SUPREME COURT OF NOVA SCOTIA

Citation: *R. Baker Fisheries v. Nova Scotia (Fisheries and Aquaculture)*, 2019 NSSC 321

Date: 20191024
Docket: Hfx No. 478662
Registry: Halifax

Between:

R. Baker Fisheries Limited

Appellant

v.

The Minister of Fisheries and Aquaculture

Respondent

DECISION

Judge:	The Honourable Justice Christa M. Brothers
Heard:	April 25, May 3, and June 6, 2019, in Halifax, Nova Scotia
Final Written Submissions:	October 16, 2019
Counsel:	Ian Gray, for the Appellant Jeremy Smith, for the Respondent

By the Court:

Overview

[1] The appellant, R. Baker Fisheries Limited, is a small fish processor located in Lockeport, Nova Scotia. It operates pursuant to fish processing and fish buying licences granted under the *Fisheries and Coastal Resources Act*, S.N.S. 1996, c. 25 (the "*Act*"). On June 9, 2017, R. Baker Fisheries applied to the Nova Scotia Department of Fisheries and Aquaculture (the "Department") for an amendment to its licences to include eels. On July 11, the Department approved the addition of eel to the licences, subject to the appellant meeting the compliance requirements outlined in the letter of intent. The letter of intent listed six compliance requirements, but identified three as "completed":

> 1. Civic Address in Nova Scotia where your daily records will be kept with respect to the buying of fish. **Completed**
> 2. Proof of compliance with the Registry of Joint Stock Companies. Information is available on the RJS website at http://www.gov.ns.snsmr/rjsc/ **Completed**
> 3. Copy of up-to-date Shareholder's Register from the corporate Minute Book of R. Baker Fisheries Limited setting out (1) the names of each shareholder and (2) the number of shares held by each.
> 4. Processor licence amendment fee ($33.15), buyer licence amendment fee ($33.15), buyer licence fee for species category, "Other," ($132.65) and designated buyer amendment fee for four designated buyers ($132.60). Please make your cheque or money order payable to the Minister of Finance. **Completed (Cheque received from Waycobah First Nation)**
> 5. Intended source of product for each species.
> 6. Proof of CFIA Compliance for species requested.

[2] The Department stated that if the compliance requirements were not met by October 11, 2017, the letter of intent would be null and void, and the appellant would need to reapply.

[3] On September 11, 2017, the Department wrote to the appellant, reminding it that several compliance requirements were still outstanding, and that the letter of intent would be void if the information was not received by October 11.

[4] On October 5, 2017, R. Baker Fisheries wrote to the Department requesting an extension of the expiry date in the letter of intent until the end of January 2018.

On October 18, the Department notified the appellant that it had extended the letter of intent to January 11, 2018.

[5] On January 29, 2018, the Registrar of Fisheries Licensing wrote to R. Baker Fisheries giving it formal notice that the "Letter of Intent to add Eels as a species to your licences has expired, and as such your amendment application has been rejected." The appellant was advised of its right under s. 118 of the *Act* to appeal the Registrar's decision to the Minister of Fisheries and Aquaculture.

[6] Also in January 2018, the Minister announced a moratorium on the issuance of new fish processing and fish buying licences, as well as on amendments to existing licences. Notwithstanding that announcement, R. Baker Fisheries attempted to reapply for the amendment to its licences. After being advised by the Registrar that reapplication was not an option, the appellant appealed the Registrar's decision rejecting its earlier application.

[7] On March 28, 2018, the Minister requested additional information from R. Baker Fisheries relating to the sourcing of the eel, the quantities to be sourced, the anticipated employment opportunities created and the intended market destination for the product. The appellant responded to the request on April 13. On June 6, the Minister dismissed the appeal.

[8] On July 24, 2018, R. Baker Fisheries appealed the Minister's decision to this court. At that time, the appellant raised two grounds of appeal. On May 16, 2019, the appellant dropped its original two grounds of appeal and amended the notice of appeal on consent, leaving only one new ground of appeal.

Ground of appeal

[9] The appellants say that the Minister erred in his application of the law to the facts when he decided that R. Baker Fisheries Limited had not provided all of the necessary information to have its licence amended.

Standard of review

[10] This is an appeal under s. 119 of the *Act* from an appeal to the Minister under s. 118:

Appeal to Minister

118 (1) A person who is aggrieved by a decision or order of an employee of the Department may, within thirty days of the date of the decision or order, appeal to the Minister by notice in writing, stating concisely the reasons for the appeal.

(2) A notice of appeal may be in a form prescribed by the Minister and shall be accompanied by the fee, if any, prescribed by the Minister.

(3) The Minister shall notify the appellant, in writing, of the decision within thirty days of receipt of the notice of appeal.

(4) The Minister may dismiss the appeal, allow the appeal or make any decision or order the employee could have made.

(5) The employee and the appellant shall take such action as is necessary to implement the decision of the Minister disposing of the appeal.

Appeal to Supreme Court

119 (1) A person aggrieved by a decision of the Minister may, within thirty days of the decision, appeal on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme Court of Nova Scotia and the decision of that court is final and binding on the Minister and the appellant, and the Minister and the appellant shall take such action as may be necessary to implement the decision.

(2) The decision of the court pursuant to subsection (1) is final and there is no further appeal to the Nova Scotia Court of Appeal.

[11] The parties agree that the standard of review on a s. 119 appeal is reasonableness: *Specter v. Nova Scotia (Fisheries and Aquaculture)*, 2012 NSSC 40. The Nova Scotia Court of Appeal considered the meaning of reasonableness in *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22:

> [67] What does reasonableness mean?
>
> [68] Generally, the reviewing court follows the tribunal's reasoning path to assess whether the tribunal's reasoning is understandable and leads to an outcome that is permitted by the legislation. If the answer is Yes, the court does not ask whether the court would prefer another outcome. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras. 14-17, per Abella J. for the Court; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, para. 54, per Abella J. for the majority; *McLean*, *supra*, paras. 32-33.
>
> [69] On the other hand, "[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker

> adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance": *McLean*, para. 38.
>
> [70] Recently, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, Justice Gascon for the majority summarized:
>
> > [55] … When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa* [*Canada (Citizenship and Immigration v. Khosa*, [2009] 1 S.C.R. 339], at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

[12] Accordingly, for the appellant to succeed, it must demonstrate that the Minister's reasoning in rejecting the appellant's application for an amendment was not understandable, and led to an outcome that is not permitted by the *Act*.

The legislation

[13] The purpose of the *Act* is set out in s. 2:

> **Purpose of Act**
>
> 2 The purpose of this Act is to
>
> > (a) consolidate and revise the law respecting the fishery;
> >
> > (b) encourage, promote and implement programs that will sustain and improve the fishery, including aquaculture;
> >
> > (c) service, develop and optimize the harvesting and processing segments of the fishing and aquaculture industries for the betterment of coastal communities and the Province as a whole;
> >
> > (d) support the sustainable growth of the aquaculture industry;
> >
> > (e) expand recreational and sport-fishing opportunities and ecotourism;
> >
> > (f) foster community involvement in the management of coastal resources;
> >
> > (g) provide training to enhance the skills and knowledge of participants in the fishery, including aquaculture;
> >
> > (h) increase the productivity and competitiveness of the processing sector by encouraging value-added processing and diversification.

[14] Section 5 provides that "[t]he Minister is responsible for the general supervision and management of this Act." The Minister's powers are outlined in s. 6:

> **Powers of Minister**
>
> 6 The Minister, for the purpose of the administration and enforcement of this Act, may
>
> (a) establish and administer policies, programs and guidelines pertaining to the administrative development and protection of the fishery and coastal zone aquatic resources;
>
> (b) consult with and co-ordinate the work and efforts of other departments and agencies of the Province respecting any matter relating to the maintenance and development of fishery resources;
>
> (c) enter into agreements with the Government of Canada or the government of any other province on matters relating to the management or development of fishery resources;
>
> (d) develop scientific databases, especially with respect to determining the impact of various geartypes on the fisheries environment and engage in consultations with the Government of Canada to ensure equitable access to fishery resources;
>
> (e) gather, compile, publish and disseminate information, including statistical data, relating to the maintenance and development of fishery resources;
>
> (f) establish and assist demonstration programs that are consistent with the intent of this Act;
>
> (g) conduct economic analyses to determine the costs and benefits of proposed alterations to traditional harvesting and processing of fisheries resources and aquaculture;
>
> (h) convene conferences and conduct seminars and educational programs relating to the development, management and protection of fisheries resources;
>
> (i) give financial assistance to any person, group, society or association for purposes related to the promotion and enhancement of the fishery;
>
> (j) establish fees for the provision, registration or filing of any information, documents, returns and reports, any application for, processing and issuance of an approval, certificate, licence or lease, any inspection or investigation and any services or material provided in the course of the administration of this Act;
>
> (k) prescribe forms for the purpose of this Act.

[15] Under Part VII of the *Act* (Licensing and Inspecting of Fish Products), the Minister is given the general supervision and control of processing, buying, selling, possession and marketing of fish products in Nova Scotia for the purpose of maintaining product quality, protecting the health and safety of seafood consumers and assisting in the orderly development of the fisheries industry (s. 72). Section 74 deals with applications for fish processing and fish buying licences, giving the Minister broad discretion over the application process:

> **Licences**
>
> 74 (1) A person may apply to the Minister, in the manner required by the Minister, for a licence to
>
> (a) process fish products; or
>
> (b) buy fish products.
>
> (2) An application for a licence shall be accompanied by the information stipulated by the Minister.
>
> (3) The Minister may require an applicant for a licence to submit any additional information the Minister considers necessary.
>
> (4) Where the Minister considers an application to be incomplete, the application shall not be processed until the information required is submitted.

[16] Section 75 sets out the grounds upon which the Minister may refuse to issue a licence:

> **Grounds for refusing licence**
>
> 75 The Minister may refuse to issue a licence to process or buy fish products if the Minister is not satisfied that it is in the public interest to issue the licence having regard to the supply of fisheries resources available, the presence of existing under-utilized processing capacity or any other factor that, in the opinion of the Minister, is relevant to determining the public interest.

[17] Under s. 76, the Minister has discretion to impose terms and conditions on any licence, and to vary, amend, or terminate a licence at any time where it is reasonably necessary to carry out the purpose of Part VII of the *Act*:

> **Particulars respecting licence**
>
> 76 (1) A licence issued pursuant to this Part
>
> (a) shall be granted for a period prescribed by the regulations, with a right of renewal by the licensee at the Minister's option;
>
> (b) may specify what fees are payable; and

(c) is subject to any terms and conditions prescribed by the Minister.

(2) A licence may be varied or amended by the Minister at any time as may be reasonably necessary to carry out the purpose of this Part.

(3) A licence may be terminated by the Minister at any time if

(a) the application for a licence is false in any material particular;

(b) the holder of the licence fails to pay, within thirty days, any fee or charges pursuant to this Part;

(ba) the holder of the licence fails to meet any requirement placed on the licence holder by the regulations;

(c) the holder of the licence fails to comply with this Part.

(4) The holder of a licence shall submit to the Minister such information as is prescribed by the regulations.

[18] Finally, s. 77 empowers the Minister, with the approval of the Governor in Council, "to authorize any action or invoke any measure to encourage the development and protection of fishery resources in the Province", and "to authorize any action or invoke any measure relating to fish products deemed necessary by the Minister to effect the purposes of the Act."

[19] In addition to the *Act*, fish processing and fish buying licences are governed by regulation. The *Fish Buyers' Licensing and Enforcement Regulations*, NS Reg 99/2000 provide, in part:

Appointment of Registrar

4 (1) The Minister may appoint a Registrar and such other employees of the Department as are necessary for the purpose of these regulations.

(2) The Registrar shall establish and maintain a Registry containing the names of all licence holders.

(3) The Minister may issue general directions to the Registrar regarding the issuance, amendment, renewal, suspension, termination and conditions of a buyers licence.

…

Licence application

5 An application for a buyers licence shall be made to the Minister on a form supplied by the Department and shall be accompanied by a non-refundable application fee of $265.40.

6 The Minister may, by notice in writing, require an applicant to

(a) submit a detailed business plan to the Minister in a form satisfactory to the Minister;

(b) provide additional information about the proposed buying activity;

(c) submit a letter of commitment to bond to the Minister in a form satisfactory to the Minister, guaranteeing all amounts payable by the applicant for the purchase of fish or fish products.

7 The Minister shall advise the applicant of the outcome of the application, in writing, within 21 days of receiving all information in relation to the application.

…

Licence issue

9 The issuance of a buyers licence to a person does not imply or confer any future right or privilege for that person to be issued a buyers licence of the same type or any other type.

Licence transfer

10 (1) Subject to subsection (2), a buyers licence is not assignable or transferable.

(2) Where the Minister is satisfied that a buyers licence is being transferred to a corporation in which the current licence holder owns the majority of voting shares, the Minister may transfer the buyers licence.

(3) If a majority of voting shares of a corporation that is a licence holder are transferred, its buyers licence ceases to be in force.

Licence expiry

11 Unless otherwise specified in the buyers licence, a buyers licence expires on December 31 of the calendar year for which it is issued.

…

Amendment, renewal or cancellation at licence holder's request

14 (1) A request by a licence holder to amend, renew or cancel a buyers licence shall be made to the Minister in writing in the form and manner determined by the Department.

(2) A request to amend a buyers licence shall be accompanied by a fee of $33.15.

[*Emphasis added*]

[20] The *Fish Inspection Regulations*, NS Reg 286/84 state:

2 (1) The Minister may appoint a Registrar and such other employees of the Department as are necessary for the purpose of administering these regulations.

(2) The Registrar shall establish and maintain a Registry containing the names of all licence holders.

(3) The Minister may issue general directions to the Registrar regarding the issuance, amendment, renewal, suspension, termination and conditions of a fish processing licence.

3 No one shall operate or maintain an establishment for the purpose of processing fish for sale unless

(a) that person has been issued a fish processing licence for that establishment in accordance with these regulations, and

(b) the establishment and the employees meet the requirements of these regulations.

4 (1) A person may apply for a licence by completing an application on a form supplied by the Department and submitting it to the Minister with a non-refundable application fee of $265.40, which is in addition to the annual licence fee prescribed in subsection 4(5).

(2) The Minister shall advise an applicant of the outcome of their application, in writing, within 21 days of receiving all information relating to the application.

…

(4) Unless otherwise specified in the licence, a licence expires on December 31 of the calendar year for which it is issued.

(5) The annual fee for a licence is $265.40.

5 (1) Subject to subsection (2), a licence is not assignable or transferable.

(2) Where the Minister is satisfied that a licence is being transferred to a corporation in which the current licence holder owns the majority of voting shares, the Minister may transfer the licence.

(3) If a majority of voting shares of a corporation that is a licence holder are transferred, its licence ceases to be in force.

5A The Minister may in his sole discretion limit the number of fish processing licences to be issued where in his opinion it is in the public interest to do so.

…

6A (1) A licence holder may request that their licence be renewed, amended or cancelled by submitting the request in writing to the Minister in the form and manner determined by the Department.

(2) A request to amend a licence shall be accompanied by a fee of $33.15.

> (3) A request to renew a licence shall be accompanied by the annual licence fee prescribed in subsection 4(5).
>
> [*Emphasis added*]

[21] Building on the *Act* and the regulations, the Department issued the *Fish Processors & Fish Buyers Licence Policy*. This document, which is available online, sets out the following objectives:

> 3. OBJECTIVES
>
> The objectives of this policy are to:
>
> i. reduce or eliminate redundant buying and processing capacity.
>
> ii. address illegal buying activities.
>
> iii. enable the Department to gather timely and relevant information from the industry which will be used to provide direction for enforcement and compliance initiatives.
>
> iv. ensure that all processing activities meet food production standards.
>
> v. promote the health and safety of seafood consumers.
>
> vi. blend opportunities in coastal communities with resource availability.
>
> vii. promote job creation with specific initiatives and capacity limitations.
>
> viii. strengthen partnerships between government and industry.
>
> ix. promote employment in coastal communities.
>
> x. encourage long-term commitment and investment in the Province of Nova Scotia.
>
> xi. increase utilization of existing processing capacity.
>
> xii. encourage and support further processing and handling of fish or fish products, by linking government lending directly to job creation in Nova Scotia.
>
> xiii. promote new species and product development.
>
> xiv. exclude non-repayable contributions by government to existing and new processing facilities for capital construction and equipment.

[22] Under the heading “Termination, Amendment or Suspension”, the policy states:

> 1.1. The Minister has the authority under the *Fisheries and Coastal Resources Act* to refuse to issue a licence, to amend, vary or terminate a licence as part of his/her mandate for the general supervision and control of the processing, buying, selling, packaging, possession and marketing of fish within the Province. All licensing decisions are made in light of that mandate.

[23] In relation to fish buying licences, the policy provides:

> D. FISH BUYERS LICENCE
>
> 1. GENERAL
>
> 1.1 A Fish Buyers Licence may be issued, or amended, to a person who is licensed to process those species outlined in Schedule "B".
>
> …

[24] Similarly, in relation to fish processing licences, it states:

> E. FISH PROCESSORS LICENCE
>
> 1. GENERAL
>
> 1.1 A Fish Processors Licence may be issued or amended with species endorsements as outlined in Schedule "B" where an applicant, or an existing licence holder, can demonstrate a commitment to processing product in Nova Scotia.
>
> …

[25] That section also includes the following at 1.3:

> If a licensed fish processing facility is sold or leased, the existing licences will be cancelled and new licences may be issued to the same facility upon all regulatory requirements being met.

[26] This is the legislative and policy framework against which the court must assess the reasonableness of the Minister's decision to reject the appellant's application to amend its licences.

The positions of the parties

[27] R. Baker Fisheries says that it is advancing its single ground of appeal "on two separate grounds": (1) that the Minister had no authority under the *Act* to reject its application for failure to provide all of the required information; and (2) that R. Baker Fisheries had substantially complied with the Department's requirements by the deadline and that the amendment should have been granted accordingly.

[28] According to R. Baker Fisheries, the Minister is only permitted to reject an application where approving it would not be in the public interest (s. 75). Where an applicant fails to provide all of the necessary information, the appellant says, s. 74(4) obliges the Minister to hold the application in abeyance until the information is submitted. In other words, according to the appellant, no decision can be made with respect to an incomplete application. Section 74(4), again, provides:

> 74(4) Where the Minister considers an application to be incomplete, the application shall not be processed until the information required is submitted.

[29] The appellant's second argument is that for some of the compliance requirements, it provided the Minister with the necessary information prior to the expiration of the letter of intent; for others, the Minister already had the information on file in connection with the appellant's original licence applications. The appellant submits that it was therefore unreasonable for the Minister to reject the amendment application on the basis of a failure to meet the compliance requirements.

[30] The Minister submits that the appellant's argument respecting his statutory authority to reject its application does not fall within the ground described in the notice of appeal. The Minister further submits that this issue was not put before him in the s. 118 appeal, and should not be considered by this court.

[31] In the alternative, the Minister says that he exercises broad authority over fish buying and fish processing licences for the purposes of maintaining product quality, protecting the health and safety of seafood consumers and assisting in the orderly development of the fisheries industry. It is up to the Minister to implement an application and amendment process that promotes these public interest objectives. Where granting an amendment appears to be in the public interest, as in this case, the Minister issues a letter of intent approving the application subject to the compliance requirements being met by a specific deadline. Said differently, the Minister has decided that the public interest is best served by requiring provisionally successful applicants to meet compliance requirements within a specific timeframe before an amendment will be issued. It follows, the Minister says, that where an applicant has failed to meet those requirements, the Minister has authority under s. 75 to reject the amendment application as not being in the public interest.

[32] As to the appellant's second argument, the Minister says that "substantial compliance" – the test for compliance applied in tendering law – has no application

to the requirements for fish processing and fish buying licences under the *Act*. The Minister further states that R. Baker Fisheries knew as of July 2017 that there were three compliance requirements outstanding, and by January 11, 2018, the appellant provided no information other than an email from CFIA that had nothing to do with product source or the shareholder's register. The Minister says his decision to reject the application was reasonable.

The statutory authority argument

[33] There are two practical difficulties with the appellant's argument that the Minister has no authority under the *Act* to reject an application due to a failure to provide the required information. First, the Minister is correct, in my view, that this argument does not fit within the appellant's notice of appeal. The ground of appeal is that the Minister "erred in his application of the law to the facts when he decided that R. Baker Fisheries had not provided all of the necessary information to have its licence amended." This ground presumes that the appellant *did* provide all of the necessary information, and that the Minister erred by concluding otherwise. For the appellant to make the argument it now puts forth, it would need to have pleaded the additional, alternative ground that, even if the appellant did not provide all of the necessary information, the Minister had no authority to dismiss the application for that reason.

[34] The other problem is that the appellant did not argue before the Minister that the Registrar, acting on the Minister's behalf, lacked authority under the *Act* to reject its application due to a failure to provide information. The court's role on a statutory appeal or an application for judicial review is to review an administrative decision. Generally speaking, an appellant on a statutory appeal or an applicant on an application for judicial review cannot raise new issues that were not considered by the original decision-maker in the decision under review. In *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis Canada Inc., 2017), Sara Blake writes at p. 186:

> If the appeal is to a court, a new issue may not be raised that was not raised before the tribunal unless the interests of justice require it and the court has a sufficient evidentiary record and findings of fact to decide it.

[35] The appellant's submissions did not address why the interests of justice require that it be permitted to raise this new issue on appeal. For that reason, and because the argument does not fall within the appellant's ground of appeal, I decline to consider this new issue on appeal.

[36] Even if I had found that this new argument fell within the ground of appeal – and that the Registrar's and Minister's decisions implied that they interpreted the *Act* as allowing them to reject the amendment due a lack of necessary information – the appellant's argument would not have been successful. I say this for several reasons. First, s. 74 deals with applications for licences, not requests or applications for amendments. There is no specific procedure set out in the *Act*, the regulations, or in any policy for applications by an existing licence holder to amend a licence. From this, it does not automatically follow that s. 74 applies to requests for amendments. In *Specter*, *supra*, Justice Wood (as he then was) heard a statutory appeal under s. 119 of the *Act* concerning amendments to three aquaculture licenses. The appellant argued, among other things, that the lack of specific procedure for amendment set out in the *Act* or the regulations meant that no amendments were permitted. Justice Wood disagreed with that interpretation, stating:

> In my view, that is not a proper interpretation of the Act. I do not believe that it is necessary that the amendment procedure be detailed in the legislation. Amendments can range from minor adjustments to substantial alterations, and the Minister should be given discretion to decide what procedure he needs to follow in order to carry out his statutory mandate.
>
> [*Emphasis added*]

[37] Accordingly, where there is no amendment procedure outlined in the legislation, it does not mean that amendments are not permitted, or that amendment applications must follow the same procedure as licence applications. It means that the Minister has discretion to determine the necessary procedure for amendments.

[38] Even if s. 74(4) applied to amendment applications, the Minister's (implicit) interpretation of that section is reasonable. In *Sparks v. Holland*, 2019 NSCA 3, Justice Farrar, for the Court of Appeal, summarized the modern principle of statutory interpretation:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, Sullivan on the Construction of Statutes, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.

> [29] Ms. Sullivan's questions have been applied in several cases, including *Keizer v. Slauenwhite*, 2012 NSCA 20, and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> 1. What is the meaning of the legislative text?
> 2. What did the Legislature intend?
> 3. What are the consequences of adopting a proposed interpretation?
>
> (Sullivan, pp. 9-10)

[39] The Court of Appeal also emphasized the importance of a purposive approach to legislative interpretation:

> [42] The motion judge failed to examine whether the text of s. 113A could be read harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the Legislature. He did not conduct a purposive analysis in order to determine if there was an interpretation of s. 113A which would operate in harmony with the Legislature's intention. This, in hindsight, may be explained by his misinterpretation of this Court's findings in *Tibbetts*.
>
> [43] As Professor Sullivan explains:
>
> > A purposive analysis of legislative texts is based on the following propositions:
> >
> > > (1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
> > >
> > > (2) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning.
> > >
> > > (3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.
> >
> > (Sullivan, p. 259)
>
> [44] According to Professor Sullivan, "an interpretation that would tend to frustrate or defeat the legislature's purpose should be rejected if there is a plausible alternative" (Sullivan, p. 288).
>
> [*Emphasis added*]

[40] The purpose section of the *Act* suggests an intention to sustain and improve the fishery, including, *inter alia*, advancing the harvesting and processing segments, while balancing other interests such as ecotourism and the environment. The Minister of Fisheries and Aquaculture is charged with the administration and

enforcement of the *Act*, and, to that end, is given wide-ranging powers in relation to the development, management and protection of fishery resources. Those powers include broad authority over fish buying and fish processing licences. The Minister determines the application process, sets the requirements for a licence, and can require an applicant to submit any additional information the Minister considers necessary. The Minister can issue a licence subject to any terms and conditions he considers appropriate. He can refuse to issue a licence having regard to any factor that, in his opinion, is relevant to determining the public interest. Once a licence is issued, the Minister can unilaterally vary or amend the licence at any time, if, in the Minister's view, it is reasonably necessary to carry out the purpose of Part VII of the *Act*. It is in this context that the meaning of s. 74(4) must be considered:

> 74(4) Where the Minister considers an application to be incomplete, the application shall not be processed until the information required is submitted.

[41] The appellant says the phrase "the application shall not be processed" means that no decision can be made with respect to an incomplete application. While that meaning is possible when the provision is considered in isolation, that is not the end of the interpretive process. The court must go on to consider whether the appellant's proposed textual meaning is harmonious with the scheme of the *Act*, the object of the *Act*, and the intention of the legislature. In my view, it is not.

[42] Adopting the appellant's proposed interpretation would mean that – notwithstanding the legislature's intention to give the Minister broad authority over every aspect of licensing – the Minister could not even set deadlines for compliance information from provisionally successful applicants. The Minister, whose mandate includes the orderly development of the fisheries industry, and who has the power under s. 74(3) to require an applicant to provide additional information, would have no authority to reject an application for a failure to submit that information within a reasonable period of time. Instead, the Minister would be forced to keep the application open and on file until the applicant submitted the information. Abandoned applications would have to be kept on file in perpetuity. Considering the *Act* as a whole, it could not have been the legislature's intention to restrict the Minister's authority over the management of a finite natural resource in this way. In reaching this conclusion, I note that identical language appears in relation to applications for aquaculture licences (s. 46(3)), another area over which the Minister otherwise exercises broad discretion. The appellant's proposed interpretation is equally implausible when applied to that part of the *Act*.

[43] An alternative interpretation of s. 74(4) (and s. 46(3)) that is more consistent with the legislative intention of the *Act* is that an incomplete application shall not be approved, and a licence issued, until the required information is submitted. In other words, where the Minister considers an application to be incomplete, he has no authority to approve the application and issue a licence. Under this interpretation, the Minister has authority to set reasonable deadlines for information and to reject an application for a failure to provide that information, as he did in this case. The applicant could then reapply.

Substantial compliance

[44] R. Baker Fisheries says the Minister's decision to reject its application for an amendment was unreasonable because it was in "substantial compliance" with the requirements by the deadline. In its brief, the appellant writes at p. 6:

> The question of what constitutes substantial compliance with requirements has not been extensively considered in the fisheries context. In *Halifax Regional Municipality v. England Paving & Contracting Limited*, 2009 NSSC 224 a decision related to municipal tendering, Goodfellow J. wrote that "The determination of substantial compliance is to be based upon an objective standard" - that is, to what extent the noncompliance materially affects the purpose of the process. In that case, Justice Goodfellow found that a contractor's failure to provide specific unit prices was not the sort of informality that could be overlooked as substantially complained with tendering requirements. In this case, we suggest that the technical noncompliance can be.

[45] The appellant argues as follows. When the Department issued the letter of intent, it acknowledged that three of the six compliance requirements had already been met: the application fees, the civic address where the appellant's records would be kept, and proof of compliance with the Registry of Joint Stock Companies' requirements. The appellant admits that the payment of the application fees by the Waycobah First Nation is insignificant. The same is not true, it says, for the other two items that the Department was prepared to acknowledge as complete. The Department did not require the appellant to provide its address, or to show that it was up to date in its corporate registration. The appellant's position is, essentially, that if the Department was willing to assume, or to take its own steps to determine, the appellant's address and its status with the Registry of Joint Stock Companies, the appellant was entitled to expect that it would take the same approach to the other requirements. In other words, since the Department had not expected strict compliance with some requirements, it could not demand it with others.

[46] The three outstanding compliance requirements were:

> 3. Copy of up-to-date Shareholder's Register from the corporate Minute Book of R. Baker Fisheries Limited setting out (1) the names of each shareholder and (2) the number of shares held by each.
>
> …
>
> 5. Intended source of product for each species.
>
> 6. Proof of CFIA Compliance for species requested.

[47] With respect to the shareholder's register, the appellant says the Department already had an up-to-date shareholders' register for R. Baker Fisheries, which it submitted in connection with its original licence applications. The appellant further points to s. 5(3) of the *Fish Inspection Regulations*:

> If a majority of voting shares of a corporation that is a licence holder are transferred, its licence ceases to be in force.

The appellant says it is required as a condition of its licences to immediately apprise the Department of any change in its ownership. According to the appellant, since it never reported any such change, the Department should have accepted that it was already in possession of an up-to-date shareholder's register.

[48] With respect to the fifth requirement, the appellant says the Department should have known that the intended supplier of the eels was the Waycobah First Nation. The letter of intent acknowledged that the application fees were paid by a cheque from Waycobah. The appellant also relies on the initial email from R. Baker Fisheries to the Registrar on June 9, 2017, that served as the "application" for the amendments. The appellant says the first line of that email acknowledges that the application arose from discussions between the Department and individuals from Waycobah.

[49] As to the sixth requirement, on December 4, 2017, Darcy MacIntosh at the CFIA emailed the Registrar, with a copy to the email address associated with R. Baker Fisheries, and stated:

> Hi Brennan, I have spoken with Robert Baker at R. Baker Fisheries Ltd. 3322 regarding possible Glass Eel storage and packing. After speaking to Robert and confirming with my area Supervisor, CFIA would not be monitoring the Eel process as described by Robert. As long as the process is not in the registered part of the facility. Thanks Darcy

The appellant says this email should have satisfied the sixth compliance requirement.

[50] The Minister submits that there is no evidence before the court as to whether the Department was ever provided with a copy of the shareholder register for R. Baker Fisheries. With respect to the source of the eels, the Minister points out that the first line of the initial email from R. Baker Fisheries to the Registrar on June 9, 2017, does not state, as the appellant suggests, that the application arose from discussions between the Department and individuals from Waycobah. Instead, it reads:

> Following your conversation with Donald Davis today regarding their eel operation using the facilities at R. Baker Fisheries Ltd…

The Minister says there is no evidence as to the identity of Donald Davis. The Minister further submits that, in February 2018, when the appellant filed its appeal and finally provided the information intended to satisfy this requirement, it stated:

> Intended source of product for each species: Waycobah First Nation, <u>as well as any other licensed eel harvesters.</u>
>
> [*Emphasis added*]

[51] The Minister says this document shows that Waycobah was not intended to be the only source of product. The appellant also planned to source from other unidentified "licensed eel harvesters". It is therefore inaccurate for the appellant to suggest that the Department already had the information it needed as to the source of the eel prior to its rejection of the appellant's application on January 29, 2018.

[52] Finally, the Minister says the email from CFIA states that CFIA would not be monitoring the eel process "[a]s long as the process is not in the registered part of the facility". Since the appellant provided no further information to confirm that the process would not, in fact, be in the registered part of the facility, the Minister submits that the sixth compliance requirement was not met.

[53] Before addressing each of the requirements, I wish to comment on the content of the appeal book in this case. The appellant made several factual assertions that were not supported by the record, including that the Department already had a copy of the shareholder's register on file, that it was a condition of its licence that the appellant report any change in ownership, and that Donald Davis is associated with the Waycobah First Nation. The burden is on the appellant to satisfy the court, based on the record, that the Minister's decision was

unreasonable. If R. Baker Fisheries felt, rightly or wrongly, that this information should have been before the court, it was open to it to argue at the motion for directions that the appeal book was incomplete. Having chosen not to do that, the appellant cannot expect to succeed with arguments based on facts not in evidence.

[54] Returning to the merits, I find that the "substantial compliance" test applied in the tendering context has no application here. The appellant provided no authority to suggest otherwise. Furthermore, the appellant offered no authority for its position that when the Department advised the appellant in the letter of intent that three compliance requirements had already been met, it somehow assumed an obligation to assist the appellant in meeting the remaining three requirements. The Department was not required to do its own research on the appellant's behalf. It was not obliged to make assumptions to the appellant's benefit, including that information allegedly filed with the appellant's original licence application was still accurate.

[55] With that in mind, I will consider whether it was reasonable for the Minister to uphold the rejection of the appellant's application on the basis that it failed to meet the compliance requirements before the deadline. The appellant admits that, after receiving the letter of intent, it did not provide a copy of its shareholder register until it filed its appeal to the Minister in February 2018. As noted above, I reject the appellant's argument that the Department should have assumed that the shareholder register had not changed since R. Baker Fisheries applied for its licences, since it was a condition of the licences that the appellant would notify the Department of any change in ownership and the appellant had not reported any change. Even if I had evidence that the shareholder register was filed with the appellant's original licence applications, whenever that was, or that there was such a condition on the appellant's licences, I would still not accept that the Department should have assumed that the information remained up-to-date simply because the appellant had not notified it otherwise. It was within the Department's discretion to require proof that the appellant had, in fact, complied with its duty to report any change in ownership prior to granting the appellant's application to add another species to its licences. Since the appellant admits that it did not file the shareholder's register before January 29, 2018, I find that the Minister's decision to dismiss the appeal was reasonable. There is no need to consider the remaining two compliance requirements.

Conclusion

[56] It is difficult to feel much sympathy for the appellant in this case. The outstanding compliance requirements outlined in the letter of intent were not onerous or time-consuming, and R. Baker Fisheries was given three months to supply the information. After two months had passed, the Department sent the appellant a reminder that the compliance requirements were still outstanding. Six days before the deadline, the appellant advised the Department that it had been too busy to meet the original deadline and asked for an extension. The Department agreed to extend the letter of intent by an additional three months. The appellant still did not provide the information, and the Registrar rejected its application on that basis. It is hard to imagine how the Department could have been more accommodating.

[57] Ordinarily, the appellant would simply pay the fees again and reapply for the amendment. What the appellant did not anticipate, however, was that the Minister would introduce a moratorium on the issuance of fish processing and fish buying licences, as well as amendments to existing licences. With the moratorium in place, the only option available to R. Baker Fisheries if it still wanted the amendments was to appeal to the Minister. The Minister dismissed the appeal, and the appellant appealed to this court. Although the consequences to the appellant of the Minister's decision were more severe due to the moratorium, that fact did not ease the appellant's burden on this appeal. To succeed, the appellant had to show that the Minister's decision was unreasonable. It failed to discharge that burden.

[58] The appeal is dismissed. I will leave it to the parties to attempt to agree on costs. If they are unable to reach agreement, I will accept written submissions within 30 days of the release of this decision.

Brothers, J.