T-872-97

IN THE MATTER of an application to review and set aside, pursuant to sections 18(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended.

AND THE MATTER of a decision by the Federal Minister of Fisheries and Oceans, on the 7th day of April, 1997, with respect to the establishment of turbot quotas for the Davis Strait fishery, (NR-HQ-97-20E)

B E T W E E N:

NUNAVUT TUNNGAVIK INC.

Applicant

- and -

MINISTER OF FISHERIES AND OCEANS

Respondent

REASONS FOR ORDER

CAMPBELL J.

In 1993, the Inuit of the Nunavut Settlement Area[1] and the Government of Canada ratified a land claims agreement[2] within the meaning of s.35 of the *Constitution*

Hereafter referred to as "the NSA".

Hereafter referred to as "the Agreement". The Agreement is entitled *The Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in the Right of Canada*. The Agreement was ratified, given effect and declared valid pursuant to s.4(1) of the *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29. By Article 1.1.1 of the Agreement, the applicant is defined as a Designated Inuit Organization and as such has status to bring this application.

Article 3 of the Agreement defines the NSA as a certain portion of the Arctic Islands and the Mainland of the Eastern Arctic.

Act, 1982. The Agreement created a relationship between the Nunavut Inuit and the Government of Canada respecting coordinated wildlife management both within and outside the geographic area covered by the Agreement. This application concerns the terms of that Agreement as it relates to the fishing of turbot[3] which swim between Greenland and Baffin Island, and whether the terms of the Agreement have been breached by the Minister of Fisheries and Oceans[4] in the making of a decision respecting fishing quotas for 1997.[5]

I. Background on the Davis Strait Turbot Fishery

The North Atlantic Fisheries Organization (NAFO) has divided the waters between Canada and Greenland into a number of sub-areas. Sub-Areas 0 and 1 comprise the ocean between Canada and Greenland with Sub-Area 0 comprising

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Reinhartius hippoglossoides, commonly known as Greenland Halibut, Northern Turbot or Turbot is a broad bodied flat fish that reaches an average length of 702 mm. (28 in.) and average weight of 3900 g. (8.6 lbs.). (Respondent's Motion Record, p.24)

Hereafter referred to as "the Minister".

This is an application for judicial review of a decision of the Minister of Fisheries and Oceans, the Honourable Fred Mifflin, dated April 7, 1997. In this decision, the Minister announced the turbot quotas for the Davis Strait fishery for 1997.

> This application is based on the following grounds:
>
> 1.The Minister's decision infringes on the Nunavut Wildlife Management Board's sole authority to establish levels of total allowable harvest in the Nunavut Settlement Area pursuant to Article 5.6.16 of the Agreement;
>
> 2.The Minister failed to consider the advice of the Nunavut Wildlife Management Board in making his decision as is required pursuant to Articles 15.3.4 and 15.4.1 of the Agreement;
>
> 3.The Minister failed to recognize the importance of and give special consideration to the principles of adjacency and economic dependence and other relevant principles set out in Article 15 of the Agreement. The Minister did not apply these principles in such a way as to promote a fair distribution of the turbot fishery between the residents of the Nunavut Settlement Area and the other residents of Canada as is required pursuant to Article 15.3.7 of the Agreement.

The applicant seeks an Order setting aside the decision of the Minister.

Canadian waters and Sub-Area 1 comprising Greenland waters. The turbot stock is assessed by the NAFO Scientific Council, at the request of both Canada and Greenland.

In Greenland, the fishery is divided into a number of regions, known as 1A-F. The division known as 1A is an independent fishery and has been accepted by NAFO as one since 1994. Being a separate fishery, this area is not included in the calculation of the Total Allowable Catch (TAC). Therefore, in Greenland waters, the divisions 1B-F are used to calculate the TAC.

In Canadian waters, the fishery is also divided into two parts: 0A and 0B. Division 0A (which is located in the northern half of the region) is an exploratory fishery and little is known about the stock status there. 0B is located in the southern half of the waters and is the main area for fishing. Therefore, for the purposes of the TAC, the areas used are 0B and 1B-F.

Within Area 0, there are two areas: the NSA and Zone I. The NSA is composed of the 12 mile sea area adjacent to the Nunavut coastline. Zone I represents all of 0A and 0B less the 12 mile NSA. Zone II, which is also referred to in the Agreement, are the waters of James Bay, Hudson Bay and Hudson Strait but Zone II is not a part of Area 0 of the turbot fishery.

Since 1982, Canada and Greenland have agreed to divide the TAC equally. In 1996, the TAC was 11,000t[6]. This figure has remained the same since 1994, when it was decreased from 25,000t due to fears of over-fishing the stock.

Canada's TAC is allocated according to who will be allowed to fish and on what size vessel. The "competitive allocation" is the allocation of the TAC which is open to all holders of Atlantic groundfish licences in Atlantic Canada; the "foreign charter or developmental allocation" is the allocation of the TAC assigned by the Government of Canada to certain Canadian companies who hire foreign vessels to fish

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In this decision, "t" refers to metric tonnes.

the allocation under joint venture arrangements; the "inshore allocation" refers to that part of the TAC which can be fished either with no boat or with a boat no larger than 65 feet; and the "offshore allocation" refers to that part of the TAC which can be fished with a boat larger than 65 feet.[7]

II. Wildlife Management within the Nunavut Settlement Area

A. *Principles*

The objectives of the Agreement are set out in its Preamble, and are as follows:

> to provide for certainty and clarity of rights to ownership and use of land and resources, and of rights for Inuit to participate in decision-making concerning use, management and conservation of land, water and resources, including the offshore;
>
> to provide Inuit with wildlife harvesting rights and rights to participate in decision-making concerning wildlife harvesting;
>
> to provide Inuit with financial compensation and means of participating in economic opportunities;
>
> to encourage self-reliance and the cultural and social well-being of Inuit.

Article 5 of the Agreement also contains several principles which create a relationship between the Nunavut Inuit and the Government of Canada with respect to wildlife[8]. In particular, Article 5.1.2, which deals with wildlife management, sets out the following governing principles:

> This Article recognizes and reflects the following

Affidavit of Mr. Jose Kusugak, Applicant's Application Record, Tab B, p.3.

Wildlife is defined in Article 1.1.1 in the following manner: "wildlife" means all terrestrial, aquatic, avian and amphibian flora and fauna ferae naturae, and all parts and products thereof.

principles:

(a)Inuit are traditional and current users of wildlife;
(b)the legal rights of Inuit to harvest wildlife flow from their traditional and current use;
(c)the Inuit population is steadily increasing;
(d)a long-term, healthy, renewable resource economy is both viable and desirable;
(e)there is a need for an effective system of wildlife management that complements Inuit harvesting rights and priorities, and recognizes Inuit systems of wildlife management that contribute to the conservation of wildlife and protection of wildlife habitat;
(f) there is a need for systems of wildlife management and land management that provide optimum protection to the renewable resource economy;
(g)the wildlife management system and the exercise of Inuit harvesting rights are governed by and subject to the principles of conservation;
(h)*there is a need for an effective role for Inuit in all aspects of wildlife management, including research*; and
(i)*Government retains the ultimate responsibility for wildlife management.*
[Emphasis added]

As an objective, Article 5.1.3 "seeks to achieve... the creation of a system of harvesting rights, priorities, and privileges...". But while Article 5.1.6 provides that "the Government of Canada and Inuit recognize that there is a need for an effective role for Inuit in all aspects of wildlife management", Article 5.1.7 provides that "for greater certainty, none of the rights in this Article apply in respect of wildlife harvesting outside the Nunavut Settlement Area".

Thus, while Article 5.1.7 of the Agreement limits the "rights" conferred under Article 5 to the Nunavut Settlement Area, the principles enunciated in this Article are not similarly limited. As such, the principles are overarching, and therefore applicable to other Articles in the Agreement.

B. ***Relative authority over the management of wildlife***

To implement the principles just quoted, Article 5 also provides for the establishment of the Nunavut Wildlife Management Board (NWMB)[9]. Reflecting principle (i) just quoted, Article 5.2.33 makes clear the relative authority of the NWMB and the Government of Canada:

> Recognizing that Government retains ultimate responsibility for wildlife management, the NWMB shall be the main instrument of wildlife management in the Nunavut Settlement Area and the main regulator of access to wildlife and have the primary responsibility in relation thereto in the manner described in the Agreement....

But, by Article 5.6.16, a great deal of authority is provided to the NWMB respecting wildlife management within the NSA as follows::

> Subject to the terms of this Article, the NWMB shall have sole authority to establish, modify or remove, from time to time and as circumstances require, levels of total allowable harvest or harvesting in the Nunavut Settlement Area.

C. ***The terms of the relationship between the NWMB and the Government of Canada***

Article 5 obviously calls for the creation of a practical but legally enforceable relationship between the NWMB and the Government of Canada. With respect to marine areas of the NSA, and in particular with respect to fish, by Article 15.2.2 the provisions of Article 5 apply to the relationship. However, with respect to the wildlife management and harvesting beyond the marine areas of the NSA, special provisions are set out in Article 15 of the Agreement which create the expectations of the relationship to prevail.[10]

By Article 5.2.1, the NWMB consists of nine members, only four of which are appointments of Nunavut Inuit organizations. Three members are appointed by the Governor in Council and one is appointed by the Commissioner-in-Executive Council. However, the Chairperson is appointed by the Governor in Council from nominations provided by the NWMB.

Article 3.5.1 reads: "For greater certainty, Inuit shall enjoy additional rights to areas outside the Nunavut Settlement Area as stipulated by other provisions of the

Article 15.1.1(d) specifically recognizes as a principle that "Inuit harvest wildlife that might migrate beyond the marine areas". Recognizing the migratory nature of marine species[11], Article 15.3.1 requires the government to "maintain a structure or structures *to promote coordinated management of migratory marine species in Zones I and II and adjacent areas*".

In addition, the following Articles are critically important to this application:

15.3.4
Government shall seek the advice of the NWMB with respect to any wildlife management decisions in Zones I and II which would affect the substance and the value of Inuit harvesting rights and opportunities within the marine areas of the Nunavut Settlement Area. *The NWMB shall provide relevant information* to the Government that would assist in wildlife management beyond the marine areas of the Nunavut Settlement Area. [Emphasis added]

15.3.7
Government recognizes the importance of the principles of adjacency and economic dependence of communities in the Nunavut Settlement Area on marine resources *and shall give special consideration to these factors* when allocating commercial fishing licences within Zones I and II. Adjacency means adjacent to or within a reasonable geographic distance of the zone in question. *The principles will be applied in such a way as to promote a fair distribution of licences* between the residents of the Nunavut Settlement Area and the other residents of Canada and in a manner consistent with Canada's interjurisdictional obligations. [Emphasis added][12]

15.4.1
The NIRB [Nunavut Impact Review Board], the NWB [Nunavut Water Board], the NPC [Nunavut Planning Commission] and the NWMB may jointly, as Nunavut Marine Council, or severally advise and make recommendations to other government agencies regarding the marine areas, and *Government shall consider such advice and recommendations in making decisions which affect marine areas.* [Emphasis added]

III. History of the Relationship Respecting Management of the Turbot Fishery

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Agreement".

The affidavit of Mr. Jose Kusugak establishes that "the turbot stock in the Davis Strait is clearly migratory and thus decisions affecting the turbot population in Zone 1 will undoubtedly impact on the turbot population in the marine areas of the Nunavut Settlement Area. (Applicant's Application Record, Tab B, p. 11.)

In a Fisheries and Oceans Canada "Backgrounder" dated April 1997, "adjacency" is described as follows: "Put simply, adjacency is the principle that those who reside next to the resource or have traditionally fished in those waters should have priority access to it. This principle is used throughout the Canadian fisheries and is recognized internationally". (*Ibid*., Tab B26.)

The following chart[13] outlines the allocation of the TAC from 1994 to 1996.

	1994	1995	1996
TAC	11,000 tonnes	11,000 tonnes	11,000 tonnes
Canadian quota	5500 tonnes	5500 tonnes	5500 tonnes
Nunavut - inshore	1000 tonnes	1000 tonnes	1000 tonnes
Nunavut - offshore	----	----	500 tonnes
Competitive (licence)	500 tonnes	1000 tonnes	1500 tonnes
Foreign Charter[14]	4000 tonnes	3500 tonnes	2500 tonnes

The history of the relationship between the NWMB and the Government of Canada since the signing of the Agreement in 1993 shows that the NWMB has vigorously pressed its position under the Agreement with mixed results.

In 1994, after the turbot allocation was announced, the NWMB made objections to the then Minister of Fisheries and Oceans, the Honourable Brian Tobin that the NWMB's roles and functions were being disregarded and ignored in the decision being made by the Minister. In providing a favourable response to these objections, Minister Tobin sent two letters, portions of which are relevant for these purposes. In the letter dated December 13, 1994, Minister Tobin writes:

> As you know, under Article 15 of the Settlement Agreement, the federal government is obligated to seek the advice of the NWMB with respect to any wildlife management decisions in Zones I and II which would affect the substance and value of Inuit harvesting rights and opportunities within the marine areas of the Settlement Area. *As such, there is no question that the NWMB must have a significant role to play in any future consultations respecting fisheries. For that reason, I have instructed the Fisheries Resources Conservation Council (FRCC) to be particularly sensitive to Nunavut interests.* To this end, I would propose that DFO conduct *special consultations* with the GNWT and the NWMB on those stocks of specific interest to them, and discuss consultative arrangements which would be appropriate to this task in the future.
>
> In the interim, I would propose that the NWMB be accorded observer status for the Federal-Provincial Atlantic Committee (FPAFC) of Deputy Ministers of Fisheries. I would further suggest that the NWMB participate in Working Groups of the FPAFC on issues affecting Nunavut fishing interests. [Emphasis added][15]

The chart is created from the evidence provided in the affidavit of Mr. Jose Kusugak. (*Ibid*., Tab B)

In 1994 and 1995, the Nunavut were allocated 400t of the foreign charter. In 1996, this allocation was replaced by the 500t "Nunavut offshore" allocation.

Applicant's Application Record, Tab B13.

In a second letter, dated January 18, 1995, Minister Tobin writes:

> I also recognize that sub-area 0 turbot represents a unique and significant economic opportunity for Nunavut residents on Baffin Island. Please be assured that both of these considerations will be taken into account in February, when 1995 decisions regarding the allocation of sub-area 0 northern turbot are made.
>
> ...I am aware of the concern you express on behalf of Nunavut, regarding permanent northern access to sub-area 0 turbot, *and wish to assure you that access to the fishery by Nunavut residents will continue to be a high priority of the Department*. [Emphasis added][16]

In this history it is important to note that Minister Tobin got the point being made by the NWMB and acted upon it.

In a letter to the Minister dated January 18, 1996, the Chairperson of the NWMB reminded the Minister, who was now the Honourable Fred Mifflin, of the following obligations imposed by the Nunavut Land Claims Agreement with respect to shrimp and groundfish:

> (a)to seek the advice and recommendations of the NWMB with respect to any wildlife management decisions in Zones I and II;
> (b)to respect the NWMB's sole jurisdiction within the NSA;
> (c)to provide for NWMB representation on structures maintained by government to promote co-ordinated management of marine species in Zones I and II; and
> (d)to include Inuit representation in discussions leading to the formulation of government positions with respect to wildlife management in Zones I and II.[17]

On March 11, 1996, the Chairperson of the NWMB wrote the Minister again. In this letter, he expressed his concerns about the use of gill nets in the competitive fishery and outlined the need for meaningful conservation measures relating to the use of gill nets.[18]

By letter dated March 14, 1996, the NWMB advised the Minister that it was its opinion that the Nunavut Inuit are entitled to a much larger share of the groundfish

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Ibid., B14.

Ibid., B15.

Ibid., B16.

quota. The NWMB made the following recommendations for the 1996 allocations:

> 1. Area 0 Inshore Turbot:
> An allocation of 1000 tonnes should be reserved exclusively for fisheries within the NSA. This would ensure the continuity of the vital Cumberland Sound winter fishery, and continued inshore development for other Baffin communities.
>
> 2. Area 0B Offshore Turbot:
> An allocation of 2000 tonnes should be reserved for Nunavut Inuit on a permanent basis. This is less than half the TAC, certainly not an exorbitant request for a fishery right on our doorstep.
>
> 3. Area 0A Offshore Turbot:
> This area has been test fished by Nunavut proponents in 1993 and 1994, and there is a proven resource base. A precautionary TAC of 1000 tonnes should be set for Nunavut Inuit to test the stock distribution in this area.
>
> 4. Area 2+3 Turbot:
> An allocation of 2000 tonnes should be reserved for Nunavut Inuit. The people of Nunavut have been sharing our adjacent offshore fishery with southern Canadians, so it is only logical that they should share with us.[19]

In a letter dated March 19, 1996, the Chairperson of the NWMB wrote the Minister to object to the fact that the NWMB was not included in a meeting between the Fisheries officials and the Newfoundland Groundfish Advisory Committee held on February 19, and wrote the following:

> I must also question why Newfoundland interests are so heavily represented in providing advice to your Department on groundfish in NAFO Area 0. The area is adjacent to Nunavut, not Newfoundland. Newfoundlanders do not have a long history of fishing in this area, and so cannot be said to have any special

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Ibid., B17.

> historical right of access. He referred to Article 15.3.7 of the Agreement, and asked that the NWMB be informed of any future advisory meetings dealing with the fishery resources in Zones I and II so that appropriate representation of Nunavut interests could be provided.[20]

In April 1996, the Minister announced the turbot quotas. He allocated 1000t to the Nunavut inshore fishery, an allocation that remained unchanged since 1994. He also announced the creation of a Nunavut offshore fishery and allocated 500t to that fishery, reasoning that "this additional allocation has been made to respect the principle of use and occupancy of marine areas by the Inuit of Nunavut.", but the decision also resulted in the loss of the 400t share of the foreign charter allocation.[21]

IV. NWMB Advice and Recommendations for 1997

With respect to the 1997 turbot allocation, the Chairperson of the NWMB wrote to the Minister on June 10, 1996. In this letter he again expressed his belief that the principles of adjacency and economic dependence entitled the Nunavut Inuit to a larger share of the turbot resource. He also recommended that 27 percent of the total 0B quota be recognized as the minimum allocation of turbot for Nunavut for the future.[22]

On December 4, 1996, the NWMB sent another letter to the Minister containing recommendations and suggestions concerning turbot management in Area 0.

The following is a summary of the recommendations contained in the letter:

1. Total Allowable Catch:

The NWMB supported the overall TAC of 11,000t. They suggested that Canada's share of the TAC should not be increased from 50 to 70 percent if Greenland does not accept a lesser (30 percent) share. The TAC should not exceed 11,000t.

2. Groundfish Licences:

The NWMB asked that groundfish licences, valid for the entire Atlantic fishery, be provided to Nunavut residents to make it economically viable to acquire vessels rather than charter them.

3. Gillnets:

Ibid., B18.

Ibid., B19.

Ibid., B20.

The NWMB asked that the mesh size be increased, and that the use of gillnets be controlled and limited.

4. Nunavut Quotas:

The NWMB considered the 27 percent allocation to Nunavut residents of the Canadian quota as an absolute minimum and indicated that they expected an increase in this proportion in the future. It based this recommendation on the principles of adjacency and economic dependence outlined in Article 15.3.7. In addition, the NWMB recommended that Nunavut Inuit allocations should be increased in the following ways:

(a) by reducing Greenland's share;

(b) by being provided with an increased portion of the foreign charter fishery;

(c) by licences being provided for Nunavut residents to participate in the competitive fishery; and

(d) by being given exclusive rights to fish in 0A.[23]

On February 19, 1997, the Chairperson and Fisheries Adviser of the NWMB met with the Minister and his advisers in Ottawa. Issues similar to those raised in the December 4, 1996 letter were again discussed, including:

a.Canada should not unilaterally increase its share of the TAC from 50% without a negotiated agreement with Greenland; to do so would go against the scientific advice for the stock, conservation must come first.

b.Both the Nunavut Land Claims Agreement and the Groundfish Management Plan recognize the importance of the principles of adjacency and economic dependence in allocating this resource.

c.The Davis Strait is adjacent to Nunavut not Newfoundland.

d.In 1996, Nunavut fishers harvested their allocations fully. There is great economic hardship in the region and the fishery is one of the few bright spots. The present allocation is considered by the NWMB to be an absolute minimum and should be increased.

e.Groundfish licences, providing access to competitive fisheries in northern and southern waters should be issued to Nunavut fishing interest [sic]. Without such licences, Nunavut interest cannot afford to invest in boats and equipment because their fishing season is very short and they have no place to go in the winter. Nunavut fishers do not have access to stocks anywhere else in Canada. [24]

Ibid., B21.

Ibid., Tab B, p.9.

V. The 1997 Allocation

A. *The decision*

By way of a news release, the Minister announced his decision with respect to turbot allocations for 1997, as follows:

> Fred Mifflin, Minister of Fisheries and Oceans, today announced quotas for the Davis Strait fishery.
>
> "I am pleased to announce that more turbot will be available to Canadian fishermen this year," Mr. Mifflin said.
>
> Turbot in the Northwest Atlantic Fisheries Organisation (NAFO) Subarea 0 located in Davis Strait off the coast of Baffin Island, is part of a stock in NAFO Subareas 0+1, shared between Canada and Greenland. Bilateral discussions with Greenland have resulted in a Total Allowable Catch (TAC) of 11,000 tonnes for this year, unchanged from 1996. Based on historical catches, Canada is claiming 6,600 tonnes or 60 per cent of the TAC in 1997, up from 5,500 tonnes in 1996.
>
> The competitive allocation to Canadian groundfish fishermen has increased to 2,100 tonnes or 32 per cent of the TAC, up from 1,500 tonnes or 27 per cent in 1996. The increase of 600 tonnes has been shared by fixed gear and mobile fleet sectors, 60:40 respectively (see attached chart).
>
> The traditional inshore allocation for the Nunavut region remains unchanged at 1,000 tonnes while their offshore quota increases from 500 to 600 tonnes. As in 1996, Nunavut organisations will be able to charter foreign vessels to harvest the offshore allocation.
>
> For the first time, the Nunavut will be given a groundfish licence to fish their allocations of turbot

> in Subarea 0 in 1997 if they wish to do so. In the past, they had to charter vessels to fish their quotas. They will now have the option of chartering a Canadian vessel with this licence, or acquiring their own vessel.
>
> As well, a special domestic allocation of 400 tonnes of turbot is to be evenly divided among LIDC, Torngat, Seaku Fisheries and Nunavik Arctic Foods.
>
> An exploratory fishery in Division 0A, directed by the Nunavut Wildlife Management Board and Fisheries and Oceans Science will continue in 1997 with an anticipated catch of 300 tonnes.
>
> A total of 2,500 tonnes of turbot will be available for Canadian companies wishing to charter foreign vessels. This represents a 38 per cent share of the TAC, down from 45 per cent in 1996. As in previous years, Canadian companies chartering foreign vessels will be required to land all of their catches at Canadian ports and 90 per cent must be processed to the fillet stage (or equivalent) in Canadian plants.
>
> As in 1996, no new participants will be given access to the foreign charter quota in 1997. Allocations of the 2,500 to specific companies will be maintained at the same levels as 1996.
>
> "I realise that the foreign charter fishery generates a significant amount of employment in several areas in Atlantic Canada," Mr. Mifflin added. "In consideration of these economic benefits it is important that the use of foreign charters be phased out carefully.[25]

B. ***The NWMB's response to the decision***

Ibid., B23.

In his affidavit, Mr. Jose Kusugak, President of the applicant, clearly sets out the Nunavut Inuit objections to the decision as follows:

> **(a)Canada's share of the 11,000 TAC was unilaterally raised from 50% to 60% from 5500t to 6600 t.**
>
> The NWMB and the Fisheries Resource Conservation Council (Tab 24) had advised the Minister that the TAC should not exceed 11,000t for Areas 0 and 1. In addition, the NWMB advised the Minister not to increase the Canadian share of the TAC unless Greenland accepted a lesser share (Tab 21). In the absence of any indication from Greenland that it is willing to take a 40% share of the TAC, the effect of the Minister's decision will be to increase the TAC.
>
> **(b)The competitive quota was raised from 1500t to 2100t with no inclusion of a groundfish license to Nunavut interests enabling them to have access to this or any southern quota. As well, a special domestic allocation of 400t was awarded to four non-Nunavut companies.**
>
> This was contrary to the advice of NWMB.
>
> **(c) The fixed gear section received more than half of the competitive quota increase.**
>
> Again, this was contrary to scientific and NWMB's advice and the numerous conservation concerns that had been expressed over the use of gill nets.
>
> **(d) The Nunavut quota was increased from 1500t to 1600t.**
>
> Although this was a relatively modest increase, the 1997 turbot allocations resulted in an overall reduction in Nunavut's share of the Canadian TAC from 27% in 1996 to 24% in 1997. Whereas the Nunavut quota increased 6.7%, the quota for non-Nunavut domestic fishers increased from 1500t to 2500t, an increase of 67%. This too was contrary to NWMB advice.
>
> **(e) A single groundfish licence was promised to Nunavut.**
>
> The license was, however, restricted only to the Nunavut turbot allocation in Area 0. Contrary to the advice of the NWMB, the licence did not equal that of all other groundfish license holders fishing in the Davis Strait. It did not permit the licence holder to fish in southern waters or to fish for species other than turbot. In fact, the licence provided no discernible benefit to Nunavut. Although the licence does give Nunavut Inuit fishers the option of acquiring their own vessel, the severe restrictions attached to the licence make such an acquisition economically unfeasible.[26]

Ibid., Tab B, p.10.

From the above, it is clear that in making the 1997 decision, the Minister substantially disregarded the submissions made to him by the NWMB. It is also clear from the internal Ministry of Fisheries and Oceans' documents supplied by the respondent that the Minister disregarded the advice of his own Assistant Deputy Minister. An important issue in this respect is the decision to unilaterally raise Canada's share of the TAC because this was the source of the "more turbot" available to which Mr. Mifflin referred in the news release, and about which the NWMB had raised specific objection in its submissions to the Minister.

With respect to the TAC decision, in a memorandum submitted by Mr. P.S. Chamut, the Assistant Deputy Minister of Fisheries Management, to the Minister and signed off by the Deputy Minister, believed to have been written December 31, 1996, the following points are made:

> ***Since 1982, when Canada claimed 50% of the TAC, Canada and Greenland have traditionally shared this stock 50:50. In the recent discussions Greenland did not agree to any change in this sharing for 1997. Many industry representatives from Newfoundland have since expressed the view that we should still claim 70% of the TAC for Canada. The Nunavut Wildlife Management Board (NWMB) have advised you by letter the catches should not exceed 11,000t if Greenland does not accept a 50% share.***
>
> ...There continue to be more fishermen wanting access to this stock....While the advocates for increasing Canada's share of the overall fishery and moving effort into OA are almost all from Newfoundland, it must be remembered that O+1 is *not* adjacent to Newfoundland and Labrador; it is adjacent to Baffin Island and the Nunavut Land Claims Settlement Area. None of those adjacent to the resource are advocating either going over 11,000t or increasing effort in OA....
>
> ...***While many advocate unilaterally declaring 70% of the TAC for Canada, such a move would lead to overfishing and would not be seen as conservation-minded....***"[7]

As a result of the opinions expressed, the Assistant Deputy Minister recommended that the TAC remain at 5500t and the allocations for 1997 remain essentially the same as for 1996.

Respondent's Motion Record, pp. 11-13.

Included with the memorandum was Annex V which stressed in specific terms that: fisheries management must always be guided by conservation rather than economic objectives; increasing the quota above 50 percent would be interpreted as "stretching the quota to the aspirations of fishermen for socio-economic reasons", anti-conservation and contrary to the United Nations Fish Agreement; and increasing the quota would be seen by the international community as hypocritical. (*Ibid*., pp.24-25)

In a subsequent letter dated January 22, 1997, the Assistant Deputy Minister referred to his previous memorandum and again cautioned the Minister as follows:

> ***...In that memorandum I pointed out that the NWMB had reminded you in their December 16, 1996 letter that the Nunavut Agreement obliges the federal government to consult the Board before making decisions which pertain to adjacent resources. I also pointed out that none of those adjacent to the resource are advocating either going over the 11,000t TAC or increasing effort in Division 0A - both options would most likely be opposed by the NWMB and the GNWT.***
>
> ...I would recommend that you attempt to meet with the NWMB prior to making a final decision on turbot.[28]
>
> ...Both the NWMB and the GNWT were clear in that Canada should not do anything that would mean the overall 11,000t TAC is overfished. They were advised that there are many in the industry who not only favor claiming more than 50% of the TAC for Canada but also want to increase our fishery in Division 0A.
>
> The NWMB pointed out that industry views regarding claiming more than 50% are contrary to both NAFO and the FRCC; both have recommended a TAC of 11,000t. To ignore the NAFO Scientific Council is one thing, but to also ignore the FRCC is another. To fish above 11,000t would be completely irresponsible. It was pointed out that to blatantly overfish after our international fight against overfishing would not be sensible.
>
> ***...The NWMB were surprised to learn that "southern" interests were advocating increasing their fishery in 0A and were quite opposed to this idea. They believe that they should have no problem making an argument for 0A on adjacency and economic dependency more than anyone else. There are many northern interests who are unhappy with the amount of "southern" effort in 0B but have come to accept it for the time being, but to consider expanding this same effort in 0A is a different matter."***

With respect to the idea that the Minister meet with the NWMB prior to making a final decision, an interesting comment is made in a departmental memorandum which is dated January 17, 1997, and which was apparently written in the course of preparing the Assistant Deputy Minister's memorandum of January 22, 1997. The note reads:

> Jacque: Thanks for the memo. It is quite clear on the position of NWMB. My only question is why we would recommend Minister meet with the Board. Their views are quite clear, and I thought you had indicated that we do not want to set a precedent that Minister must meet to share decision making. We need to consult, which we have done. Pat

The "Jacque" referred to is J. Robichaud, Director General Resource Management, and the "Pat" referred to is P.S. Chamut, Assistant Deputy Minister, Fisheries Management.
(*Ibid*., pp. 29.)

Ibid., pp. 26-28.

C. ***Issues framed by the applicant***

1. ***Did the Minister's decision infringe on the NWMB's sole authority to establish levels of total allowable harvest in the Nunavut Settlement Area pursuant to Article 5.6.16 of the Agreement?***

On this issue the respondent argues that any suggestion that southern fisherman will fish in the NSA is speculative and hypothetical, is not supported by the evidence, and, further, there has been no history of such incursion.

While it is true that, since the Agreement came into effect, the Nunavut Inuit allocation has been 1000t, and while it is also true that on the evidence this inshore allocation has been exclusively for NSA fishers, the content of the 1997 decision raises some doubt about this situation continuing.

The opening sentence in Mr. Mifflin's press release announcing his decision is: "I am pleased to announce that more turbot will be available to Canadian fishermen this year." From the decision it is clear that the "Canadian fishermen" to which he is referring are not Nunavut Inuit. As a result, it is at least ambiguous as to whether the Minister intended to alter the status quo with his announcement. There is, therefore, a doubt left as to whether the Minister intended that southern fishers should have access to turbot in the NSA. This doubt should not arise given the terms of the Agreement respecting consultation and consideration.

Respecting the TAC, on the evidence the NWMB had every reason to assume that, for 1997, it would remain at 5500t. Of course, the NWMB did not know about the debate inside Fisheries and Oceans regarding increasing the TAC. Most importantly, there was no meaningful prior consultation with the NWMB on the apparently strongly held view of the Minister that the Canadian share of the TAC should increase, and as a result, the NWMB really had no opportunity to express a precise position on this view. Since the NWMB has the primary responsibility for setting quotas within the NSA, for the Minister not to have consulted on such an important proposal is a contravention of the Agreement.

Accordingly, I find that the answer to the question is yes.

2. ***Did the Minister fail to consider the advice of the NWMB in making his decision as required by Articles 15.3.4 and 15.4.1 of the Agreement?***

Judged according to the standard of consultation and consideration required under the Agreement as I have expressed above, there is no doubt that the answer to this question is yes.

While the Assistant Deputy Minister did show a good deal of respect for the NWMB in his advice to the Minister, the memorandum of January 17, 1997[30] is evidence that officials of Fisheries and Oceans have been prepared to go only so far in meeting their obligations to the NWMB under the Agreement. I believe that the Agreement does require the sharing of decision making for the reasons I have mentioned.

3. ***Did the Minister fail to give special consideration to the principles of adjacency and economic dependence as is required by Article 15.3.7 of the Agreement?***

There is no doubt on the evidence that the primary concern in the Minister's mind in the making of the decision was the economic interests of fishers other than those of the Inuit living in the communities of the NSA. The NWMB's request for unrestricted groundfish licenses as enjoyed by southern fishers was rejected with no reasons given, and instead one unrequested limited licence was granted. This cannot be considered special consideration. Thus, the answer to this question is yes.

4. ***If the Minister did give special consideration to the principles of adjacency and economic dependence, did the Minister apply these principles in such a way as to promote a fair distribution of the turbot fishery***

See footnote no. 28.

between the residents of the Nunavut Settlement Area and the other residents of Canada?

Since no special consideration was given to the adjacency and economic dependence of communities in the NSA, there has not been a fair distribution of licences between the residents of the NSA and the other residents of Canada. Thus, the answer to this question is no.

VI. The Legality of the Decision

Section 7 of the *Fisheries Act*, R.S.C., 1985, c. F-14, grants the Minister discretion to issue licences, and s.43 of the *Fisheries Act* and s.22(1)(a) of the *Fishery (General) Regulations* SOR/93-53 grants the Minister discretion to set quotas. However, any discretion granted by statute is not absolute and must be exercised within the confines of the Minister's jurisdiction. Failing to act within jurisdiction will result in the decision being set aside under section 18.1 of the *Federal Court Act*.

The applicant argues that the Minister exceeded his jurisdiction by failing to take into account relevant considerations when making his decision. In effect, the applicant therefore asks that the decision of the Minister be set aside pursuant to s. 18.1(4)(f) which provides that:

> The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal...
>
> (f) acted in any other way that was contrary to law.

It is a firmly established principle of administrative law that a decision-maker must not take extraneous factors or irrelevant considerations into account when making a decision. In *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, Dickson J. at 237 noted that a decision-making body, though it possesses the juridiction to make a decision, may lose its jurisdiction by:

> ...acting in bad faith, basing the decision on extraneous matters, *failing to take relevant factors into account*, breaching the provisions of natural justice or misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. [Emphasis added]

Regarding "failing to take relevant factors into account", in *Oakwood Developments Ltd.* v. *Rural Municipality of St. Francois Xavier*, [1985] 2 S.C.R. 164, Wilson J. confirmed Dickson J.'s view. In *Oakwood*, a developer was challenging the refusal of a municipality to subdivide land for residential development because of the danger of flooding. The council refused to read an engineer's report which described measures that could be taken to avoid the problem. In her decision, Wilson J. held that while flood control and soil erosion were relevant factors to consider, the refusal of permission was *ultra vires* because the council failed to consider material that was highly relevant to its concerns. Wilson J. stated at 174 that:

> As Lord Denning pointed out in *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal*, [1959] A.C. 663 at p. 693, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration.

And she added at 175 that:

> The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.

Thus, while it is an error to base a decision on irrelevant considerations, similarly, a decision-maker *must* consider all *relevant factors* before a decision can be said to have been made in a lawful manner. Failure to do so will result in the decision being set aside.

Here, it was incumbent upon the Minister to consider the advice and recommendations of the NWMB. Generally, outside of the context of this case, what does the duty to "consider" entail? The New Shorter Oxford Dictionary defines the word "consider" as follows:

> **1.** Look at attentively; survey; scrutinize. **2.** Look attentively. **3.** Give mental attention to; think over, meditate or reflect on; pay heed to, take note of; weigh the merits of. **4.** Think carefully, reflect. **5.** Estimate; reckon. **6.** Take into account; show regard for; make allowance for. **7.** Regard in a certain light or aspect. **8.** Recognize in a practical way; remunerate; recompense. **9.** Think highly of; esteem; respect.

The definition thus varies from requiring a decision-maker to simply "look at attentively" to making "allowance for", and "respect" the advice and recommendations given. The scope and extent of the term, therefore, must be examined on a case by case basis, as the duty to consider varies with the function of the decision-maker and the rights in question.

The respondent has argued that the duty to consider in this case means that the Minister must simply receive and examine the advice and recommendations given by the NWMB. In light of the Agreement signed, however, I find that the duty to consider entails much more.

It is clear from Articles 15.3.4, 15.3.7, and 15.4.1 quoted above, with particular emphasis on the portions italicized, that the relationship is intended to be *mandatory*[31], *close*, *cooperative* and *highly respectful*. I consider it very important

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Section 4(3) of the Nunavut Land Claims Agreement Act reads as follows: "For greater

to remember that the Agreement was struck within a context of acknowledgement of an Aboriginal right. The Agreement is, therefore, a solemn arrangement, the provisions of which must be given full force and effect. In particular, with respect to these provisions regarding "consultation" and "consideration", I find that they must be fully enforced.

As a result, it is also my opinion that, within the relationship between the NWMB and the Government, and in the resulting process of consultation and consideration leading to acceptance or rejection of a particular position put forward by the NWMB to the Government, there must be activities and results which reflect the intent of the Agreement.

That is, regarding consultation under Article 15.3.4 and 15.4.1, there must be *meaningful inclusion* of the NWMB in the Governmental decision-making process before *any* decisions are made. Obviously, this means that if the Government is contemplating taking a position, that possible position must be put to the NWMB to obtain advice and recommendations *before* any final conclusion is reached about including the position in a decision. The "coordinated management" contemplated by Article 15.3.1 must involve such a procedure.

Regarding consideration under Article 15.4.1, there must be *full, careful and conscientious consideration* of any advice or recommendation made by the NWMB respecting decisions which affect marine areas, and in this context, *allowance must be made for* the advice or recommendations. This latter requirement means that, if a given position is not accepted by the Government for implementation, at the very least, out of respect, an explanation for doing so should be provided to the NWMB. This is also advisable because, in deciding whether proper consideration was given in the making of a particular decision, the communications between the NWMB and the Government will likely be the subject of scrutiny as well as the terms of the decision itself.

There is no doubt that, when it comes to wildlife management, the positions of

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certainty, any person or body on which the Agreement confers a right, privilege, benefit or power or imposes a duty or liability may exercise the right, privilege, benefit or power, *shall perform the duty* or is subject to the liability, to the extent provided for by the Agreement. [Emphasis added]

many competing parties will need to be considered. In this case, however, there is only one party competing with the benefit of an agreement extinguishing an Aboriginal right. Accordingly, the position of that party, being the Nunavut Inuit, is to be given *priority consideration*.

Thus, consultation and consideration must mean more than simply hearing. It must include listening as well.

When it comes to the principles of adjacency and economic dependence under Article 15.3.7, "special consideration" is required to be given to the communities of the NSA when allocating commercial fishing licences within Zone I and II. In implementing this provision, the term "special consideration" must be interpreted to mean that the communities in the NSA have *priority consideration* for licences in Zones I and II over any other competing party, and the allocations made must clearly reflect this principle.

VII. Result

As a result of the above findings, in my opinion the Minister erred in making his decision of April 7, 1997 by failing to take relevant factors into account. But in written and oral argument, counsel for the respondent has stated that to set the Minister's decision aside for any reason at this stage will cause hardship to persons who are not parties to this application, and therefore, has asked me not to make such an order.

On July 10, 1997, the day of the hearing, I was informed that as of the day before, only fixed gear turbot fishing has commenced and that 585t had been caught. I was also advised that the balance of the TAC would not be fished until August or early September. While I recognize that setting the Minister's order aside will cause some deflated expectations and renewed activity within the decision-making process, on the evidence I have I cannot find any impediment to providing the applicant with the remedy to which it would normally be entitled.

Accordingly, I choose to exercise my discretion and, thus, I set aside the Minister's decision of April 7, 1997 as being contrary to law, and refer the matter to the present Minister for reconsideration in accordance with these reasons.

Judge

VANCOUVER
July 14, 1997