Federal Court  Cour fédérale

Date: 20240426

Docket: T-1362-21

Citation: 2024 FC 649

Ottawa, Ontario, April 26, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

NUNAVUT TUNNGAVIK INCORPORATED AND THE QIKIQTANI INUIT ASSOCIATION

Applicants

and

THE MINISTER OF FISHERIES AND OCEANS, CLEARWATER SEAFOODS LIMITED PARTNERSHIP, AND FNC QUOTA LIMITED PARTNERSHIP

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Nunavut Tunngavik Incorporated [NTI] and the Qikiqtani Inuit Association [QIA] [together, the Applicants] seek judicial review of a July 16, 2021 decision [Decision] by the Minister of Fisheries and Oceans [Minister] to approve the reissuance of one Greenland halibut

and two Northern shrimp fishing licences in waters adjacent to the territory of Nunavut from Clearwater Seafoods Limited Partnership [Clearwater] to FNC Quota Limited Partnership [FNC Quota].

[2] At issue is a consideration of the Minister's authority for the issuance or reissuance of licences pursuant to section 7 of the *Fisheries Act,* RSC, 1985, c F-14 [*Fisheries Act*] in light of the limitations placed on the Minister's authority pursuant to article 15.3.7 of the *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* [Nunavut Agreement], a constitutionally protected modern day treaty.

[3] The application for judicial review is granted.

II. Background

A. *Parties*

[4] Together, NTI and QIA represent the Inuit of Nunavut as Designated Inuit Organizations under the Nunavut Agreement. NTI represents Inuit from all three regions of Nunavut (Qikiqtani, Kivalliq and Kitikmeot) and plays a central role in administering and implementing the Nunavut Agreement. QIA represents the Inuit of the Qikiqtani region where over half of all Inuit in Nunavut reside. As Designated Inuit Organizations, the Applicants are mandated to protect Nunavut Inuit rights and advance Inuit economic, social and cultural well-being through the implementation of the Nunavut Agreement.

[5] The Minister, Clearwater, and FNC Quota are all Respondents. The Minister is involved because it is responsible for the Department of Fisheries and Oceans [DFO], including the discretionary control of granting, issuing and transferring commercial fishing licences under section 7 of the *Fisheries Act.* Clearwater is a Nova Scotia based company and is one of the largest seafood companies in North America. Clearwater is the operating entity of Clearwater Seafoods Inc., which held all of the organization's fishing licences that are at issue. FNC Quota is a company involved in the transfer or reissuance of the licences and is owned by seven Mi'kmaq communities in Nova Scotia [Mi'kmaq Coalition]. The Mi'kmaq Coalition also owns FNC Holdings Limited Partnership [FNC Holdings]. FNC Holdings, along with Premium Brands Holdings Corporation [Premium Brands], also jointly and equally own Clearwater as of January 25, 2021.

B. *Context*

[6] While this matter does not involve the allocation of fishing quota, it is still helpful to review the applicable fishing regime. The Minister controls fishing of the Greenland halibut and Northern shrimp by setting an overall limit on the amount of the total allowable catch [TAC] that licence holders may fish within each regulatory region, then the TAC is distributed to individual licence holders as a "quota". There are two relevant regulatory regions at issue here: the North Atlantic Fishing Organization sets the divisions for Greenland halibut quota and Canada sets the Shrimp Fishing Areas for Northern shrimp. This matter concerns one Greenland halibut licence (142081) located in Division 0B, which overlaps with Zone I as described in the Nunavut Agreement, and two Northern shrimp licences (11267 and 25784) in Davis Strait East and Davis Strait West (part of the Eastern Assessment Zone), which also overlap with Zone I.

[7] Prior to the creation of Nunavut, the Federal Government had introduced the Enterprise Allocation Program [EA Program] in Nunavut adjacent waters to prevent over-fishing. The EA Program provided large tracts of quota to a small number of companies that would be stable licence holders, limiting the number of participants with access to the market. None of the quota were provided to Nunavut Inuit.

[8] The Nunavut Inuit and Canada ratified the Nunavut Agreement in 1993. Article 15 of the Nunavut Agreement acknowledged the inequality of access to commercial fishery in off-shore adjacent waters by recognizing (1) Canada's sovereignty over Arctic waters is supported by Inuit use and occupancy; and (2) the need for the development of an Inuit economy based on marine resources. Article 15.3.7 of the Nunavut Agreement recognizes the "principles of adjacency and economic dependence of communities in the Nunavut Settlement Area on marine resources" and requires the Minister to "give special consideration to these factors when allocating commercial fishing licences within Zones I and II." Article 15.3.7 also defines adjacency as "adjacent to or within a reasonable geographic distance of the zone in question."

[9] Government and Senate committees have recommended that the Minister grant increased access to Nunavut interests in off-shore fisheries. In 2002, the Independent Panel on Access Criteria concluded that Nunavut interests' access to marine resources lagged behind their coastal counterparts and recommended that no additional access be granted to non-Nunavut interests in waters adjacent to Nunavut until the territory has achieved access to a major share of its adjacent fisheries resources. In 2004 and 2009, Canada's Standing Senate Committee on Fisheries and Oceans found that Nunavut interests in off-shore commercial fisheries lagged behind the 80-90%

access enjoyed by Atlantic provinces in their adjacent waters and it urged the Minister to ensure that Nunavut received the primary benefit from the resources of their shore.

[10] As of 2021, Nunavut's share was approximately 76% of Greenland halibut quota in Areas 0A and 0B, which is an increase from 27.2% in 2002. Division 0A is now held 100% by Nunavut interests, but it was previously an exploratory fishery due to barriers such as it having a shorter season and the area being less economically viable. Division 0B was an area where the Minister allocated quota to Nunavut interests and the EA Program. Nunavut's share of the Northern shrimp quota is 38.5%, which is about a 5% increase from 2002. The growth in both fisheries is a result of DFO increasing the TAC and not due to any new or transferred licences. In contrast, Atlantic based fisheries entities from adjacent provinces hold 90% of allocations.

[11] The issue of applying the principles of Article 15.3.7 to decisions about commercial licences has been the subject of several cases before the Federal Courts, including *Nunavut Wildlife Management Board v Canada (Minister of Fisheries and Oceans)*, 2009 FC 16 [*Nunavut Wildlife*]. *Nunavut Wildlife* concerned the permanent transfer of licences from Seafreez Foods Inc. to Clearwater and involved essentially the same Greenland halibut quota. The Court did not set aside the decision to transfer the licences since the transfer was in accordance with existing government policy, despite finding that the Minister did not appropriately give special consideration to the principles in Article 15.3.7.

C. *Transaction*

[12] On March 5, 2020, Clearwater announced a strategic review process. By early summer 2020, Clearwater announced that it would only seek bids for the purchase of the whole company. In August 2020, Premium Brands, a British Columbia corporation, made a joint bid along with the Mi'kmaq Coalition through FNC Holdings. On November 9, 2020, Premium Brands and FNC Holdings announced a definitive agreement for the purchase of Clearwater in which both parties would each own half of Clearwater [Transaction]. On January 25, 2021, Clearwater, Premium Brands and FNC Holdings completed the Transaction and announced it publicly.

[13] The transfer of certain mid-shore and off-shore commercial fishing licences from Clearwater to the FNC Quota [Licence Transfer] was a key part of the Transaction. The Mi'kmaq Coalition financed its contribution through the First Nations Finance Authority [FNFA] which required collateral. The Transaction required completing the Licence Transfer, including transferring the associated quota from Clearwater to FNC Quota, and FNC Quota would then pledge them as collateral to FNFA. Thereafter, FNC Quota would give Clearwater the right to use the licences, harvest, and sell the catch on its behalf.

[14] On January 26, 2021, Clearwater requested the Minister's approval of the Licence Transfer. On February 17, 2021, DFO sent the Applicants and the Government of Nunavut a copy of Clearwater's application and sought their views. The DFO had several further communications with the QIA in March 2021 by meeting, letter, and call, then by another meeting in June 11, 2021.

[15] Prior to these events, in December 2019, Qikiqtaaluk Corporation [QC], the business arm of QIA, met with Clearwater and the Mi'kmaq Coalition to discuss terms of a joint purchase. QC declined the proposal because it would not increase Inuit self-sufficiency, as it did not fit within the existing commercial fishing practices of the Nunavut Inuit, but QC wanted to remain committed to finding a mutually agreeable arrangement with Clearwater and the Mi'kmaq Coalition. QIA had expressed to the Minister that it had neither the assets nor interest to acquire all of Clearwater. Negotiations were ultimately unsuccessful, as Clearwater was only interested in bids for the whole company.

D. *Evidence*

[16] The Applicants filed affidavits from Jerry Ward, Director of Fisheries for QC; Harry Flaherty, President and Chief Executive Officer for QC; Jeffrey Maurice, Director of Policy and Planning for NTI; and Richard Paton, Senior Director of Projects for QTI. Collectively, their affidavits describe the roles of NTI and QIA, the importance of fisheries to Inuit culture and traditions, the Northern fisheries regime, Government and Senate committee studies about the state of Inuit participation in fisheries, and economic development and capacity-building initiatives in Nunavut.

[17] The Minister filed affidavit evidence from Adam Burns, Acting Assistant Deputy Minister of Fisheries and Harbour Management for DFO. Clearwater filed affidavit evidence from Christine Penney, Vice President of Sustainability and Public Affairs for Clearwater Seafoods Inc. FNC Quota filed affidavit evidence of Chief Terrance Paul of Membertou First Nation, located in the Cape Breton Regional Municipality, Nova Scotia. Collectively, the

evidence describes the Respondents' roles, the Transaction discussions with the Applicants, and the importance of the Licence Transfer to Clearwater and FNC Quota.

[18] None of the affiants were cross-examined on the contents of their respective affidavits.

III. The Decision

[19] On July 13, 2021, DFO issued a memorandum to the Minister recommending that the Minister approve the Licence Transfer [Memorandum]. The Memorandum outlined the Transaction, the Licence Transfer, the legal and policy framework, stakeholder views, foreign ownership requirements, obligations under the Nunavut Agreement, as well as voluntary licence relinquishments and reconciliation. On July 16, 2021, the Minister approved the Licence Transfer after agreeing with DFO's recommendation. DFO communicated the Decision to the Applicants at a meeting with the QIA on July 20, 2021 stating that the licences were already purchased and that there was no regulatory role for the Minister to play. The Decision was communicated to the Applicants and the Government of Nunavut by letter dated July 30, 2021. The Applicants and the Minister agree that the reasonableness review should primarily look at the Memorandum, as well as the rest of the record that was before the Minister in making the decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 137).

IV. Issues and Standard of Review

[20] This matter raises the following issues:

1. Was the Decision reasonable?
2. Did the Minister meet the requirements of the duty of procedural fairness in making the Decision?

[21] The Applicants and the Respondents agree that the standard of review for the merits of the Decision is reasonableness. I agree with the parties that the merits of the Decision generally are reviewable under a reasonableness standard. This aspect of the case does not engage one of the exceptions set out by the Supreme Court of Canada in *Vavilov*. Therefore, the presumption of reasonableness is not rebutted (at paras 16-17).

[22] A reasonableness review is a robust form of review that requires the Court to consider both the administrator's decision-making process and the outcome of the decision (*Vavilov* at paras 83, 87; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 58 [*Mason*]). A reviewing Court must take a "reasons first" approach to assess whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justifiable in relation to the relevant factual and legal constraints (*Vavilov* at paras 15, 99; *Mason* at paras 59-61). The onus is on the applicant to demonstrate the unreasonableness of the decision (*Vavilov* at para 100). A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). Two types of fundamental flaws can render a decision unreasonable: a failure of rationality internal to the reasoning process and a failure of justification given the legal and factual constraints bearing on the decision (*Vavilov* at para 101; *Mason* at para 64). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision

falls within a range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86).

[23] The Applicants and the Respondents do not provide submissions on the standard of review for procedural fairness or for matters of treaty interpretation. Jurisprudence confirms that such matters both attract a standard of review of correctness (*First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 [*Nacho Nyak Dun*]; *Makivik Corporation v Canada (Attorney General)*, 2021 FCA 184 at paras 77-81 [*Makivik*]). On a correctness review, no deference is owed to the decision-maker (*Blois v Onion Lake Cree Nation*, 2020 FC 953 at para 26, citing *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31 and *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57). Instead, when evaluating whether there has been a breach of procedural fairness, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Vavilov* at para 77; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at paras 21-28 [*Baker*]).

V. Relevant Provisions

[24] Section 7 of the *Fisheries Act* states:

> 7 (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.
>
> …
>
> (2) Except as otherwise provided in this Act or regulations made under it, leases or licences for any term of more than nine years

> shall be issued only under the authority of the Governor in Council.

[25] Article 15 of the Nunavut Agreement sets out principles on marine areas:

> 15.1.1 This Article recognizes and reflects the following principles:
>
> (a) Inuit are traditional and current users of certain marine areas, especially the land-fast ice zones;
>
> (b) the legal rights of Inuit in marine areas flowing from the Agreement are based on traditional and current use;
>
> (c) Canada's sovereignty over the waters of the arctic archipelago is supported by Inuit use and occupancy;
>
> (d) Inuit harvest wildlife that might migrate beyond the marine areas;
>
> (e) an Inuit economy based in part on marine resources is both viable and desirable;
>
> (f) there is a need to develop and co-ordinate policies regarding the marine areas; and
>
> (g) there is a need for Inuit involvement in aspects of Arctic marine management, including research.

[26] The provision of the Nunavut Agreement at issue is Article 15.3.7:

> 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.

VI. Analysis

[27] In written submissions, a preliminary matter arose between the parties. The Minister asked the Court to give no weight to the Applicants' affidavit of Mr. Paton and to prefer Canada's evidence set out in the affidavit of Mr. Burns where there is a contradiction between the two affidavits. At the hearing, the Applicants agreed to strike the contested paragraphs of Mr. Paton's affidavit after noting that the exhibits of that affidavit are already part of the Certified Tribunal Record.

A. *Was the Decision reasonable?*

(1) Applicants' Position

[28] The Minister has broad discretion to allocate licences and quotas pursuant to the *Fisheries Act* but this discretion has significant legal constraints upon it as a result of the Nunavut Agreement. In addition, the uniqueness of the particular holdings needed to be considered, including the impact of placing these holdings into non-Inuit hands. In this case, the obligations flowing from the honour of the Crown had not yet taken shape when other cases interpreting Article 15 were decided. The honour of the Crown is a constitutional principle that is always at stake when the Crown deals with Indigenous people (*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 69-70 [*Manitoba Metis*]; *NTI v Canada (Attorney General)*, 2012 NUCJ 11, rev'd in part, 2014 NUCA 2). The honour of the Crown requires diligent implementation of the Nunavut Agreement, particularly when it imposes a special burden on the Minister's discretion through Article 15.

[29] There are four main reasons why the Decision was unreasonable in light of the constraints from the Nunavut Agreement. First, the Minister failed to give special consideration to the principles of adjacency and economic dependence by not recognizing that without the re-allocation of at least some of the Clearwater licences to Nunavut fishers, Nunavut interests are unlikely to gain access comparable to other provinces due to the permanent nature of these licences.

[30] Second, the Minister failed to grapple adequately with the issue of whether reissuing the Clearwater licences would be consistent with the Minister's obligation to "promote a fair distribution of licences". The Clearwater licences are the only practical prospect to attaining adjacency in Nunavut. The Memorandum asserted that "Nunavut interests already hold very significant shares in the two areas for which Clearwater has licences" and that it would be "unfair" to increase Nunavut's participation, despite Senate and Court conclusions otherwise on the fairness of distribution. An increase in TAC resulted in an increase in Nunavut's share for both Greenland halibut and Northern shrimp and TAC cannot be relied on to increase Nunavut's share in these fisheries in a timely manner.

[31] Third, the Minister failed to give special consideration to the principle of economic dependence of Nunavut communities on marine resources, despite the significant annual landed value of the Greenland halibut and Northern shrimp fisheries. This landed value is significant in the context of the smaller Nunavut economy relative to the economies of other provinces.

[32] Fourth, the record before the Minister failed to analyze basic questions raised by the reissuance of the Clearwater licences in light of the Nunavut Agreement, particularly concerning a pathway to future fair distribution. Instead, the Minister has continued to lack a policy or plan for how to give special consideration to Article 15 principles, despite the Court's direction to do so in *Nunavut Wildlife*. The block of licences at issue in the Licence Transfer is the only way for Nunavut shares in the fisheries to increase.

[33] Furthermore, the Minister inappropriately prioritized commercial expectations over Inuit treaty rights. The Minister fettered her discretion by either assuming she had no discretion to affect the Transaction or by deferring to the commercial expectation that arose from the past precedent of approving permanent transfers between willing buyer and seller. The Minister seemed to consider herself bound to comply with precedent in which the Minister routinely approves permanent transfers between willing buyers and sellers as fishing licences can be analogized to proprietary rights (*Saulnier v Royal Bank of Canada*, 2008 SCC 58 [*Saulnier*]). However, *Saulnier* was clear that fishing rights are not actually property and the typical expectation that the Minister will reissue licences to a willing buyer cannot fetter the Minister's discretion (*Saulnier* at paras 33-35; *Doucette v Canada*, 2015 FC 734 at para 109, citing *Andrews v Canada (Attorney General)*, 2009 NLCA 70 at para 84). The Minister's approach to licence transfers in Nunavut-adjacent waters is a consistent, decades-long pattern of unwillingness to interfere with the legacy of Nunavut exclusion from the fishery.

[34] Reconciliation with non-adjacent Indigenous communities cannot be prioritized over the fulfillment of treaty obligations to Inuit. The Minister appeared motivated in part by the fact that

Clearwater would transfer the licences to an Indigenous-owned consortium as it could contribute to reconciliation. Reconciliation with a non-adjacent Indigenous group cannot be prioritized over the fulfillment of treaty obligations to Inuit. The concept of reconciliation is reflected in Article 15 and this essentially means that diligence is required by the Minister in arriving at licence allocations.

[35] Lastly, the Applicants submit that the Minister failed to explore practical solutions to promote a fair distribution of licences within the context of the Transaction. The Minister had options at her disposal to facilitate meetings between the Applicants and the parties to the Transaction, signaling to the parties to the Transaction an unwillingness to approve a reissuance without Nunavut involvement, or indicating a preference for certain Transaction terms. Instead, the Minister incorrectly assumed the Applicants' intent as wanting a "repatriation" of Clearwater's licences, rather than a willingness to purchase the licences, and decided not to take any of these steps to ensure fair distribution of licences.

(2) Minister's Position

[36] The Memorandum is internally coherent and justified because it sets out the facts, Article 15.3.7 requirements of the Nunavut Agreement, relevant policy considerations, the positions of the interested parties, the law, and a clear analysis that connects the evidence to the Decision.

[37] The Federal Court of Appeal in *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)*, 1998 CanLII 9080 (FCA) [*Nunavut Tunngavik 1998*] identified the principles applicable in reviewing the Minister's exercise of discretion. The role of the Court is not to

"second guess" the Minister's decision and the Minister must have "the widest possible freedom to manoeuvre" (at para 18). The reviewing Court is concerned with the legality of the ministerial decision and not its opportunity, wisdom or soundness (at para 19). The Federal Court of Appeal also provided an interpretation of Article 15.3.7 whereby special consideration means that "particular and appropriate attention ought to be given when balancing the fierce competing interests at stake with a view to promoting a fair balance in the distribution of commercial fishing licences in these zones" (at para 52).

[38] The Federal Court in *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)*, 1999 CanLII 8815 (FC), aff'd 2000 CanLII 16334 (FCA) [*Nunavut Tunngavik 1999*] applied this framework and determined that Article 15.3.7 does not imply a mandatory preference to be given to Nunavut residents (at para 87). The Federal Court in *Nunavut Territory (Attorney General) v Canada (Attorney General)*, 2005 FC 342 [*Nunavut Territory*] similarly found that the decision made by the Minister was open to him, taking into account all of the competing interests that were before him (at paras 69-70).

[39] *Nunavut Wildlife* arose in a different context so the Court should be cautious in applying this case as it concerned a decision to reallocate Greenland halibut quotas, not licences, and the challenger of the decision was the Nunavut Wildlife Management Board which was not applying to be a recipient of the quota.

[40] In response to the Applicants' submissions, first, the Memorandum expressly and in detail articulates the special considerations from Article 15.3.7, and applied this in making the

Decision, so the Applicants' allegation that the Minister failed to give special consideration to adjacency and economic dependence on marine resources is unfounded. The Memorandum shows that the Minister considered the Crown's obligations, the principles of adjacency and economic dependence, and fairness in the distribution of licences. The Minister ultimately agreed with the fact that Nunavut interests held significant shares in the two areas in which Clearwater had licences, so made the determination that it would be unfair to strip Clearwater and FNC Quota of the value of the licences to increase Nunavut participation in Zone I. This is really a question of treaty implementation.

[41] Second, the Court's comment in *Nunavut Wildlife* about the need for a policy to respond to Inuit concerns concerning an unfair distribution of licences was *obiter* but regardless, DFO does have a policy-based approach to the application of the principles in Article 15.3.7. The Decision involved consideration of fishery management plans and other important guidance documents, including the "Integrated Fishery Management Plan – Greenland Halibut, Northwest Atlantic Fisheries Organization Subarea 0" and "Integrated Fishery Management Plan – Northern shrimp and striped shrimp – Shrimp fishing areas 0, 1, 4-7, the Eastern and Western Assessment Zones and North Atlantic Fisheries Organization (NAFO) Division 3M". In any event, a written policy was not required for the Minister to meet the requirements of Article 15.3.7 and a written policy would not have bound the Minister or have been enforceable.

[42] Third, the evidence undermines the Applicants' inferences that the Minister "considered herself bound to comply with past precedent", "relied on *Saulnier*", or that there was a "pattern of unwillingness". The evidence demonstrates that the Minister took steps to ensure the decision-

making process was fully informed and Article 15.3.7 does not preclude the Minister from considering other elements, including commercial interests, as long as special consideration is given to the principles within Article 15.3.7 (*Nunavut Tunngavik 1999* at paras 68-69, 87; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 34-35, 78-79 [*Beckman*]).

[43] Fourth, contrary to the Applicants' submissions, the Minister was under no obligation and had no authority to broker a commercial arrangement between the Applicants, Clearwater, and FNC Quota. This is outside the scope of Article 15 of the Nunavut Agreement and the honour of the Crown. If the intended role of Article 15.3.7 was to give priority access to the Applicants over other persons or entities, the Nunavut Agreement would have been drafted differently (*Nunavut Tunngavik 1998* at para 50). The Applicants were entitled to special consideration of the principles of adjacency and economic dependency but they were not entitled to a specific outcome in relation to the Decision.

(3) Clearwater's Position

[44] The statutory schemes under the *Fisheries Act* and the Nunavut Agreement are the main constraining factors and context for the Court's review. Even though the Nunavut Agreement limits the exercise of the Minister's discretion under section 7 of the *Fisheries Act*, the Minister still retains broad discretion (*Nunavut Tunngavik 1998* at paras 13-16, 18).

[45] Furthermore, the Nunavut Agreement is a comprehensive and modern treaty negotiated by sophisticated parties whose terms must be given appropriate weight (*Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 7 [*Moses*]; *Beckman* at paras 10-12, 36).

[46] Article 15 of the Nunavut Agreement is a balanced scheme for Nunavut Inuit involvement in fisheries decisions both within the Nunavut Settlement Area's marine areas and Zone I. The Nunavut Agreement guarantees special consideration but not "priority" access or an outcome *(Nunavut Tunngavik 1998* at paras 50-52). There is also no set percentage of what Nunavut interests should hold. As well, Article 15.3.7 does not expressly or implicitly provide that the interests of others identified in the Nunavut Agreement should be disregarded or minimized (*Nunavut Tunngavik 1999* at paras 87-88). It only respects the interests of Nunavut Inuit and the interests of others with a historically entrenched place in the fishery (*Nunavut Territory* at para 71). Accordingly, the Nunavut Agreement does not require Courts to re-write it through "broad" interpretation that deviates from the carefully negotiated text.

[47] The Transaction was not new access to the fisheries but rather an internal corporate transfer. There was no change to the status quo of fishing allocations.

[48] This matter is distinguishable from two cases where there have been breaches of Article 15.3.7. In *Nunavut Tunngavik 1998*, there was a reduction in the share of overall TAC with no indication of any special consideration or reasons provided. In *Nunavut Wildlife*, it concerned the approval of a sale of unwanted quota attached to particular licences and mainly concerned the need to consult and consider the views of the Nunavut Wildlife Management Board. In contrast,

the factual context of this matter is the most complicated matter that the Minister has had to consider as it is a large, complex transaction involving a sale to an arm's length party in which there was not a sale of unwanted quota on the open market. There was also thorough consultation.

[49] The Decision adequately considered the impact of the Transaction on the economic dependence of Nunavut communities. First, the Applicants overstate the need for the Minister to reference explicitly the principles of adjacency and economic dependence in the Decision and the record. Written reasons "must not be assessed against a standard of perfection" and must be read in light of the history and context of the proceedings in which they were rendered (*Vavilov* at paras 91, 94). Regardless, the record and DFO's reasons to QIA on July 20 and 30, 2021 show that the Minister did give special consideration to adjacency.

[50] Second, the Applicants' assertion that the Minister believed it would be unfair to increase Nunavut participation in Zone I as Nunavut already had significant shares in two areas is a gross mischaracterization because the Applicants only focus on what would be fair to Nunavut and not any other party. Nunavut interests are to be considered but they will not always prevail over others.

[51] Third, the Memorandum noted specific context on economic dependence and was not required to cite any specific data or evidence in the Decision. A review of the Decision in light of the record makes clear that the Minister gave special consideration to economic dependence when the Memorandum referred to the landed value of the Clearwater licences and the interests

currently held by Nunavut, as well as correspondence with the Government of Nunavut, the Applicants and the Nunavut Wildlife Management Board regarding the Transaction.

[52] Fourth, the question of whether DFO has a policy or plan for fair distribution is a "red herring" and not reviewable in this application.

[53] Furthermore, there is nothing in the record supporting the Applicants' assertion that the Minister fettered her discretion or was unduly influenced by precedent, including DFO's preference for a willing buyer and willing seller or licence transfer policy. Instead, the record shows that the Minister was aware of the option to reallocate the licences, including to Nunavut interests.

[54] The Minister was also not required to explore options that would result in the Applicants receiving the licences against Clearwater's wishes. It was not clear on the record that the Applicants sought the Minister's assistance in facilitating a transaction, rather than a forcible taking of the licences. Such involuntary licence allocations are not only rare but are disruptive and result in instability. Fairness and equity is a two-way street and is crystalized in Article 15 as well as Clearwater's long history in fishing in the North.

(4) FNC Quota's Position

[55] FNC Quota relies on Clearwater's submissions and restricts its submissions to the issue of whether it was reasonable for the Minister to factor in the principle of reconciliation as it related to the Mi'kmaq Coalition. It acknowledges the principles of the honour of the Crown are

always at stake, however, submits that it was likely that, in this instance, the honour of the Crown did not give rise to a fiduciary duty.

[56] Citing the Truth and Reconciliation Commission's "What Have We Learned: Principles of Reconciliation", FNC Quota submits that reconciliation is about securing economic justice for Indigenous peoples or in other words, "closing gaps in economic opportunities and outcomes that exist between Indigenous and non-Indigenous Canadians."

[57] Reconciliation as it related to the Mi'kmaq Coalition was a relevant factual consideration. Article 15.3.7 of the Nunavut Agreement seeks to apply the special considerations in a way that promotes a fair distribution of licences between Nunavut Settlement Area residents and "the other residents of Canada", so the Mi'kmaq Coalition's interests were relevant. FNC Quota agrees that the honour of the Crown is "always at stake" in the Crown's dealings with Indigenous people, and that in this case the Crown had to pay attention to the Mi'kmaq Coalition's interests since the Transaction could secure their long-term prosperity. FNC Quota claims that the Minister's refusal to approve the transfer of licences would have a far more devastating impact on the Mi'kmaq Coalition's prospects of achieving economic justice than its approval would have on the Applicants' preferred method of increasing its share of adjacent quota.

[58] FNC Quota also refutes the Applicants' submission that the Memorandum included vague and abstract references to reconciliation. The Minister was showing sensitivity to the "undeniable reality" of the Transaction and that the Licence Transfer would "catapult the Mi'kmaq Coalition and its members into a leading position in the global seafood industry,

providing opportunities and prosperity for those communities" by the Memorandum stating that "the Clearwater sale could contribute significantly to reconciliation".

(5) Conclusion on Reasonableness

[59] The Decision was unreasonable. The Applicants have satisfied their onus of demonstrating that the Decision is unreasonable (*Vavilov* at para 100). I will make some observations before setting forth my analysis.

[60] Modern land claims agreements and treaties, as opposed to historical treaties, while still being required to be interpreted and applied in a manner that upholds the honour of the Crown, were intended to create some precision around property and governance rights and obligations (*Beckman* at para 12). Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency and predictability (*Beckman* at para 12).

[61] The parties all acknowledge the importance of the Nunavut Agreement's role as a legal constraint on the Minister's authority, but disagree on whether the Minister reasonably complied with its provisions when making the Decision.

[62] The Courts have applied the Nunavut Agreement in judicial reviews of the allocation or reissuance of licences in the Nunavut Settlement Area. Notably, previous decisions concerning the issuance of licences in the Nunavut Settlement Area have been determined on the basis of

patent unreasonableness (*Nunavut Tunngavik 1998* at paras 18-19; *Nunavut Territory* at paras 52-54), unless the decision involved procedural fairness (*Nunavut Wildlife* at para 61).

[63] Flowing from these cases, there are several things to note. First, the Federal Court of Appeal has provided some guidance on the correct interpretation of Article 15.3.7 of the Nunavut Agreement. The Nunavut Agreement provides for a principle of equity, not priority, in distributing licences and that "special consideration" means that particular and appropriate attention ought to be given to adjacency and economic dependence when balancing the competing interests, with a view to promoting a fair balance in the distribution of licences (*Nunavut Tunngavik 1998* at paras 49-52).

[64] Second, *Nunavut Wildlife* addressed a relatively similar issue and concerned the same Greenland halibut quota. It is also the most recent decision in a series of cases concerning whether the Minister has complied with the Nunavut Agreement. The Court decided not to set aside the transfers because the transfers complied with existing government policy and a change in the policy would require time and consultation. The Court acknowledged that "the representations from the applicant to the Minister's department in this case have demonstrated new concerns about future transfers which must be considered by the Minister under Section 15.3.7 before future transfers of company quotas are approved" (at para 116). Furthermore, "no further inter-company transfers of allocation should be approved in division 0-B until the Minister has considered the new concerns raised by the applicant" (at para 120). Though not directly applicable to the present matter, the Court nevertheless identified factors that the

Minister should consider in reissuing licences, which are useful here given the similarities in the transfer and quota.

[65] In my view, the reasonableness of the Minister's Decision, which the parties agree is set forth in the Memorandum, must be read in light of a close reading of the Nunavut Agreement and with attention to the Courts' jurisprudence on the Nunavut Agreement. As the Supreme Court of Canada has stated, "[p]aying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text *as a whole* and the treaty's objectives" [emphasis in original] (*Nacho Nyak Dun* at para 37). As pointed out by Clearwater, the case law suggests that modern treaties should be determined in light of the detailed negotiations and comprehensive written agreements (*Moses* at para 7).

[66] Article 15.3.7 must be read in light of the text of the Nunavut Agreement and the honour of the Crown, the scheme of Article 15, as well as the treaty's objectives. A treaty will not accomplish its purpose if it is interpreted in an ungenerous manner or as if it were an everyday commercial contract (*Beckman* at para 10). Article 15 is intended to reflect seven principles that largely recognize the importance of marine areas and its resources to the Inuit way of life and economy (Article 15.1.1). Article 15.3.7 specifically gives effect to these principles by providing Nunavut Inuit with a promise of special consideration of their adjacency and economic dependence when the marine resources are in Zones I or II rather than the marine areas of the Nunavut Settlement Area. Although it is not the only consideration, as the Minister must also consider other residents of Canada, it is nevertheless a guarantee of *special* consideration. Similar to how the Federal Court of Appeal stated in *Nunavut Tunngavik 1998* that Article 15.3.7

would have been worded differently if it were to be a principle of priority and not equity, "special consideration" would have been worded differently if it were not intended to be an explicit obligation in determining a fair distribution of licences. Considering the honour of the Crown, "an honorable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose" (*Manitoba Metis* at para 77; *Makivik* at para 105).

[67] The Memorandum clearly acknowledges the requirements under the Nunavut Agreement; however, the question is whether the Minister gave special consideration, meaning particular and appropriate attention, in accordance with Article 15.3.7 (*Nunavut Tunngavik 1998* at para 52). In other words, it is not enough to state the applicable principles or to state that one is giving special consideration to the Applicants' interests. It is also insufficient to treat the obligations in the Nunavut Agreement as simply contractual terms. There must be a demonstration that the Minister engaged with the evidence, with particular and appropriate attention to the treaty principles of adjacency and economic dependence, in determining whether special consideration was given in accordance with the objectives of the treaty and the honour of the Crown.

[68] Special consideration is not a defined term, but its context can be gleaned from the terms of the Nunavut Agreement and, as noted above, from case law (*Nunavut Tunngavik 1998* at paras 49-52). In this respect, I disagree with Clearwater that it is unimportant for the Minister to explicitly reference principles of adjacency and economic dependence as those terms are enshrined in the Nunavut Agreement. That said, more than re-stating these principles is required. Actual engagement with the circumstances of the particular matter, in light of this special

consideration, must be demonstrated, bearing in mind that the Nunavut Agreement is a constitutionally protected modern treaty.

[69] In the recommendation section, DFO recognizes that Nunavut interests "already hold very significant shares in the two areas for which Clearwater has licences" and it would be "unfair" in these circumstances to strip Clearwater and FNQ Quota of the licences. In contrast, in reviewing the fairness of the distribution to Nunavut interests, DFO mainly recognized that, over time, it had "facilitated increased fishing access to Nunavut Inuit interests in adjacent waters as demonstrated by the increases in access in Sub-Area 0 for Greenland halibut and shrimp." Under stakeholder views, DFO again focused on Nunavut's share of allocations over time in the respective areas for Greenland halibut and Northern shrimp. DFO then summarized the Applicants' position on how the Clearwater sale is important for economic development and to address inequities in their fisheries access, as well as that Canada should not rely exclusively on the marketplace for licence distribution. Tab 3 of the Certified Tribunal Record sets out the Applicants' position on adjacency and economic dependence and the delays in upholding these principles, so it is clear that further information was before the Minister in making the decision. The Memorandum focuses on fairness in broad terms without addressing the special considerations of adjacency and economic dependence and the delays in upholding these principles.

[70] I agree with the Respondents that there is a fine line where the Court must take a "reasons first" approach to evaluate the Minister's justification for the Decision but that the reasons must be reviewed "holistically and contextually" and not for perfection (*Vavilov* at paras 91, 97). I

further agree with the Respondents that a decision-maker does not need to respond to every argument or make an explicit finding on each constituent element, but "failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128). This is particularly so when a constitutionally protected treaty, such as the Nunavut Agreement, is being considered. Judicial forbearance to the terms of the Nunavut Agreement should not come at the expense of adequate scrutiny of the Crown's conduct to ensure constitutional compliance (*Nacho Nyak Dun* at para 34).

[71] The Minister cites the section of the Memorandum on stakeholder interests in support of its submissions that the Minister did give special consideration. However, the recommendations section of the Memorandum seems to suggest that this passage focused on Nunavut's "significant shares" in the licence areas that it had obtained over the years, rather than specific economic dependency or adjacency concerns as required by Article 15.3.7. The Minister recognized the special considerations requirement in both the Memorandum and the July 30, 2021 letter to the Applicants, but the Minister provided little written analysis of how exactly the special considerations played into weighing what is a fair distribution for both Nunavut interests and other parties. In short, I find that the Minister failed to sufficiently engage with the submissions when reviewing what is required to be considered, as set out in Article 15.3.7. There is no indication that particular and appropriate attention was given to the principles of adjacency and economic dependence. Simply measuring the slow increase in allocation to Nunavut interests in Areas 0A and 0B in and of itself is insufficient, particularly when the evidence indicates that 0A is not a particularly productive fishing area.

[72] Similarly, I find that it is appropriate to consider the Applicants' submissions on the Minister's failure to provide a path to a fair distribution in the future. The Respondents characterize this argument as "immaterial" or a "red herring" since *Nunavut Wildlife* did not require DFO to create a policy, a policy could not fetter the Minister's discretion in any event, and DFO regardless has a "policy-based approach" to the application of the principles in Article 15.3.7. In support of the existence of this policy, the Minister cites the affidavit of Adam Burns, which lists considerations like the requirement of Article 15.3.7, fisheries management plans or policies that provide little to no mention of Article 15.3.7, and factors like the willing buyer and seller model, environmental and economic sustainability and reconciliation. Regardless, the Minister and Clearwater seem to mischaracterize the Applicants' argument since the Applicants are not arguing that the lack of policy is reviewable in this judicial review. Instead, the Applicants submit that because there is a lack of policy on *how* the Minister must apply the special considerations, the Minister must demonstrate meaningfully how she grappled with the principles in Article 15.3.7. I am persuaded by this submission.

[73] There is a heightened responsibility on the Minister to analyze and engage with the evidence to demonstrate how special considerations were determined, given it is a constitutionally protected treaty requirement and it is a requirement of the honour of the Crown. While the Minister referred to fairness, the reasons do not grapple with what special consideration of adjacency and economic dependency means within the context of the Applicants' interests, Article 15.3.7 of the Nunavut Agreement, and the Transaction. For these reasons, I find that the Decision was unreasonable.

[74] Furthermore, though the term reconciliation is not explicitly used in Article 15.3.7, I agree with the Applicants that its context must be gleaned from this Article. Accordingly, reconciliation is a reasonable factor for the Minister to consider when determining a fair distribution of licences for the residents of the Nunavut Settlement Area and the other residents of Canada, particularly when another Indigenous group is involved. However, DFO ascribes little meaning to what reconciliation means in this context in the Memorandum. Reviewing the record as a whole and context provide insight into reconciliation reasonably referring to the Mi'kmaq Coalition's significant role in fisheries and economic benefits derived from the licences, as FNC Quota suggests. Since decision-makers are not required to make an explicit finding or response on every issue, I agree with FNC Quota on both the availability of the factor and that the Minister reasonably did not consider reconciliation in the abstract.

[75] However, the concept of reconciliation and how it was considered by the Minister further illustrates the lack of engagement with how the Minister handled the issue of economic dependency vis-à-vis the Applicants and FNC Quota. FNC Quota prefers a definition of "reconciliation" which it summarizes as "securing economic justice for Indigenous peoples living in Canada." The economic justice definition does seem to align with DFO's intended meaning of reconciliation with the Mi'kmaq Coalition in the Memorandum. However, the Applicants frequently refer to Inuit-Crown reconciliation, fisheries reconciliation, and socio-economic reconciliation in their correspondence to the Minister. The Memorandum lacks reference to reconciliation with Inuit aside from a brief reference that the Mi'kmaq Coalition would view the substitution of a non-voluntary licence relinquishment for a voluntary one as undermining reconciliation, even though "Nunavut Inuit might consider it a welcome

reconciliatory step." DFO appears to provide more written justification on the economic importance of the Transaction to the Mi'kmaq Coalition for reconciliation rather than for the Applicants, despite there being a requirement for the Minister to give special consideration to the economic dependency of Nunavut interests on fisheries. This lack of engagement between Inuit interests vis-à-vis the Mi'kmaq Coalition's interests in reconciliation further demonstrated the unreasonableness of the Decision.

[76] I do agree with the Respondents that the Minister did not necessarily prioritize commercial expectations over treaty rights. DFO's discussion of commercial expectations in the Memorandum goes more toward determining a fair distribution, rather than showing a prioritization over treaty rights. The issue is that the Minister's consideration of treaty rights was flawed, as discussed above, and not that the Minister considered what is fair to the commercial parties. I also agree that there is no evidence that the Minister considered herself bound to comply with past precedent or *Saulnier* when considering the commercial interests of the other parties. In any event, as set out above, the Decision is nevertheless unreasonable.

[77] Lastly, the Applicants' argument that the Minister should have explored practical solutions to promote a fair distribution of licences remains an open question. The Court in *Nunavut Wildlife* identified the unanswered question of whether the Minister had an obligation to promote the transfer of unwanted quota from a non-Nunavut resident to a Nunavut resident until Nunavut interests have their fair share of allocations in adjacent waters (*Nunavut Wildlife* at para 115). I agree that on the face of the Nunavut Agreement, there was an obligation on the Minister to do more to explore possibilities for the Applicants within the spirit and intent of the Nunavut

Agreement, however, I do agree with the Minister that she was not required to broker a commercial transaction for the Applicants.

[78] For the reasons above, I find that the Decision was not justified in relation to the legal constraint of the Nunavut Agreement nor was it justifiable, transparent, or intelligible in its analysis and determination of special considerations within the meaning of Article 15.3.7 and the honour of the Crown.

B. *Did the Minister meet the requirements of the duty of procedural fairness in making the Decision?*

(1) Applicants' Position

[79] The Minister owed the Applicants a high duty of procedural fairness, which was breached by the Minister failing to share relevant information and by failing to provide a chance to respond to allegations made against them prior to the Decision.

[80] Decisions involving protected Aboriginal and treaty rights require heightened participatory rights (*Grandjambe v Canada (Parks)*, 2019 FC 1023 at para 136 [*Grandjambe*]; *Knight v Indian Head School Division No 19*, 1990 CanLII 138 (SCC) at 682; *Métis Nation of Alberta Association Fort McMurray Local Council 1935 v Alberta*, 2016 ABQB 712 at paras 164-65).

[81] Decisions affecting livelihood, rights of great importance to an individual and larger community, or which have a cultural or spiritual dimension also warrant a high degree of

procedural fairness (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 5; *Everett v Canada (Minister of Fisheries and Oceans)*, [1994] FCJ No 418, 169 NR 100 at para 9). Here, the Decision implicated both cultural and livelihood concerns for Inuit, as it was a rare opportunity for economic growth in Nunavut.

[82] Third, the Applicants had legitimate expectations to be involved in the Decision due to the modern treaty right to special consideration, including expectations to receive regular information and an opportunity to be heard.

[83] The Decision was procedurally unfair because the Minister failed to share relevant information and provide a chance to respond to the inaccuracies in descriptions of the Applicants' position prior to the Decision. The Minister forwarded the Applicants' letter providing input on the Transaction to the parties involved in the Transaction so that the parties could respond to the letter. In response, the Transaction parties stated in a letter dated April 9, 2021 that the Mi'kmaq Coalition invited Nunavut companies to participate in the purchase but they declined. The Minister failed to provide the Applicants with an opportunity to respond to this inaccuracy, despite the statement being misleading and only intended to facilitate the approval of the Transaction.

[84] If the Minister had provided the Applicants with an opportunity to respond, the Applicants could have clarified its interest through the following facts: QC turned down one offer because it would undermine Inuit self-sufficiency and economic growth in Nunavut which is enshrined in the Nunavut Agreement; QC and QIA engaged in multiple negotiations with

Clearwater; and QIA's offer was rejected because it focused on the licences in Nunavut Adjacent Waters and not Clearwater as a whole. Instead, the Minister denied the Applicants with the basic principle of the right to respond to allegations against interest. By failing to provide the Applicants with an opportunity to respond to allegations against them, the Minister breached a fundamental principle of natural justice (*Supermarchés Jean Labrecque Inc v Flamand*, 1987 CanLII 19 (SCC) at paras 46-54 [*Supermarchés*]).

(2) Minister's Position

[85] The Applicants have abandoned aspects of their procedural fairness argument outlined in their Amended Notice of Application. Specifically, the Applicants' memorandum of fact and law does not address the following procedural fairness grounds raised in paragraphs 43 to 46 of their Amended Notice of Application: the alleged breach of procedural fairness in relation to development and implementation of a policy for making the Decision; the alleged failure to provide adequate written reasons; or the alleged failure to meet the duty to consult.

[86] The Minister acknowledges that there is an elevated duty of procedural fairness owed because the Minister was required to act in accordance with the honour of the Crown and give special consideration to the principles in Article 15.3.7 of the Nunavut Agreement as a modern treaty. However, the Minister determined that a duty in the middle of the procedural fairness spectrum is owed after analyzing the *Baker* factors, which would consist of a meaningful opportunity for the Applicants to present their position and receive sufficient information on the Decision to be made. Specifically, the Minister identifies the following factors: the Decision is a highly discretionary administrative decision; there is no statutory right of appeal for the

Decision; there are constitutionally protected rights to special consideration under Article 15.3.7; there is no deprivation of vested rights or interests; there were no legitimate expectations or procedural promises to the Applicants; and the Court should respect the procedural choices made by the Minister.

[87] The duty of fairness did not require the Applicants to have an opportunity to respond to specific statements in the materials sent from Clearwater and FNC Quota to the Minister. Generally, there is no right to respond to every statement by a party and this situation is distinguishable from *Grandjambe* since the decision-maker had promised the opportunity to respond to the party so there were legitimate expectations for that right. Here, the central question is whether the Applicants were prejudiced by the Minister receiving new information, rather than whether the Applicants had an opportunity to respond (*Jada Fishing Co Ltd v Canada (Minister of Fisheries and Oceans)*, 2002 FCA 103 at paras 16-20). The Applicants have not shown that the statement in the April 9, 2021 letter prejudiced the Applicants nor that a response would have made any material difference to the Decision. The record clearly demonstrates the Applicants' interest and the April 9, 2021 letter did not provide any new information to the Minister. Similarly, the Minister did not give significant weight to the statement in the April 9, 2021 letter since the Memorandum makes one reference to it.

[88] Instead, the duty of fairness required that the Applicants had a meaningful opportunity to present their position in relation to Clearwater's request, which they did. Appendix E of the Applicants' memorandum of fact and law providing a timeline of events and the affidavit of Adam Burns are evidence that there was no breach of this procedural right. Specifically, there

were a series of letters between the Applicants and the Minister or DFO staff, as well as several meetings between the Minister, ministerial staff, DFO officials and the Applicants between April 2020 and July 2021. As a result, the Applicants had a significant role in the decision-making process, an opportunity to be heard, notice of the Decision to be made with relevant information, and opportunities in person or in writing to discuss their position.

(3) Clearwater's Position

[89] Clearwater agrees that the Applicants abandoned grounds listed in the Amended Notice of Application. The Applicants do not address these pleaded grounds so cannot assert them at the hearing (*Sandhu v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15526 (FCA) at para 4; *Radha v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1040 at paras 15-18; *Bridgen v Deputy Head (Correctional Service of Canada)*, 2014 FCA 237 at paras 20-21, 27, 35).

[90] An analysis of the *Baker* factors shows that the duty of fairness owed is at the lower end of the spectrum. First, the Decision was far from a judicial decision, which favours a relaxed duty of fairness. Second, the nature of the statutory and Nunavut Agreement schemes support a duty being at the low end of the spectrum. While the *Fisheries Act* does not have an appeal right, the Applicants still have recourse through judicial review. The Nunavut Agreement is a negotiated scheme that also does not provide for consultative rights where Article 15.3.4 is not triggered (as is the case here). Third, Article 15.3.7 does not guarantee an outcome or alter the ratio of Nunavut to non-Nunavut allocations. Absent a substantive right to a specific outcome, the Minister's Decision does not harm the livelihoods or cultural, social or spiritual rights of

individual Inuk. Fourth, Article 15.3.7 and the scheme of Article 15 do not support a legitimate expectation for involvement. Lastly, the process chosen by the Minister is entitled to weight and supports a relaxed duty of fairness.

[91] The relaxed duty of fairness only required the Minister to provide the Applicants with sufficient notice of and information about Clearwater's application and a reasonable opportunity to be heard. The Minister fully discharged this duty by seeking the views of the Applicants on the potential Licence Transfer and attending meetings with the Applicants. A central part of the Memorandum also focused on the Applicants' position. Furthermore, DFO met with QIA to explain the Decision and provided a formal letter afterward.

(4) Conclusion on Procedural Fairness

[92] The Minister did not breach the duty of procedural fairness. I agree with the Respondents that the Applicants have abandoned aspects of their procedural fairness arguments. A party before the Court must limit its submissions to those advanced in its memorandum of fact and law *(Sibomana v Canada*, 2020 FCA 57 at para 6; *Bigeagle v Canada*, 2023 FCA 128 at para 90). The Applicants did not attempt to argue the abandoned grounds in their oral submissions.

[93] The Applicants submit that it is owed a high duty of fairness while the Minister submits that it is somewhere in the middle of the spectrum and Clearwater submits it is a relaxed duty of fairness. As stated in *Vavilov, Baker* remains the guiding case for determining the level of duty of fairness owed:

> [77] It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74-75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

[94] After reviewing the *Baker* factors, I agree with the Minister. The first *Baker* factor of the nature of the decision being made and the process followed in making it do not attract a high level of procedural fairness here (at para 23). The decision is a discretionary one that does not resemble a hearing before a Court and does not require procedural protections closer to the trial model. The fourth *Baker* factor also does not grant higher procedural protections because there are no legitimate expectations as to what procedure will be followed or that a certain result will be achieved (at para 26). Similarly, the fifth *Baker* factor requires taking into account the

procedure made by the agency itself (at para 27). Here, there should be some deference to the level of procedures followed by the Minister, which involved the rights to make representations and to receive notice.

[95] In contrast, the second *Baker* factor provides for greater procedural protections when the decision is determinative of the issue and further requests cannot be submitted or when there is no appeal procedure (at para 24). Although Clearwater points to the availability of a judicial review, a judicial review is not a statutory appeal procedure so this factor favours stronger procedural protection. Furthermore, the third *Baker* factor states that the more important a decision is to the lives of those affected and the greater its impact on that person or persons, the more stringent the procedural protections mandated (at para 25). This factor favours at least a moderate amount of procedural protection because the Decision concerns whether a decision-maker is properly complying with a modern treaty and a constitutionally protected right to special consideration under Article 15.3.7, which has significant impact on the treaty members.

[96] At minimum, the duty of fairness consists of the right to be heard and the right to an impartial hearing (*Therrien (Re)*, 2001 SCC 35). The Applicants submit that the duty of fairness should consist of the requirement to provide a chance to respond to allegations against them prior to the Decision, which was the allegation that the Mi'kmaq Coalition invited Nunavut companies to participate in the purchase but they declined. The Applicants cite *Supermarchés* in support of this point that the Minister’s failure to afford the Applicants an opportunity to respond to allegations against them breaches a fundamental principle of natural justice.

[97] While I agree that the Applicants should have more than minimal procedural protections, the Applicants are seeking to encompass the right to respond to allegations within the right to be heard. Clearwater distinguishes *Supermarchés* because the case involved a trial-like penal process. I agree with Clearwater that *Supermarchés* speaks generally of the right to be heard and specifically the procedural protections that may be owed when making a decision of a judicial nature. While the right to be heard can encompass the right to respond to allegations, it is more appropriate where there is a high level of procedural fairness owed such as trial-level protections. It would not be appropriate here given the nature of the Decision and the non-adversarial administrative process followed. As such, the Minister did not owe the Applicants an opportunity to respond to the impugned comment.

[98] In any event, considering the matter as a whole, I find that the Minister met the procedural fairness requirements. The Applicants do not take issue with the procedural fairness aspects of the Decision aside from the right to respond to allegations, so I will address this briefly. The Applicants had the opportunity to be heard because the Respondents specifically provided notice of and sought the Applicants' input on the Transaction, the Minister and DFO staff held meetings or had calls with the Applicants, and the Applicants provided written representations on their positions.

[99] The Applicants focus their written submissions on an alleged breach of procedural fairness that requires a duty of fairness at the high end of the spectrum. As stated above, the duty of fairness owed is beyond a minimal standard. For the reasons set out above, the Decision was rendered in a procedurally fair manner.

VII. Remedy

[100] At the hearing, the Applicants urged the Court to quash the Decision if the Court finds it unreasonable. However, the Applicants also submitted, for the first time, that the Court can tailor the remedy to the circumstances, including maintaining the status quo pending another ministerial decision on this matter (*Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680). On consent of the parties, I agreed to grant the Respondents time to file written sur-reply submissions in response to this submission.

[101] The Minister seeks dismissal or alternatively, remitting the matter to the Minister as delaying the effect of such order would have no beneficial effect and would not reduce that order's disruptive effect.

[102] Clearwater and FNC Quota both seek dismissal or alternatively, a declaration that clarifies the Minister's obligations under Article 15.3.7 to avoid the substantial prejudice to the private parties. Delaying the effect of the order would not mitigate the prejudice to the private parties.

VIII. Conclusion

[103] For the reasons above, I am allowing the application for judicial review and remitting the matter to the Minister for re-determination. The Minister's reasons are unjustifiable in light of the legal constraint of the Nunavut Agreement due to the Minister's failure to grapple appropriately with the special considerations of adjacency and economic dependency.

JUDGMENT in T-1362-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed because the Decision is unreasonable. The Decision is quashed.
2. The matter is remitted to the Minister for re-determination in accordance with these reasons.
3. The Decision was rendered in a procedurally fair manner.
4. The Applicants are awarded costs payable by the Respondent, Minister of Fisheries and Oceans.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1362-21
STYLE OF CAUSE:	NUNAVUT TUNNGAVIK INCORPORATED AND THE QIKIQTANI INUIT ASSOCIATION v THE MINISTER OF FISHERIES AND OCEANS, CLEARWATER SEAFOODS LIMITED, PARTNERSHIP, AND FNC QUOTA LIMITED PARTNERSHIP.
PLACE OF HEARING:	IQALUIT, NUNAVUT
DATE OF HEARING:	OCTOBER 16-18, 2023
JUDGMENT AND REASONS:	FAVEL J.
DATED:	APRIL 26, 2024

APPEARANCES:

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