of the *Fisheries Act* and to affix licence conditions pursuant to the *Fishery (General) Regulations*. The Respondent submits that the Applicants mischaracterize the source and nature of the CMBs' powers. It is inaccurate to state that the CMBs manage the fisheries, issue licences and change licence conditions. Rather, DFO has exclusive statutory and regulatory authority in this regard. The Respondent notes that DFO has not delegated its authority to issue licences, licence conditions or the designation of community groups to CMBs. The CMBs exercise only powers of a private character.

[86] The Respondent submits that the CMBs administer the percentage of TAC allocated to them by DFO, establish membership eligibility criteria, trip limits, fishing times, and develop a conservation harvesting plan [CHP]. The Respondent describes these as internal administrative tasks. The Respondent submits that DFO maintains its responsibilities in management of the fishery by issuing licences, licence conditions, quota allocations and community group designations.

[87] DFO issued the Applicants' licences and determined the community group with which they were associated. The ENS CMB letter indicating that it did not support Mr. Munroe's request for a transfer of his licence and catch history to another community has no impact on Mr. Munroe's licence conditions and was in the nature of a recommendation only. And, while the CMBs may set their own by-laws and eligibility criteria, this does not impinge on the Minister's discretion to ultimately determine the community group designations associated with licences.

Analysis

[88] The issue here is whether this Court has jurisdiction to hear these applications. If the CMBs are not federal boards, commissions or other tribunals, then this Court has no jurisdiction which, of course, is determinative.

[89] The Federal Court of Appeal in *Oceanex* summarized the law concerning the determination of whether a decision maker is a federal board, commission or other tribunal:

> [26] By subsection 18(1) of the *Federal Courts Act*, the Federal Court has jurisdiction in applications for judicial review of decisions of a "federal board, commission or other tribunal" (except those tribunals in respect of which this Court has jurisdiction under section 28 of the Act): see *Girouard* at para. 31.
>
> [27] The term "federal board, commission or other tribunal" is defined in subsection 2(1) of the Act. Subject to certain exceptions not relevant in this context, the definition includes a body that has, exercises, or purports to exercise jurisdiction or powers that are conferred by or under either an Act of Parliament or an order made pursuant to the Crown prerogative:
>
> > **federal board, commission or other tribunal** means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.
>
> …
>
> [29] This Court set out in *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52 at paras. 29-30, 400 N.R. 137, a two-step inquiry for determining whether an entity is a "federal board, commission or other tribunal": the court must first identify the

> jurisdiction or power at issue, and then identify the source or the origin of that jurisdiction or power. The Court in *Anisman* cited with approval a passage in D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, Vol. 1, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 2:4310, in which the authors state that it is "the source of a tribunal's authority, and not the nature of either the power exercised or the body exercising it, [that] is the primary determinant of whether it falls within the [subsection 2(1)] definition." This Court reiterated the *Anisman* test in *Girouard* (at paras. 34, 37).
>
> [30] The Supreme Court recently revisited the law governing the availability of judicial review in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750, a case decided after the Federal Court's decision here, and one not involving the *Federal Courts Act*. In doing so it emphasized (at para. 14) that judicial review is available only where two conditions are met – "where there is an exercise of state authority and where that exercise is of a sufficiently public character" (emphasis added). It agreed with the observation by my colleague Justice Stratas in *Air Canada v. Toronto Port Authority Et Al*, 2011 FCA 347 at para. 52, [2013] 3 F.C.R. 605, that bodies that are public may nonetheless make decisions that are private in nature – the Court referred as examples to renting premises and hiring staff – and that these private decisions are not subject to judicial review.

[90] Therefore, the required analysis in this matter is: what is the power at issue and what is the source of that authority? The source of the power, as opposed to the nature of the decision-making body is the primary determinative factor.

[91] The power at issue in Mr. Munroe's application, at its narrowest, is the power to decide to permit, or refuse, the transfer of quota allocation associated with a licence to a different CMB.

[92] Mr. Munroe submits that the source of this decision-making power should be considered as incidental to the CMBs' authority to manage and operate fisheries and fishing licences. In

support of that view, Mr. Munroe refers to this Court's decision in *Archer*. In that case, the applicant sought to set aside a decision of a harbour authority not to renew the applicant's lease of a storage locker. The harbour authority was a not-for-profit corporation, incorporated under the *Canada Corporations Act*, which operated and managed the harbour pursuant to a lease agreement entered into with the Minister. Justice Rennie (then of this Court) at paragraph 13 of his reasons stated: "Construed at its narrowest, the power the FCHA sought to exercise in this instance was the power to decide whether or not to renew a lease to a gear storage locker, which is an incidental aspect of its more general authority to operate and manage the Harbour".

[93] In my view, *Archer* is distinguishable on its facts from the matters before me. In *Archer*, Canada conceded that the Minister was legally required to control and administer the use, management and maintenance of every scheduled harbour, but the Minister was not doing so. Rather, the harbour authority exercised all aspects of the Minister's authority. Canada also conceded that the Minister had no residual authority or discretion over the harbour operations (at para 24). Justice Rennie noted that there was no express authorization under the *Fishing and Recreational Harbours Act*, RSC 1985, c F-24 for the Minister to delegate his authority. However, the relevant legislative provisions did give the Minister a number of options by which his authority to delegate could be authorised, including by lease (at para 20). Those provisions, read together, gave implied authority to the Minister to sub-delegate his authority over the use, management and maintenance of a harbour to its lessee (at para 22).

[94] As will be discussed further below, the circumstances here are unlike *Archer*, where it was conceded that the Minister had delegated his statutory authority, in whole, over the

management and operation of a harbour and, where sub-delegation was implicitly permitted by the regulations. In this matter, the power the ENS CMB was exercising when it made the decision not to release the catch history quota associated with Mr. Munroe's licence to another CMB was not incidental to a general delegation of authority to the CMBs to manage the fishery as the Applicants assert.

[95] Mr. Munroe refers to *Morton v Canada (Attorney General)*, 2015 FC 575 [*Morton*] in support of his view that the ENS CMB was exercising delegated authority. That case was concerned with the transfer of salmon smolts from a hatchery to fish farms. The conditions for the transfer were governed by licence conditions. At issue was whether certain licence conditions met or were consistent with the regulatory pre-conditions and requirements governing transfer as established by s 56 of the *Fishery (General) Regulations*. Justice Rennie found that the subject conditions were unreasonable as they were inconsistent with and contrary of s 56. He also found that one of those conditions failed on a second ground, being that the Minister had not properly delegated authority to the harvester.

[96] Justice Rennie addressed sub-delegation as follows:

> [79] Sub-delegation is "the granting by a delegate to another…of some part of the authority granted to the delegate by Parliament" (Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure before Administrative Tribunals* (loose-leaf) (Toronto: Carswell, 1988) (2012 updated) at 5-20). There is a general presumption against sub-delegation in administrative law, referred to as the latin maxim *delegatus non potest delegare*: a delegate may not re-delegate (John Willis, "Delegatus Non Potest Delegare" (1943) 21 Can Bar Rev 257).
>
> [80] **The presumption against sub-delegation does not apply, however, when the action is purely administrative or of such a character that no significant degree of discretion or**

> **independent judgment is involved. It only applies to discretionary decisions, legislative or adjudicative decisions: see *Forget v Quebec (Attorney General)*, [1988] 2 SCR 90**. In the case at hand, the sub-delegate, Marine Harvest, has been given legislative authority in the form of a discretion to exercise independent judgment regarding the transfer of fish pursuant to condition 3.1(b) of the licence. As Marine Harvest has the ability to exercise discretion when deciding whether to transfer fish, the presumption against sub-delegation is engaged. However, the presumption against sub-delegation is just that, a *presumption*. It is not a rule of law, and is therefore rebuttable with either express or implied statutory authorization (*Brown and Evans*, at 13-17). Thus, the Minister may further delegate the authority granted to him by Parliament under section 56 of the *FGRs*, through express or implied authorization. There is no express authorization in the *FGRs* for the Minister to sub-delegate authority under section 56 to the aquaculture industry. As such, the question is whether the *FGRs* can be interpreted to impliedly authorize a sub-delegation of the Minister's authority.
>
> [81] **I do not think that the scope of section 56 is so narrow as to preclude the Minister from sub-delegating to the aquaculture industry. Section 56 can be interpreted to impliedly authorize sub-delegation of administrative and operational responsibilities if a pragmatic and functional approach is applied**. I agree with Justice Dymond's analysis in *R v Cox*, 2003 NLSCTD 56, at para 70 that the size and complexity of DFO's mandate requires delegation of administrative functions, provided the criteria are objective, discernable and clear.
>
> [82] Therefore, I find that the *FGRs* impliedly authorize the Minister to delegate to Marine Harvest. However, although sub-delegation is *permissible*, the question remains: did the Minister *properly* delegate to Marine Harvest?
>
> (emphasis added)

[97] Here, as discussed above, it is clear that the Minister has broad authority over fisheries and licencing. Further, the affidavit of Jennifer Ford, Acting Director, Resource and Aboriginal Fisheries Management, DFO, affirmed on October 9, 2020 [Ford Affidavit T-582-20] (a similar affidavit of Ms. Ford was filed in T-583-20 [Ford Affidavit T-583-20]) explains that the Minister

decides the TAC for ground fish stock for each fishing season. Out of the TAC, DFO distributes a quota allocation to each fleet. From the FG<45' Fleet quota allocation, DFO distributes a quota allocation to each of the CMBs. Thus, the CMBs do not exercise any power or authority over the amount of quota allocated to each of them.

[98] Ford Affidavit T-582-20 states that since about 1998 the FG<45' Fleet has been managed by DFO under the community management approach. The geographic community group designations of a licence is based on the registration of the home port of the licence holder according to DFO records as of 1996. All FG<45' Fleet licences issued to licence holders are associated with one of the seven geographic community groups.

[99] Therefore, this is not a situation like *Morton*, where Justice Rennie found that the applicant was given legislative authority by way of the discretion to exercise independent judgment pursuant to a specific licence condition, thus engaging the presumption against sub-delegation. In *Morton*, the presumption was rebutted by the fact that s 56 of the *Fishery (General) Regulations* impliedly authorized sub-delegation of administrative and operational responsibilities. Here, there is no assertion that the CMB was given discretion to exercise independent judgement – and to ensure regulatory compliance – by way of a licence condition. Nor does Mr. Munroe point to any regulatory provision that might support an implied sub-delegation of the power to decide the transfer of quota allocation associated with a licence to another CMB.

[100] Rather, the record establishes that the CMBs were established in furtherance of the Operational Guidelines. In this regard, they are creatures of policy. They are also provincially incorporated under the *Societies Act*, RSNA 1989, c. 435 [*Societies Act*] and set their own by-laws, member eligibility requirements and member agreements, which may vary between Boards. The CMBs are intended to, and do, facilitate community management of that portion of the quota allocations assigned to each CMB by the Minister. Significantly, the Operational Guidelines explicitly address the authority of the CMBs and state that legislative authority remains with the Minister:

> The Common policies and principle of community management are primarily established through the SF Fixed Gear Committee making recommendations to DFO for implementation. **Under the current Acts and Regulation, no power or authority is delegated to the different community boards, as the legislative authority rests with the Minister.** Under the current system, the management boards submit their specific fishing plans, which are then approved and implements by DFO provided they do not conflict with existing legislation and fulfill conservation requirements. A fleet CHP for all FG<45' is developed and all management boards must adhere to this Plan. In addition to this generic CHP, the FG<45' CHP can contain additional management measures such as seasonal quotas, trip limits, and sanctions that not enforced by DFO. Most groups also require members to sign waivers that authorizes DFO to send the weekly catch report by individual licence holders to the indicated management board fore review. This allows management boards to ensure that participants in their groups respect the management measures set out in their plan.
>
> (emphasis added)

[101] Ford Affidavit T-582-20 (nearly identical paragraphs are contained in Ford Affidavit T-583-20) states that because the CMBs are provincially incorporated they are independent of DFO and that DFO is not a party to the agreements members signed with their CMB.

[102] Further that:

> 10. Each Board sets the eligibility criteria for a fisher to become a member ……. As each Board sets its criteria for membership, the criteria are not standard across boards. As the Boards are independent, DFO does not set the eligibility criteria. However, DFO has advised Boards of the following expectations with respect to eligibility criteria:
>
> - Advance notice on what is being proposed regarding changes to eligibility criteria must be given to membership in sufficient detail so that membership can understand the implications prior to consultations/meetings.
>
> - Meetings or other processes must be clearly documented and minutes must be available to DFO and interested parties.
>
> - Eligibility criteria must be clear and implemented fairly.
>
> - An appeal process (also clearly described and documented) must exist.
>
> - DFO must approve changes to eligibility criteria, therefore sufficient notice to do so must be given.
>
> 11. The Board notifies DFO when their quota allocations for the fishing season have been caught. They also monitor bycatch, particularly for depleted species. Some Boards establish seasonal quotas amongst themselves and industry-monitored trip limits. Those internal Board requirements are not enforced by DFO (as they are not part of the licence conditions).
>
> 12. The Boards assist DFO in monitoring the groundfish fishery for the FG<45' fleet throughout the Maritimes Region. In addition, DFO requires each Board to develop an annual Conservation Harvesting Plan ("CHP") for an orderly fishing season that takes into account considerations that are particular to their Board and community. These plans are not negotiated between a Board and DFO. However, all CHPs are subject to DFO's regulatory requirements and approval as plans must not conflict with existing legislation and must fulfill conservation requirements.

[103] I agree that that the CMBs are involved in day-to-day fisheries management. However, this is for the limited purpose of implementing DFO's community management policy and that management is effected within the confines of the quota allocation distributed to each group by DFO. That is, the CMBs tend to the internal management of the resource allocated to them by DFO. Contrary to the Applicants' submissions, the CMBs do not set licence conditions.

[104] The ENS CMB decision here at issue is that it would not support releasing groundfish licence number 101220, or its catch history to the Shelburne County Community Group. The ENS CMB states that because this is a community-based fishery, where the opportunity to fish is equitable, it would not release quota to another community group. Ultimately, however, and whether the ENS CMB's decision is read as deciding not to support the request or as refusing to release the quota, it is only the Minister who can actually change the geographic community associated with the licence and it is only the Minister who could re-distribute related quota allocation if this were to be agreed to or supported by the CMBs.

[105] In my view, the Applicants have not established that this is a situation like *Morton* where the relevant regulations implicitly authorized sub-delegation, so long as it was done properly.

[106] Further, as stated in *Morton*, the presumption against sub-delegation does not apply when the action is purely administrative or of such a character that no significant degree of discretion or independent judgment is involved. It only applies to discretionary decisions, legislative or adjudicative decisions.

[107] It is true that the CMBs have the discretion to agree, or not, to a request to transfer share quota attached to a licence associated with the community group that they represent. And, the practical reality is that a CMB is very unlikely to agree to such a request as it would mean less available quota for its community members. This is clear and recognized in the Operational Guidelines:

> The policies adopted by the FG<45' Committee do allow for licence holders to change from one geographic community designation to another **provided the two boards involved are in agreement. The movement of a licence involves one community either gaining or losing a licence and this has both quota and effort implications. Currently the two management boards have to support the change in community designation as well approve the amount of quota that is to be transferred and advise DFO.** The different management boards do not have to adhere to any specific quota formula, but to date when licence holders have changed communities, the home port community has only agreed to transfer quota in an amount equal to or less than the percentage share attributed to that licence without any share of the quota percentage defined as unidentified. **If there is no agreement, the new licence holder will then have to choose to fish under the plan of the original board or choose to remain in Group X.**
>
> **Community Designation and Access to Stock Areas**
>
> …
>
> The Community designation and area that the licence is eligible to fish will be permanently attached to the GRO and will not change upon any transfer to another individual. Following a licence transfer, a new licence holder will be bound by community and fishing area designation unless the community management boards involved agree to an amendment.
>
> (emphasis added)

[108] Thus, viewed in the context of the Operational Guidelines, the CMBs' discretion is limited. In my view, this is a situation where the presumption against sub-delegation is not

engaged as the ENS CMB's decision was "purely administrative or of such a character that no significant degree of discretion or independent judgment is involved". The ENS CMB was simply declining to give up a portion of a quota allocation given to its community group by DFO. And, where a transfer request is denied, the option remains for a fisher to opt into Group X, although for holders of a licence with a high catch history this may be unattractive.

[109] In any event, and most significantly, the source of the CMB's authority is, in my view, the Operational Guidelines. However, policies are not law – they are not binding and they do not create legally enforceable rights. Therefore, the question becomes whether the source of a body's authority can be a non-binding instrument, in this case, one that explicitly states that the Minister has not sub-delegated any authority to the CMBs. In my view, it cannot. The words "conferred by or under an Act of the Parliament of Canada" in s 2 of the *Federal Courts Act* have been held to mean that an Act of Parliament has to be a source of the jurisdiction or powers which are being conferred (*Southam Inc. v. Canada (Attorney General)*, [1990] 3 FC 533 (FCA) at p 13). The Operational Guidelines are not an Act of Parliament and, therefore, cannot be the source of the CMBs' authority.

[110] In *Jada Fishing Co. Ltd. v. Canada (Minister of Fisheries and Oceans*), 2002 FCA 103 [*Jada Fishing*], the Federal Court of Appeal held that the decision of an appeal board, created by policy, was not subject to judicial review.

> [11] The Minister argues that the recommendations of the Panel are not judicially reviewable because it is not a federal board, commission or other tribunal under subsection 2(1) of the Act and it did not make a decision. The Minister also asserts that the recommendation of the Panel is not reviewable because the Panel only made recommendations, not decisions that affected the rights

> of the appellants, and its recommendations allegedly played an insignificant role.
>
> [12] It is clear that the Minister is empowered under section 7 of the *Fisheries Act*, R.S.C. 1985, c. F-14, with absolute discretion to make decisions with regard to fishing licences**. The Panel, on the other hand, was without statutory authority and merely made recommendations which the Minister was entitled to accept or reject. Accordingly, the Panel's recommendations are not in themselves *prima facie* reviewable**. In this case, due to the breadth of the Notice of Application for Judicial Review before Pelletier J., I am well satisfied that this Court can review a discretionary decision of the Minister based, in part, upon the Panel's recommendation.
>
> [13] The present appeal seeks to set aside the Reviewing Judge's order, and refers only to the "decision" of the Panel and its conduct, without reference to the Minister. However, the Minister's decision of April 3, 1998, still stands, and, in any event, the decision or recommendation of the Panel is inexorably connected to his decision, being without legal effect unless "adopted" by the Minister as one of the basis for his decision. In my analysis, this appeal can only continue as a review of the Minister's decision, albeit under the guise of an attack on the Panel's recommendation, based on paragraph 18.1(4) of the Act as a review of the exercise of Ministerial discretion.

[111] In this case, the Operational Guidelines do not explicitly state that the CMBs are making a recommendation as to a transfer request. Rather, as noted above, the Operational Guidelines state that a licence can be transferred between geographic communities if the relevant CMBs agree.

[112] Mr. Munroe submits that the ENS CMB’s role is not merely advisory. In that regard, he refers to a letter dated April 25, 2019 sent by his counsel to DFO requesting that DFO review a

February, 28, 2019 denial of membership in the Shelburne Country Community Group. Ms. Doherty responded, stating:

> As stated on Mr. Munroe's licence conditions, licence #101220 is associated with the Eastern Nova Scotia (ENS) Community Group. DFO assigns quota to each Management Board based on the catch history associated with licences that belong to that Management Board. Any quota based on catch history associated with licence #101220 is under the management of the ENS 4VsW Management Board.
>
> Although licence holders are allowed to join other Community Management Boards, it remains the decision of the Management Board (in this case ENS 4VsW) as to whether any quota could be released from the Board.

[113] As to the latter statement, on cross-examination, Ms. Ford stated that this position was wrong, and that:

> That in fact really is not the decision of the Management Board. It's DFO's decision but we typically consider the – like a recommendation from the Management Board is typically our primary consideration when we make that sort of decision so really what I think is meant there is that we look to the Boards to make a recommendation to DFO about that and typically we would accept the Board's recommendation about that matter.

[114] The Respondent takes the position that the ENS CMB decision is in the nature of a recommendation and, as the CMBs do not have any authority over Mr. Munroe's licence and licence conditions, it cannot be anything more.

[115] In my view, the CMB's decision does not present itself as a recommendation made to DFO. Nor is there anything in the record indicating that the ENS CMB presented its decision, as a recommendation or otherwise, to DFO. However, the Operational Guidelines do speak to

recommendations in stating that the views recommended by the management board are intended to clearly represent the majority position within a community. Ultimately, I agree that the ENS CMB's decision can be viewed as being in the nature of a recommendation, given that the policy, as set out in the Operational Guidelines, is not law, is not binding, and, significantly, as it also cannot fetter the Minister's discretion to issue licences and affix licence terms and conditions or allocate quota. If the CMB's decision were final, this would fetter the Minister's discretion.

[116] To conclude, the ENS CMB's decision not to support a transfer of Mr. Munroe's licence and licence catch history allocation was an administrative decision made pursuant to the Operational Guidelines, which is policy, not law. The source of the CMB's authority to make the decision was not statutory, it did not arise from an implied sub-delegation of the Minister's authority under the *Fisheries Act* and the *Fishery (General) Regulations*. And, ultimately, the final decision rests with the DFO as only the Minister can issue licences, effect licence conditions and allocate or reallocate quota as between CMBs. As the ENS CMB was making an internal administrative decision, or a decision in the nature of a recommendation, it was not acting as federal board, commission, or tribunal. Accordingly, this Court does not have jurisdiction to consider the subject decision of the ENS CMB that is challenged in this application for judicial review.

[117] As a final observation, I note that I have above addressed the parties' submissions as to what constitutes a federal board, commission, or tribunal as defined by s 2 of the *Federal Courts Act*. However, the parties have not addressed the effect, if any, of the CMBs being provincially incorporated under the *Societies Act* has on this question. There is jurisprudence from this Court

holding that bodies constituted or established by or under a law of a province are excluded from the definition of “federal board, commission or other tribunal”, even though they may exercise jurisdiction or powers conferred under an Act of Parliament.

[118] In those cases, the Court held that a judicial review of the decisions of provincial administrators should be brought through the courts of the province, not Federal Court. For example in *9037-9694 Quebec Inc v Canada (Attorney General*), 2002 FCA 203 at para 25 the Court stated: “Parliament has in very clear terms created an exclusion in its definition of ‘federal board, commission or other tribunal’, even though the agency or the person exercises jurisdiction or powers conferred by or under an Act of Parliament. Any body constituted or established by or under a law of a province, or any persons appointed under or accordance with the law of a province, is excluded”. See also *Saugeen Band of Indians v Canada (Minister of Fisheries and Oceans)*, [1992] 3 FC 576; *CP Express & Transport Ltd v Motor Carrier Comm* [1986], 1 FC 59; *Able and Penetanguishene Mental Health Centre (Re)* (1979), 97 DLR (3d) 304). However, given that I have found above that the source of the CMB’s power is not the *Fisheries Act*, I do not need to make a determination on this point.

[119] Having reached the above conclusion that ENS CMB was not acting as federal board, commission, or tribunal and, accordingly, that this Court does not have jurisdiction to consider the subject decision, it is not necessary to consider the remaining issues raised by the parties.

T-583-20 (Veinot)

Additional Background Facts

[120] Mr. Veinot's licence is associated with the Halifax West community group and Prospect Area Full Time Fishermen's Association [PAFFA] is the relevant CMB [PAFFA CMB].

[121] Mr. Veinot's evidence is that in 2019 he applied for membership in PAFFA CMB and was not permitted to join (Affidavit of Anthony Veinot, sworn on August 26, 2020) and that he has applied to join the PAFFA CMB "on numerous occasions" but has not been permitted to join. His most recent request to join was made on March 6, 2020 when he submitted, via email, a "formal request" to join PAFFA and was advised by Mr. George Zinck, the head of the PAFFA CMB, that there would be a vote on his request.

[122] On May 1, 2020, Mr. Zinck responded to a follow up email from Mr. Veinot stating that because of the pandemic there had been no meeting that year. Mr. Veinot seeks judicial review of this decision.

Decision Under Review

[123] The decision under review is the May 1, 2020 email from the PAFFA CMB stating: "Because of the covid-19 virus there was no meeting this year".

[124] In his Notice of Application Mr. Veinot states that the judicial review is the refusal, delay, or other failure to exercise administrative action by the PAFFA CMB to determine the status of his March 6, 2020 application for membership. The refusal being the May 1, 2020 email from the PAFFA CMB. He seeks an order of *mandamus* to compel the PAFFA CMB to take immediate action and make a decision with respect to the status of his membership.

Issues

[125] As indicated above with respect to Mr. Munroe's application (T-582-20), the issues in this matter largely overlap as does the analysis as to whether the PAFFA CMB is a federal board, commission, or tribunal.

[126] Mr. Veinot asserts that the power the PAFFA CMB is exercising is the power to deny Mr. Veinot access to the fisheries, even though he holds a licence. He asserts that the Minister has implicitly sub-delegated her authority under the *Fisheries Act* and the *Fishery (General) Regulations* to the CMBs. Because the CMBs are responsible for the day-to-day management of the fishery, the exercise of PAFFA CMB's power is incidental to its more general authority to manage and operate fisheries and fishing licences within it geographical area. The PAFFA CMB is therefore a federal board, commission or tribunal.

Analysis

[127] For the reasons set out above, I do not agree that the PAFFA CMB is a federal board, commission or tribunal.

[128] In my view, the power being exercised by the PAFFA CMB is the power to decide not to hold a meeting to determine his request for admission to membership. Mr. Veinot has not established that the PAFFA CMB's power to decide not to hold a meeting to vote on his membership is incidental to a more general authority of the PAFFA CMB to manage and operate fisheries and fishing licences and/or that it was exercising a statutory delegation of the Minister's powers under the *Fisheries Act* when making the decision. This is determinative.

[129] I would, however, make a few further comments.

[130] First, I do not agree with Mr. Veinot that the power that the PAFFA CMB was exercising was the power to deny Mr. Veinot access to the fisheries as he asserts. Mr. Veinot was issued his licence by the Minister who has the sole authority to issue licences and to implement and change licence conditions. And, even if membership is delayed or denied by the PAFFA CMB, Mr. Veinot still retains the option to fish in Group X. While he may not prefer that option, through it he does have access to the fishery.

[131] I do agree with Mr. Veinot (and Mr. Munroe) that DFO's oversight role with respect to the CMBs is not defined in the Operational Guidelines. Indeed, the Operational Guidelines are long overdue for an update. However, I am not persuaded that Mr. Veinot (and Mr. Munroe) has demonstrated, as he asserts, that the CMBs operate as a "private club" and have unsupervised powers – thereby supporting a finding of implied delegation of the Minister's authority. For example, in 2017 Mr. Veinot, through his then counsel, requested that DFO address Mr. Veinot's licence concerns. Ms. Doherty responded, explaining the community management system. As to

a denial by the Halifax West CMB of Mr. Veinot's application for membership, she explained that the Halifax West CMB had a longstanding policy of not accepting licences that have been inactive for more than 5 years, which was the case with Mr. Veinot's licence and that "DFO has supported Management Boards in establishing criteria for membership, as long as the criteria are transparent, reasonable, and applied in a manner that is fair and consistent". Thus, DFO was responsive to Mr. Veinot's concern about his membership denial.

[132] The PAFFA CMB must, of course, be responsive to requests for membership. And, if membership is denied, the basis for the refusal must be explained and be in compliance with the Operational Guidelines, the PAFFA By-Laws and any other relevant considerations. Nor can it be discriminatory; Mr. Vienot asserts in his affidavit that he was previously told he was denied membership due to his age. That is, any eligibility decision by PAFFA CMB must be reasonable. Ms. Ford's affidavit evidence in this matter was that she believed that DFO would intervene in a decision based on discriminatory criteria.

[133] Finally, I note that at the hearing the Respondent submitted that this matter was now moot as the remedy of *mandamus* sought by Mr. Veinot – that the Court order PAFFA CMB to consider his application – had now occurred and he had been offered conditional membership. Counsel for Mr. Veinot opposed the claim of mootness asserting, among other things, that a letter from PAFFA's counsel submitted by the Respondent was not in evidence nor was it an accurate reflection of the nature of certain discussions held between PAFFA and Mr. Veinot. In my view, in the absence of any supporting documentation, it is not possible to assess the

mootness allegation. And, given my finding that the PAFFA CMB is not a federal board, commission or tribunal, the assertion itself is moot.

[134] Similarly, given that finding, there is no need to address the remaining issues.

Costs

[135] At the hearing, the parties advised that hey had not discussed or agreed on costs but that they would do so and revert to the Court. The parties subsequently advised that they could not agree on costs and submitted individual Bills of Costs, based on Column III of Tariff B, for each application. The differential in the amounts claimed by the Applicants and the Respondent was small and I am satisfied that the amounts submitted are reasonable. I will grant costs to the Respondent in the amounts set out in the Bill of Costs.

JUDGMENT IN T-271-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. The Respondent shall have its costs of this application in the all inclusive amount of $5702.29; and

3. A copy of these reasons shall be placed in each of the Court File Nos.: T-271-20, T-582-20 and T-583-20.

JUDGMENT IN T-582-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. The Respondent shall have its costs of this application in the all inclusive amount of $5280.70; and

3. A copy of these reasons shall be placed in each of the Court File Nos.: T-271-20, T-582-20 and T-583-20.

JUDGMENT IN T-583-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. The Respondent shall have its costs of this application in the all inclusive amount of $5287.08; and

3. A copy of these reasons shall be placed in each of the Court File Nos.: T-271-20, T-582-20 and T-583-20.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-271-20
STYLE OF CAUSE:	TREVOR MUNROE v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-271-20
STYLE OF CAUSE:	ANTHONY VEINOT v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-582-20
STYLE OF CAUSE:	TREVOR MUNROE v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-583-20
STYLE OF CAUSE:	ANTHONY VEINOT v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	JUNE 16, 2021 (T-271-20), JUNE 17, 2021 (T-582-20 AND T-583-20)
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JULY 8, 2021

APPEARANCES:

Richard Norman	FOR THE APPLICANTS
Melissa A. Grant Jessica Thompson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT