

Court File No.

FEDERAL COURT

B E T W E E N :

NUNAVUT TUNNGAVIK INCORPORATED and the QIKIQTANI INUIT ASSOCIATION

Applicants

And

The MINISTER OF FISHERIES AND OCEANS

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED BY THE APPLICANTS. The relief claimed by the Applicants appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicants. The Applicants request that this application be heard at Iqaluit, Nunavut.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any document in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules*, and serve it on the Applicants' solicitor, or where the Applicants are self-represented, on the Applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGEMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date _____ Issued by _____

(Registry Officer)

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APPLICATION

1. This is an application for judicial review of the decision of the Minister of Fisheries and Oceans, Government of Canada (the “**Minister**”) approving the reissuance of Greenland Halibut (turbot) and Northern shrimp fishing licenses in the Northwest Atlantic Fisheries Organization (“**NAFO**”) Subarea 0, Division 0B waters adjacent to the territory of Nunavut, including but not limited to licences numbered 11267, 25784, 11267, 25784 and 142081 (the “**Licences**”), from Clearwater Seafoods Incorporated (“**Clearwater**”) to FNC Quota Limited Partnership (the “**Decision**”).

THE APPLICANTS MAKE APPLICATION FOR:

2. An order in the nature of *certiorari* quashing the Decision;
3. A declaration that the Decision was unreasonable;
4. An order setting aside the Decision and remitting this matter to the Minister to be determined in accordance with this Court’s reasons;
5. Directions concerning the redetermination, in the event that the matter is remitted back to the Minister;
6. An order for costs of and incidental to this application; and,
7. Such further and other relief as this Court may deem appropriate and just.

THE GROUNDS FOR THE APPLICATION:

PART 1: Factual Background

The Parties

The Applicants, Nunavut Tunngavik Incorporated and Qikiqtani Inuit Association

8. NTI and QIA represent the interests of the Inuit of Nunavut generally (with respect to NTI) and within the region impacted by the Decision (with respect to QIA). Through the Nunavut Agreement and their own self-governance structures, NTI and QIA are mandated to represent Inuit rights and interests, to work with territorial and federal governments on issues impacting Inuit, and to administer certain programs for the benefit of Inuit, including with respect to fisheries.
9. NTI represents Inuit from all of the three regions of Nunavut – the Qikiqtani, Kivalliq, Kitikmeot – at a territorial and national level. It plays a central role in administering and implementing the Nunavut Agreement.
10. QIA represents the interests of Inuit within the Qikiqtani region, where over half of all Inuit of Nunavut reside. QIA works on issues impacting Inuit in that region, including with respect to fisheries.

The Respondent, the Minister of Fisheries and Oceans

11. The Minister is responsible for the management and control of fisheries in Canada. She is empowered to act pursuant to the *Fisheries Act*, RSC 1985, c F-14, and associated regulations and policies to the extent that they are consistent with Canada's constitutional and Treaty obligations, as well as the Honour of the Crown.

The Nunavut Agreement

12. The Nunavut Agreement is a modern Treaty. It was ratified in 1993. Among other terms, that agreement created the Nunavut territory by establishing the "Nunavut Settlement Area," which extends 12 miles out from Nunavut's coastline into the territorial sea.

13. Aboriginal rights affirmed by s. 35 of the *Constitution Act, 1982* held by Inuit outside the Nunavut Settlement Area were not diminished or extinguished by the Nunavut Agreement. Inuit also possess Treaty rights and interests outside of the Nunavut Settlement Area, as specified in the Nunavut Agreement.
14. With respect to fisheries outside of the Nunavut Settlement Area, Article 15.3.7 of the Nunavut Agreement provides that:

[The Government of Canada] 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.
15. Pursuant to section 1.1.1 of the Nunavut Agreement:
 - a. Zone I means those waters north of 61°E latitude subject to Canada's jurisdiction seaward of the Territorial Sea boundary, as measured from lines drawn pursuant to the Territorial Sea Geographical Coordinates (Area 7) Order SOR/85-872 that are not part of the Nunavut Settlement Area or another land claim settlement area; and,
 - b. Zone II means those waters of James Bay, Hudson Bay and Hudson Strait that are not part of the Nunavut Settlement Area or another land claim settlement area.

Regulatory Framework for Fisheries Adjacent to Nunavut

Jurisdictional Overview

16. In the Northwest Atlantic Ocean, including in and around Nunavut, the waters are administratively divided pursuant to the *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, Can. T.S. 1979 No. 11, art. II (of which Canada is a signatory).
17. As represented in Appendix A, the waters immediately to the east of Nunavut are classified as Subarea 0, and the waters immediately to the west of Greenland are classified as Subarea 1. The boundary between Subareas 0 and 1 runs along the equidistant points between Greenland and Canada, such that the waters are equally divided. Within their adjacent subarea waters, each state enjoys certain exclusive economic benefits and activities, including with respect to fisheries.
18. Subarea 0 covers the entire eastern coastline of Nunavut. It starts north of Grise Fiord on Ellesmere Island, and extends south towards the northern tip of Labrador. The bottom of Subarea 0 aligns with the southernmost border of the Nunavut Settlement Area.
19. Subarea 0 is managed by Canada with assistance from the NAFO (an intergovernmental body of which Canada is a member).
20. Subarea 0 is further divided by NAFO into two divisions, with a border at 66°15'N latitude (roughly in line with Pangnirtung): Division 0A in the north (Baffin Bay) extending to 78°10'N latitude, and Division 0B in the south (Davis Strait) extending to 61°00'N latitude.
21. Subarea 0 includes Zone I as defined in the Nunavut Agreement but not Zone II.
22. Marine fisheries in Canada are primarily regulated by the *Fisheries Act* and its regulations and policies. While this legislation has not been amended to fully reflect the Nunavut Agreement, the Government of Canada is bound by its obligations under the Nunavut Agreement, including Article 15.3.7.

Ministerial Control over Commercial Fisheries Licencing

23. Commercial fishing licenses are one of the main regulatory vehicles for fisheries in Canada. A fishing licence grants permission to access a fishery and defines the terms of entry, including the allocation of allowable harvest within the fishery. A licence-holder acquires a limited privilege to fish, but not a permanent or absolute right. Licence-holders have no automatic rights of transfer.
24. Pursuant to s. 7 of the *Fisheries Act*, the Minister retains discretionary control over commercial fishing licences, including the granting, issuance and transfer of those licenses. That discretion is curtailed by the general principles of administrative decision-making, the Minister's constitutional and legal obligations (including obligations under s. 35 of the *Constitution Act, 1982* and the Nunavut Agreement), and DFO policies.

Historic and Ongoing Inequities in Nunavut Fisheries

25. Since the ratification of the Nunavut Agreement, and continuing today, Nunavummiut and Nunavut entities have held a disproportionately low interest in the commercial fisheries in NAFO Subarea 0 / Zone I, and especially in Division 0B. Today, Nunavut-based enterprises hold only about 50% of the quota allocations for the fisheries in adjacent waters – a stark contrast to the Atlantic coast provinces, where close to 90% of allocations are held by entities in adjacent provinces.
26. The disproportionately low nature of the Nunavummiut interest in Nunavut-adjacent fisheries has been acknowledged by the federal government on a number of occasions, including by the DFO in the 2002 Independent Panel on Access Criteria Report and in a 2009 Senate Committee on Fisheries and Oceans Report.
27. In 2009, this Court recognized the distinct challenges that Inuit of Nunavut face in entering the fisheries. It directed the DFO to develop a policy to implement Article 15.3.7: *Nunavut Wildlife Management Board v Canada (Minister of Fisheries &*

Oceans), 2009 FC 16 at paras 28, 106, 114-118. To date, no such policy has been released.

28. On multiple occasions since the ratification of the Nunavut Agreement, Nunavut stakeholders, including the applicants, the Government of Nunavut, and the Nunavut Wildlife Management Board have expressed the positions that:
 - a. Nunavummiut and Nunavut entities hold a disproportionately low proportion of Nunavut-adjacent fishery allocations and licenses;
 - b. That proportion needs to be increased to reflect Inuit s. 35 rights, Article 15.3.7 of the Nunavut Agreement, and general administrative decision-making principles;
 - c. Any Ministerial decisions regarding both fisheries allocations and licenses, including but not limited to the reissuance or transfer of existing licenses or allocations, must take these considerations into account; and,
 - d. To be reasonable, given the importance of Article 15.3.7 and the nature of the delay, such decisions must prioritize Nunavut fisheries.

The Decision

29. For many years prior to 2020, Clearwater – a Nova Scotia based company – held a large portion of the fishing licenses and allocations within Nunavut-adjacent waters for Greenland Halibut (turbot) and Northern shrimp, including in Zone I.
30. In March 2020, Clearwater announced that it was considering a sale of the company. Given the large state of Clearwater’s holdings, such a sale offered a unique opportunity for Inuit of Nunavut to be allocated something closer to their proportionate holding of fishery licenses in Zone I.

31. In March 2020, the Government of Nunavut, NTI and QIA wrote a joint letter to the Minister expressing interest in working with the federal government to develop a plan through which Nunavut fishers could acquire Clearwater's Greenland halibut and shrimp quotas and licenses in Zone I. The Government of Nunavut, NTI and QIA sent a follow-up letter in May 2020. Those letters received no response.
32. QIA also directly raised the issues of inequity and licence repatriation with the Minister on June 26, 2020 in a telephone call, and again in letters from July and September 2020.
33. In November 2020, Clearwater reached a deal in which Premium Brands Holdings Corporation, a BC-based company, and a coalition of Mi'kmaq First Nations (operating as FNC Holdings Limited Partnership), would acquire joint and equal ownership of Clearwater. That deal was finalized in January 2021.
34. In or around the same period, the DFO received a request to approve the transfer of the Licenses previously held by Clearwater to FNC Quota Limited Partnership, an associated entity of FNC Holdings Limited Partnership owned by the same coalition of Mi'kmaq First Nations.
35. On February 17, 2021, the Minister sent a letter to the Government of Nunavut, NTI and QIA seeking their input on the transfer of the Licences.
36. On March 15, 2021, the Government of Nunavut, NTI and QIA responded by setting out their position that given the historic inequities and in accordance with Article 15.3.7, Greenland halibut and shrimp licences in the waters adjacent to Nunavut should be allocated to Qikiqtani Inuit communities.
37. The Minister did not engage in any further discussion or information-sharing with the applicants until the Decision.

38. On August 3, 2021, the applicants received a brief letter from DFO Deputy Minister Timothy Sargent advising them of the Decision. That letter constitutes the sole reasons communicated to the applicants. Besides one sentence stating that the Minister had considered Article 15.3.7, the letter provides no further content regarding either how Article 15.3.7 or Inuit rights were considered, or any other considerations that contributed to the Decision.

PART 2: Legal Basis

39. The Decision should be set aside as it was made in a procedurally unfair manner and is incorrect or, in the alternative, unreasonable.

Decision Process was Unfair

40. Given the importance of the Decision to the applicants, the modern Treaty obligations imposed by Article 15.3.7, s. 35 of the *Constitution Act, 1982* and the Honour of the Crown, as well as the legitimate expectations of the applicants that the Minister would follow a robust process, the applicants were entitled to a high degree of procedural fairness. That duty included, but was not limited to, a high degree of participatory rights and detailed written reasons.
41. The Minister failed to provide the requisite degree of procedural fairness by:
- a. Providing a process that afforded the applicants only minimal participatory rights;
 - b. Failing to develop and implement a policy for making the Decision as mandated by this Court in 2009; and,
 - c. Failing to provide adequate written reasons.

42. In the alternative, even if the duty of procedural fairness owed to the applicants fell at the lower end of the spectrum, the decision-making process still did not meet the procedural fairness requirements.
43. In the further alternative, the Decision was procedurally unfair because the Minister owed and failed to discharge the duty to consult pursuant to s. 35 of the *Constitution Act, 1982*, because the Decision had the potential to negatively impact the Aboriginal and Treaty rights of Qikiqtani Inuit.

Decision was Incorrect and Unreasonable

44. Although Ministerial decisions regarding fishing license transfers are generally subject to a reasonableness review, the Decision must be reviewed on a correctness standard as it engages the scope of Aboriginal and Treaty rights under s. 35 of the *Constitution Act, 1982*.
45. Regardless of the standard of review, the Decision was both incorrect and unreasonable because it:
 - a. Failed to give special consideration to the principle of adjacency and Canada's obligations under Article 15.3.7 of the Nunavut Agreement, especially given the history of delay in implementing Article 15.3.7 and the perpetuation of the disproportionately small nature of Nunavut Inuit fisheries holdings; and, accordingly,
 - b. Failed to uphold the Honour of the Crown.

Request for Materials in the Possession of the Minister and DFO

46. Pursuant to Rule 317 of the Federal Courts Rules, the applicants request that the respondent provide a certified copy of all material in its possession that is relevant to the application, including but not limited to:

- a. All information, advice and/or submissions considered by the Minister when making the Decision;
- b. All information, advice and/or submissions provided by any federal or territorial departments or agencies regarding the approval of reissuing fishing licences in waters adjacent to Nunavut and Qikiqtani Inuit communities and the Decision; and
- c. Relevant communications, including but not limited to communications between (i) the respondents and the applicants, (ii) any of the respondents and other federal government officials, and (iii) any of the respondents, territorial and provincial officials, regarding reissuing fishing licences in waters adjacent to Nunavut and Qikiqtani Inuit communities and the Decision.

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THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIALS:

1. The Affidavit of Jeff Maurice, to be affirmed;
2. The Affidavit of Rosanne D'Orazio, to be affirmed;
3. Such further and other materials as counsel may advise.

Dated: September 1, 2021

Signature of Counsel for the Applicants

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APPENDIX A

