

FEDERAL COURT

BETWEEN

KRISTA MITCHELL, HERMAN VOISEY, FRAZER RICH, NATASHA RICH, RORY ALLEN and DARRYL FLOWERS

APPLICANTS

and

THE NUNATSIAVUT ASSEMBLY

RESPONDENT

NOTICE OF APPLICATION

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985 and Rule 301 of the *Federal Court Rules*, SOR/98-106.

TO THE RESPONDENT

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears in the following pages.

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 Applicant. The Applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts 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, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date JUN 07 2024 Issued by ORIGINAL SIGNED BY
SVETLANA DOBROTA
A SIGNÉ L'ORIGINAL
(Registry Officer)

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APPLICATION

This is an application for judicial review in respect of:

1. The decision of the Nunatsiavut Minister of Lands and Natural Resources (the "Minister") to allocate the entirety of the available 43% of communal shrimp allocations in Shrimp Fishing Areas numbered four and five of the Labrador Inuit Settlement Area to a designate for harvesting by way of an off-shore factory-freezer trawler (the "2024 Allocation Decision").

PART I – RELIEF SOUGHT

THE APPLICANTS MAKE AN APPLICATION FOR:

1. The following declarations:
 - a. That the 2024 Allocation Decision is unlawful and/or unreasonable because it:
 - i. Fails to comply with the Nunatsiavut Government's Commercial Fishery Designation Policy ("CFDP");
 - ii. Was made without consideration of all relevant factors including the objectives in the Integrated Fisheries Management Plan ("IFMP") and
 - iii. Was made without requisite administrative and procedural fairness.
2. An order:
 - a. Quashing the 2024 Allocation Decision;
 - b. Requiring the Minister to reconsider the 2024 Allocation Decision;
 - c. Granting costs in favour of the Applicants; and
 - d. Such further relief as counsel may advise and this Court may permit.

PART II – GROUNDS FOR APPLICATION

A. Factual and Procedural Background

2. On December 1, 2005, the Nunatsiavut Government was formed via the signing of the Labrador Inuit Land Claims Agreement. This Agreement further established the Labrador Inuit Settlement Area (the "LISA") and the Labrador Inuit Lands. The LISA consists of 72,520km² of land and an adjacent ocean area of 45,690km². The Agreement outlines conditions for individuals who hunt, trap and fish within the LISA.

3. The Department of Fisheries and Oceans ("DFO") subsequently issued an Integrated Fisheries Management Plan (the "IFMP") which contemplated the allocation of a certain percentage of the total quota to the Nunatsiavut Government of shrimp within Shrimp Fishing Areas (the "SFA") numbers four and five in Newfoundland and Labrador.

4. The shrimp allocations contemplated by the IFMP were then implemented by allocation to a communal commercial licence issued to the Nunatsiavut Government under the *Aboriginal Communal Fishing Licences Regulations*, S.O.R./93-332.

6. In 2021, the Nunatsiavut Government implemented a Commercial Fishery Designation Policy (the "CFDP") which governs the internal allocation to community members of fishing quotas granted by DFO to the Nunatsiavut Government for several marine species, including shrimp.

7. The stated purposes of the CFDP are to maximize economic development in the LISA through commercial fishery, and to establish an open, transparent, and fair process to determine who ought to be a beneficiary and receive allocations under the Nunatsiavut communal-commercial fishing licences. Given the isolation of communities within the LISA, the commercial fishery is one of the most viable options for employment and economic opportunities.

8. The CFDP prioritizes the interests of beneficiaries who are resident in the LISA. The CFDP was developed in accordance with a resolution made by the Nunatsiavut Executive Council, which provides that one hundred percent of the Nunatsiavut Government's communal-commercial fishing designations will be harvested by registered vessels owned by beneficiaries resident in Nunatsiavut, within fifteen years of the implementation of the CFDP.

9. Under the CFDP, allocations may be granted on an annual basis or on a multiyear basis. However, multiyear applications are prioritized over annual applications.

The Applicants

10. The Applicants have been inshore Inuit Northern Shrimp Harvesters for numerous years as beneficiaries under the LISA:

- a. Krista Mitchell, who previously held allocations for approximately 21 years;
- b. Herman Voisey, who previously held allocations for approximately 7 years;
- c. Frazer Rich, who previously held allocations for approximately 21 years;
- d. Natasha Rich, who previously held allocations for approximately 6 years;
- e. Rory Allen, who previously held allocations for approximately 6 years; and
- f. Darryl Flowers, who previously held allocations for approximately 21 years.

11. The Applicants have consistently received and fished annual allocations of quota under the community's communal fishing license, and they, their families, and at least two dozen crew members have come to rely on these annual quota allocations.

B. The 2024 Allocation Decision

12. In previous years, allocations under Shrimp Fishing Areas four and five have been divided amongst several Nunatsiavut residents, including the Applicants.

13. On or about May 9, 2024, the Applicants received notice of the 2024 Allocation Decision.

14. Under the 2024 Allocation Decision, the entirety of the available 43% of communal shrimp allocations was awarded to a single designate (the "Designate"), stripping the Applicants of their long-standing annual allocations.

15. The Designate who received the 43% intends to harvest shrimp by way of a factory-freezer trawler, operating primarily off-shore by non-community members.

16. Further, the Designate is a former Fisheries Minister in the Nunatsiavut Government and is backed by interests in the offshore sector. The current Fisheries Minister is also the Designate's brother-in-law.

C. The 2024 Allocation Decision Is Unlawful and/or Unreasonable

17. The 2024 Allocation Decision is unlawful and/or unreasonable because it:

- a) Fails to comply with the Nunatsiavut Government's Commercial Fishery Designation Policy ("CFDP");
- b) Was made without consideration of all relevant factors including the objectives in the Integrated Fisheries Management Plan ("IFMP") and
- c) Was made without requisite administrative and procedural fairness.

(i) The 2024 Allocation Decision fails to comply with the Nunatsiavut Government's Commercial Fishery Designation Policy

18. The 2024 Allocation Decision fails to comply with the CFDP, is inconsistent with its purposes, and does not consider the relevant factors outlined in the policy.

19. The stated purpose of the CFDP is "to establish an open, transparent, and fair process to determine Beneficiary access and allocations... to Nunatsiavut's communal-commercial fishing licenses."

20. The CFDP also recognizes that as Nunatsiavut is a small region, and is an important guarantee of independence of evaluations to avoid bias and other conflicts of interest.

21. The process used in respect of the 2024 Allocation Decision was neither open, transparent, nor fair. The process was also tainted by a reasonable apprehension of bias, contrary to the CFDP.

22. The CFDP sets out the following principles to guide the allocation of Nunatsiavut's commercial-fisheries resources:

- a. The fisheries are broadly recognized as a renewable resource to help build a sustainable economy for the benefit of Labrador Inuit;
- b. The allocation of fisheries access must be conducted openly, transparently, and fairly;
- c. The primary goal is to maximize employment for beneficiaries resident within the LISA, and a secondary consideration is the employment of beneficiaries who are not resident in the LISA. The other considerations are ranked as follows:
 - i. Beneficiaries who are registered-vessel owners and are resident in the LISA;

- ii. Beneficiaries resident in the LISA who are fishers, plan to become vessel owners, and have instead entered into a Cooperative Arrangement or Lease-to-Own Arrangement;
 - iii. Beneficiaries who are vessel owners but are not resident in the LISA;
 - iv. Beneficiaries who are not resident in the LISA and are not vessel owners.
- d. Multiyear designations will be prioritized over annual designations to encourage business planning and help ensure the return on investment for vessel owners;
 - e. There is a need to give special consideration to enterprises that create employment opportunities for other beneficiaries, and/or other benefits to beneficiaries, and/or to Nunatsiavut as a whole;
 - f. There is a need to give special consideration to economically viable fishing enterprises and beneficiaries that have a successful and verifiable history in a particular fishery.

23. The CFDP also provides that to achieve the stated goals of the policy, there must be a balance between creating opportunities for new vessel owners and ensuring established vessel owners are able to make returns on their investment.

24. The 2024 Allocation Decision did not take these relevant factors into consideration.

(ii) The 2024 Allocation Decision was made without consideration of all relevant factors including the objectives in the IFMP

25. The 2024 Allocation Decision was made without consideration of all relevant factors including the objectives in the IFMP. The allocations and communal license are granted to the Nunatsiavut Government for specific purposes, which are expressed within the IFMP.

26. The current iteration of the IFMP expresses the long-term objectives of maximizing economic benefits, promoting sustainable fishing practices, and providing fair access to and equitable sharing of the Northern shrimp resource.

27. The Minister did not adequately consider these purposes in deciding to award the entire available 43% allocation to a single designate who intends to harvest shrimp by way of a factory-freezer trawler, operating primarily off-shore by non-community members.

(iii) The 2024 Allocation Decision was made without requisite administrative and procedural fairness

28. The 2024 Allocation Decision was made without the requisite degree of procedural fairness.

29. No advance notice of the 2024 Allocation Decision was provided to Applicants.

30. Further, there has not been adequate communication and consultation with the Applicants on the 2024 Allocation Decision or its rationale.

31. The following criteria are relevant to determining the content of the duty of fairness in particular circumstances:

- a. The nature of the decision being made and the process followed in making it;
- b. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- c. The importance of the decision to the individual or individuals affected;
- d. The legitimate expectations of the person challenging the decision; and
- e. The choices of procedure made by the agency itself.

Baker v. Canada, [1999] 2 SCR 817 ("*Baker*") at paras. 23-27

32. The Applicants were entitled to a high degree of procedural fairness in the circumstances, including advance notice of the 2024 Allocation Decision, disclosure of the information relied on by the Minister, and fulsome reasons for the decision.

33. A high degree of fairness was warranted due to the nature of the decision, the importance of the decision to the Applicants, the choices of procedure made by the agency, and the Applicants' legitimate expectations that the principles in the CFDP would be followed.

34. A higher degree of procedural fairness is required for decisions that are judicial or quasi-judicial in nature.

Baker at para. 23

35. The decision in this case involved adjudication of applications by the Fishery Review Committee ("FRC"), which then submitted its recommendations for final Ministerial approval.

36. Courts have found similar processes, by which a decision-maker must evaluate applications according to certain objective criteria, before rendering a decision that affects the rights and obligations of the applicants, to be quasi-judicial.

Bingo City Games Inc. et al v. B.C. Lottery Corp. et al,
2005 BCSC 25 at paras. 198-199

37. Alternatively, as an administrative licensing decision it required a high degree of procedural fairness.

Shelburne Elver Limited v. Canada, 2023 FC 1166 at paras. 31-33 and 45

38. A high standard of justice is required when the right to continue in one's profession or employment is at stake.

Kane v. Board of Governors of UBC, [1980] 1 SCR 1105 at p. 1113

39. The 2024 Allocation Decision has a significant negative impact on the Applicants. It is highly prejudicial to the Applicants, their families, and at least two dozen crew members who will lose their employment as a result of the decision.

40. Having consistently received and fished annual allocations of quota under the communal fishing license for a number of years, the Applicants, their families and at least two dozen crew members have come to rely on the annual quota allocations.

41. The Applicants must now resort to releasing vessels and other equipment as there has not been enough allocations to sustain sufficient business.

42. There are limited work opportunities available to the Applicants because of the remoteness of the areas in which they live.

43. The choices of procedure made by the agency also favour a high degree of procedural fairness.

44. The allocation process under the CFDP entails a merit-based process of adjudicating applications by the FRC and the Minister, and transparent communication to the applicants regarding the result.

- a. At the first stage, the FRC reviews objective factors to determine eligibility and ranks the applicants according to certain assessment criteria.
- b. Once the FRC has formulated its recommendations, these are submitted to the Deputy Minister, who can comment on decisions by the FRC and will pass these recommendations to the Minister for final approval.

- c. Once the Minister has reviewed and approved of the FRC's designations, these decisions must be communicated to all applicants in a publicly available general letter to applicants, with the final scores of each applicant, the FRC's evaluation comments, and the rationale for the designation communicated to each applicant confidentially in an appendix to the general letter.
- d. Applicants deemed ineligible will receive a confidential explanation of which criterion they did not meet and the notice of designations.

45. Further, the Applicants had a legitimate expectation that the processes and principles of openness, transparency, and fairness, expressly outlined in the CFDP, would be followed.

Bias and Conflict of Interest

46. Procedural fairness includes the right to a decision made by an impartial decision-maker, free from a reasonable apprehension of bias. It is through the concept of reasonable apprehension of bias that the common law of procedural fairness addresses alleged conflicts of interest.

Oleynik v. Canada (Attorney General), 2020 FCA 5 at para. 54

47. In *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at p. 394, Justice DeGrandpré expressed the test for bias as follows:

“...the apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is ‘what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.’”

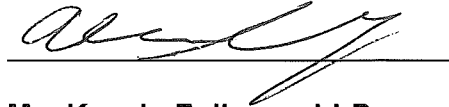
48. The 2024 Allocation Decision raises a reasonable apprehension of bias and a conflict of interest, given that the Designate is a former Fisheries Minister in the Nunatsiavut Government, and the current Fisheries Minister is the Designate's brother-in-law.

PART III – MATERIALS IN SUPPORT OF THE APPLICATION

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- a. Evidence to be provided.

Date: June 6, 2024



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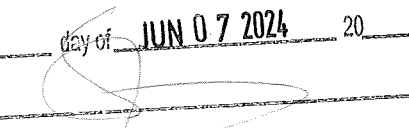
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I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of JUN 07 2024 A.D. 20 _____

Dated this _____ day of JUN 07 2024 20 _____



SVETLANA DOBROTA
REGISTRY OFFICER
AGENT DU GREFFE