| Federal Court | | Cour fédérale |
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**Date: 20090107**

**Docket: T-426-08**

**Citation: 2009 FC 16**

**Ottawa, Ontario, January 7, 2009**

**PRESENT: The Honourable Mr. Justice Kelen**

**BETWEEN:**

**NUNAVUT WILDLIFE MANAGEMENT BOARD**

**Applicant**

**and**

**MINISTER OF FISHERIES AND OCEANS,**
**BARRY GROUP INCORPORATED,**
**SEAFREEZ FOODS INC.,**
**CLEARWATER SEAFOOD LIMITED PARTNERSHIP, and**
**LABRADOR FISHERMEN'S UNION SHRIMP COMPANY**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant, the Nunavut Wildlife Management Board (NWMB), seeks judicial review of a decision dated January 30, 2008 by the respondent Minister of Fisheries and Oceans approving the permanent re-allocations of 1900 metric tonnes of quota for turbot for the offshore fisheries areas adjoining the marine areas of the Nunavut Settlement Area (NSA).

[2] The respondent Minister approved the transfer of the quota allocation from the respondent Seafreez Foods Inc., owned by the respondent Barry Group Incorporated, to the respondents Clearwater Seafood Limited Partnership and Labrador Fisherman's Union Shrimp Company. These later companies paid the Barry Group $10 million and $1.8 million respectively for the quota transferred.

[3] This application seeks to set aside the approval of the transfers because the Minister did not honour Canada's treaty obligations under the *Nunavut Land Claims Agreement* (NLCA or Settlement Agreement) to consult with the applicant and give Nunavut interests "special consideration" and "fair consideration" when re-allocating quota adjacent to the NSA.

**FACTS**

The Nunavut Land Claims Agreement

[4] In 1993, the Inuit of the NSA and Canada executed the NLCA, which was ratified by Parliament in law pursuant to the *Nunavut Land Claims Agreement Act,* S.C. 1993, c. 29. In exchange for the rights and benefits set out in the NLCA, the Inuit agreed to surrender all their aboriginal claims, rights, title and interest in and to lands and waters anywhere within Canada and adjacent offshore areas.

[5] The Preamble to the 1993 Settlement Agreement sets out the following background facts, amongst others:

- Canada recognizes existing Aboriginal rights and is prepared to enter into treaties with Aboriginal peoples to affirm those rights;
- Canada desired to negotiate a Settlement Agreement with the Inuit whereby the Inuit would receive defined rights and benefits in exchange for surrender of their land claims and assertion of an Aboriginal title; and
- Canada recognized the contributions of the Inuit to Canada's sovereignty in the Arctic.

The Court notes that Canada's right to allocate fishing quota in the North Atlantic Ocean off the coast of the Nunavut emanates from Canada's sovereignty in the Arctic, which relates to the Inuit presence in the area.

[6] Under the NLCA, a number of land, water and resource management tribunals were created. These tribunals operate as institutions of public government and are composed of an equal number of Inuit and government appointees.

[7] The NCLA has the following objectives:

1) to provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore;

2) to provide Inuit with wildlife harvesting rights and rights to participate in decision-making concerning wildlife harvesting;

3) to provide Inuit with financial compensation and means of participating in economic opportunities; and

4) to encourage self-reliance and the cultural and social well-being of Inuit.

The Applicant

[8] The NWMB is a public institution created under the NLCA. It is based in Iqualuit, Nunavut, and is composed of nine members; four appointed by each of the four Designated Inuit Organizations; four appointed by the Governor-in-Council on the advice of the Minister; and one appointed by the Commissioner-in-Executive-Council. The NWMB is the main instrument of wildlife management in the NSA and the main regulator of access to wildlife. It exercises authority in the marine environment adjacent to the NSA, including Division 0B, where the turbot reallocations that are the subject of this application took place.

The Respondents

[9] The applicant named five respondents in this case: the Minister of Fisheries and Oceans, and the companies Barry Group Incorporated (Barry Group), Seafreez Food Inc. (Seafreez), Clearwater Seafood Limited Partnership (Clearwater), and Labrador Fishermen's Union Shrimp Company (Labrador Shrimp Co.). Three of the respondents made submissions before this Court: the Minister, and the two companies that acquired quota allocations in the relevant transfers, Clearwater and Labrador Shrimp Co.

Clearwater

[10] Clearwater is a limited partnership through its previous legal incarnations and has been fishing for turbot in Division 0B since the early 1990s under the "Ground Fish Development

Program." Through joint-venture agreements with the Inuit, Clearwater trained Nunavut fisherman with the necessary skills and experience to operate fishing vessels in the Arctic waters.

[11] Clearwater entered an agreement to purchase 1,650t of turbot quota from Seafreez for $10 million in 2007. After doing its due diligence, Clearwater did not identify any claims or other obstruction by any parties in Nunavut, including the applicant, to such a transfer. The Minister approved this transfer in his January 30, 2008 decision.

Labrador Shrimp Co.

[12] Labrador Shrimp Co. is a co-operative of 400 fishermen of southern Labrador, which historically have fished a portion of the Division 0B turbot quota and, pursuant to the Minister's January 30, 2008 decision, purchased 250t of the turbot quota in Division 0B from Seafreez.

[13] The general manager for the Labrador Shrimp Co., Mr. Gilbert Linstead, deposed in an affidavit that no notice, constructive or otherwise had been received from any party, particularly the applicant, that they had any objection to the transfer. In his affidavit, Mr Linstead testified about the history of temporary transfers between the parties for the turbot quota in Division 0B and about the "undue hardship", which the Labrador Shrimp Co. would incur if the transfer is set aside.

Barry Group and Seafreez

[14] The respondents Barry Group and Seafreez were not represented at the hearing. Seafreez, which owned the quota that was transferred to Clearwater and Labrador Shrimp Co., was purchased by Barry Group.

Relevant Marine Areas

[15] The relevant marine areas in this case are defined in three separate ways:

1. under the Nunavut Land Claims Agreement;
2. under the Northwest Atlantic Fisheries Organization Convention; and
3. under the NSA waters referred to the NLCA.

[16] The definitions section of the NLCA defines "Zone I" as the waters of Davis Strait and Baffin Bay north of 61° latitude subject to Canada's jurisdiction seaward of the Territorial Sea boundary.

[17] The waters of the North Atlantic adjacent to Nunavut's Baffin Island contain Greenland halibut, commonly called "turbot", in sufficient numbers to sustain a commercial fishing industry. Canada shares the turbot stock with Greenland. It is managed on the basis of sub-areas established by the Northwest Atlantic Fisheries Organization (NAFO) through the *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries.* NAFO sub-area 0 is on the Canadian side of the line equidistant from Canada's and Greenland's 200-mile limits. Sub-area 0 is further divided into Division 0A in the north and Division 0B in the south. The Minister decides annually the Canada quota for Divisions 0A and 0B, and the allocation among different groups. The fishing

quotas allocated to the companies in this case are in the sub-area 0B of the North Atlantic international waters beyond Canada's 12 mile territorial sea to where Greenland controls the international waters.

[18] Sub-Area 0 also contains the NSA waters, which are waters on the landward side of the outer limit of the 12-mile territorial sea along the Nunavut coastline. Divisions 0A and 0B are outside the NSA waters. "Zone 1" in the NLCA refers to Divisions 0A and 0B minus the territorial waters, i.e. the NSA waters.

Affidavit Evidence of the Applicant

History of Consultations

[19] The evidence of the applicant consisted of the Affidavit of Mr. Michael D'Eça, the applicant's lawyer since 1995. Mr. D'Eça states that the respondent Minister has consistently sought the applicant's advice pursuant to section 15.3.4 of the Settlement Agreement on all decisions regarding the harvesting of fish in the North Atlantic off the shore of Nunavut. He provided nine examples in the current fiscal year when the respondent Minister sought the advice of the applicant with respect to issues involving the fishery. The issues on which the NWMB was consulted pursuant to Article 15.3.4 during the 2007-8 fiscal year include: the proposed establishment of Enterprise Allocations in the NAFO Division 0B competitive turbot fishery, guaranteeing a specific percentage of the formerly competitive allocation in order to reduce over-harvesting; the proposed *Fishery Management Plan Greenland Halibut NAFO Sub-area 0 2006-*

*2008*; and a proposal to develop a closed area in NAFO Division 0A for the preservation of deep sea corals and narwhal.

[20] The affidavit also discussed the “consultations” between DFO and the applicant leading to the Minister’s decision to approve the transfer of the quota allocations in this case. This evidence is referred to below. Mr D’Eça provided information on the development of the fishing industry in the relevant marine areas, which is set out below.

The NAFO Sub-Area 0 Turbot Fishery

[21] The Nunavut Inuit began fishing turbot in NAFO Division 0B, within the NSA, in 1985. Prior to 1990, the applicant states that Nunavut Inuit were virtually the only Canadian fishers to harvest turbot in Sub-Area 0. The Inuit did not have access to groundfish licenses, boats or financing, and fished in winter only using hand-held longline fishing gear.

[22] In 1990, the Minister established the “Groundfish Developmental Program” to encourage harvesting of underutilized groundfish stocks. The program provided access opportunities in Division 0B, primarily to existing groundfish license-holders owning vessels and with processing plants in their communities. These include the companies with company allocations in sub-area 0B. At the time, the Inuit had no licenses, vessels or processing plants.

[23] In 1990, 5,400t of turbot were allocated to southern fishers, and 6,600t to foreign countries in Division 0B. The Nunavut Inuit applied under the program and were allocated 500t for their

winter fishery. By 1994, the Total Allowable Catch ("TAC") for Division 0B had been reduced to 5,500t and the allocation to Inuit had climbed to 1,400t. That amount was raised by a further 100t in 1996, providing Inuit with a 27.3% share of the Division 0B TAC. In 2005, an additional 500t was allocated to the community of Pangnirtung, raising Nunavut's overall share in Division 0B to 33.3%.

Provincial access to fishery resource

[24] A Federal-Provincial Fisheries Committee Working Group was set up in 1995 to determine the provincial shares of groundfish from 1979-1991 in order to determine the historical resource access to the Atlantic Fishery by fishing enterprises. The report stated that adjacent fishers normally receive 80 to 95% of the allocations. With respect to the Northwest Territories (NWT) the report stated:

> A review of historic sharing of fisheries resources must also identify a circumstance when resources have not been shared. During the entire period of this historic shares model, access to groundfish resources, in both traditional species and un-exploited stocks, have been denied to NWT applicants on grounds of policy, management structures and exclusionary application criteria. (Applicant's Record, p. 33).

Nunavut access to fishery resource

[25] In 1995, the Minister established a 300t exploratory turbot quota for Nunavut fishers in Division 0A. This amount was increased to 4,000t in 2002, and rose to 6,500t by 2006.

[26] In June of 2001, the Minister established the Independent Panel on Access Criteria (IPAC) with the mandate to focus on issues governing access to particular fisheries. The IPAC Report, released in March 2002, stated:

> It is clear that Nunavut does not enjoy the same level of access to its adjacent fisheries as do the Atlantic provinces. The Panel is of the view that every effort must be made to remedy this anomalous situation. In keeping with the spirit of the Nunavut Land Claims Agreement Act and the fair and consistent application of the adjacency principle, <u>the Panel recommends that no additional access should be granted to non-Nunavut interests in waters adjacent to the territory until Nunavut has achieved access to a major share of its adjacent fishery resources</u>. (Applicant's Record, p. 34).
>
> (Emphasis added)

[27] The Minister formally accepted this recommendation in November 2002. The Minister's November 8, 2002 Response to the Report of the Independent Panel on Access Criteria for the Atlantic Coast Commercial Fishery states:

> This recommendation as it pertains to new access is accepted.
> …
> In 1997, as part of a 5-year turbot management plan, a commitment was made to allocate Nunavut 50% of any increase in Subarea 0 (either Division A or B) turbot quota. There have been two quota increases since then, both in Division 0A. Nunavut received 100% of these increases on both occasions, resulting in Nunavut having the major share of turbot (58%) in subarea 0 in 2002. Further increases will be provided within the spirit of this recommendation.
> …
> Fulfilment of this recommendation will not affect the current status of other participants in these fisheries. Other issues relating to Nunavut's share or allocation of fisheries resources adjacent to the Territory will be addressed through other processes

[28] Mr. D'Eça states that the OB quota allocated to the Nunavut Inuit is an insufficient quantity to form the critical mass necessary for vessel ownership by Inuit. The only alternative to vessel ownership is to enter into royalty charters with those who have their own vessels and crews. The Inuit receive a small fraction of what could be obtained if the catch were directly harvested and

processed by the Inuit themselves. The quota for the Inuit in 0B is currently too small to support Inuit fishers purchasing their own vessel and having their own crew.

Affidavit Evidence of the Respondent Minister

[29] The evidence of the Minister consisted of three affidavits:

1. Mr. Barry Rashotte, Acting Director-General of the Resource Management Directorate in the Department of Fisheries and Oceans;

2. Mr. Stefan Romberg, a Resource Management Officer with the Resource Management Directorate and until March 31, 2008, a Fisheries Management Biologist in the Central and Artic Region of the Department based in Iqualuit, Nunavut; and

3. Mr. Keith Pelley, the Acting Area Director, Eastern Artic Area, of the Department of Fisheries and Oceans.

I. Affidavit of Mr. Barry Rashotte

[30] Mr. Rashotte deposed that he is responsible for developing national policies on fishery management, fish licensing, and allocation of fishing quotas. He provided information relating the history of the turbot fishery in the Arctic waters between Nunavut and Greenland, the overall total allocable catch for the area and the historic allocation of the quota for the turbot fishery in the area. At the moment, Nunavut interests have 68% of the total Canadian turbot quota in areas 0A and 0B, not including the Nunavut settlement area, which is the 12 miles of the North Atlantic Ocean off the coast of Nunavut.

[31] Mr. Rashotte set out the comprehensive policy resulting from the history, which policy includes:

> 1. no new quota would be granted to non-Nunavut interests until the Nunavut has achieved access to a major share of the fishery resources adjacent to Nunavut;
>
> 2. as a result the Nunavut people have received 100% of all increases for turbot quotas in these areas since 2002; and
>
> 3. granting Nunavut interests all increases will “not affect the current status of other participants in these fisheries”.

[32] As a result, the increases in Canadian quota for turbot since 2002 has been given to Nunavut interests, and there has been no increase in the number of licences issued to non-Nunavut interests since that time. The other participants in the area 0B turbot fishery have not been affected and have maintained their historic quota allocations.

[33] Participants in the commercial fishery have historically been allowed to transfer, either on a temporary or permanent basis, their allocations for turbot. Such transfers have allowed for the “rationalization of the industry and more efficient operations”. Mr. Rashotte deposed at paragraph 26 that:

> … In 2006, the NWMB was consulted on those Guidelines (Atlantic Canada Ground Fish Transfer Guidelines).

[34] The approval of the Minister dated January 30, 2008 for the transfers of the turbot quota did not affect the overall quota allocation or add any new commercial fishing interest to the turbot fishery in Area 0B. Mr. Rashotte deposed at paragraph 30 that:

> The re-allocation decisions did not alter the ability of Nunavut interests to approach existing licence holders to seek arrangements to re-allocate turbot quota to Nunavut interest to the extent that such arrangements may be possible.

II. Affidavit of Stefan Romberg

Actual consultations with the applicant about the transfers in issue

[35] The deponent states that the request for the transfer from Seafreez to Clearwater was received on January 11, 2008. On January 15th he telephoned the Director of Fisheries of the Nunavut Government in response to which the Nunavut Government sent a letter opposing the transfer to non-Nunavut interests. The letter stated that only 27% of the Canadian turbot quota in Area 0B is currently allocated to Nunavut interests, and that transferring the quota to non-Nunavut interests does not address this inequity. The Government of Nunavut requested a special meeting with the Department of Fisheries and Oceans on this issue.

[36] Mr. Romberg also telephoned the applicant on the same date and left a voicemail message and requested the applicant's comments. Not having received a response, the next day the deponent sent an e-mail to the applicant asking for comments from the applicant. Again, the deponent did not receive any response and on January 17th spoke by telephone with the applicant. The applicant requested a "formal letter" requesting comments, which was sent the next day.

Actual consultations with the applicant on the "Draft Atlantic Canada Ground Fish Transfer Guidelines"

[37] The deponent consulted the applicant with respect to the abovementioned Guidelines for the quota allocation transfers for all fleets in the Atlantic areas including Area 0B. The deponent attended meetings on February 7th and 8th, 2006 with the Chairman of the applicant as well as two other members of the applicant's staff and requested comments on the draft Guidelines by the end

of April 2006. A further presentation from the Department of Fisheries and Oceans was made to the applicant at a public meeting of the applicant held in Nunavut on March 28th to 30th, 2006 on matters regarding the draft Guidelines for the transfer of quota. The deponent testifies at paragraph 13:

> … no comments or concerns were ever raised with the department by the (applicant) members or staff with respect to the Guidelines … dealing with "permanent transfers" of quota allocations within the greater-than 100-foot fleet sector. The Guidelines indicate that such transfers may be applied for "without restriction".

III. Affidavit of Keith Pelley

[38] Mr. Pelley deposes that on November 30, 2007 he telephoned Wayne Lynch, the Director of Fisheries and Sealing in the Nunavut Government about a transfer of permanent reallocation of turbot quota from Seafreez to the Labrador Shrimp Co. On the same day, the Nunavut Government objected to the transfer on the same basis as referred to above with respect to the transfer from Seafreez to Clearwater.

[39] The deponent also states that on November 30th, 2007 he telephoned the applicant about the transfer and asked for concerns or comments. No response was ever received from the applicant.

[40] Finally, the deponent states that the meeting on February 13, 2008, at which the applicant was informed of the Minister's decision to approve the transfers, was not scheduled for the purpose of consulting the applicant with respect to the Minister's decision, as the applicant contends. Mr. Pelley states at paragraph 6:

While the subject line of my e-mail states “Discussions with Nunavut on 0B transfers”, in fact the meeting had initially been scheduled with a number of interested parties including the Board in order to deal with another issue: the proposed conversion of 600 tonnes of competitive quota in Division 0B to enterprise allocations. My e-mail of January 24, 2008, simply confirms that the pre-arranged meeting of February 13, 2008, would go ahead, with the intention that the opportunity for “Discussions with Nunavut on 0B transfers” would also be provided. To the best of my recollection, I had no conversation with staff or Board members of the NWMB concerning that proposed agenda item prior to the February 13, 2008, meeting.

Decisions under review

[41] On January 30, 2008 an official for the Minister advised the respondent Barry Group Inc. in two separate letters that:

1. the Minister approved the Barry Group October 19, 2007 request for the transfer of 250t of 0B turbot company quota held by Seafreez to the Labrador Shrimp Company; and
2. the Minister approved the Barry Group January 11, 2008 request for the transfer of 1,650t of 0B turbot company quota held by Seafreez to the Clearwater Seafood Limited.

The Minister did not inform the applicant about these decisions or explain why the applicant's representations were rejected.

Consultations prior to decision on January 30, 2008

[42] In response to Mr. Pelley's November 30, 2007 telephone call to Mr. Lynch of the Nunavut government, Mr. Lynch wrote a letter to Mr. Rashotte that same day advising him of the concerns of the Nunavut government. The letter stated, *inter alia*:

> As you are aware, Nunavut interests are limited to a 27% share of the Canadian turbot quota in 0B, an unfair situation that continues to this day. Redirecting this quota to non-Nunavut interests does nothing to address this inequity; … if Seafreez or any other outside interest is looking to transfer or sell part of its entire quota in Nunavut waters, their first recipients and offers should be to Nunavut interests, until this inequity is addressed.
>
> The Government of Nunavut continues to request that DFO (the respondent Minister) respond to the numerous submissions made by the GN (Government of Nunavut), as well as addressing the recommendations of the Senate Standing Committee on Fisheries and Oceans, with respect to increasing Nunavut share of adjacent resources in 0B. Our position has been clearly outlined in several submissions, including the position paper on turbot.

[43] As noted above, Mr. Pelley telephoned the CEO of the applicant that same day to advise of the request for the transfer and asked if the applicant had any concerns. The CEO of the applicant said that he would have to discuss this issue with his staff and possibly have a discussion with the Board. Mr. Pelly deposed that no response was ever received from the applicant.

[44] As noted above, Mr. Romberg received a letter from the Nunavut government in response to his January 15, 2008, phone call, expressing the same concerns outlined in the November 30, 2007 letter.

[45] Mr. Romberg also telephoned the applicant that same day and, as stated above, eventually sent a formal letter to the applicant requesting its comments on January 18, 2008.

[46] The letter was signed by Mr. Rashotte and stated *inter alia*:

> As you know, Article 15.3.4 of the Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Agreement) requires the Government to “seek advice of the NWMB with respect to any wildlife management decisions in Zones I and II which would affect the substance and value of the Inuit harvesting rights and opportunities within the marine areas of the Nunavut Settlement Area.
>
> Therefore, I would appreciate if you could provide your comments on this request by January 21, 2008, so that a recommendation can be made to the Minister for his decision.

[47] The Court notes that January 18, 2008, the date of the letter was a Friday and the letter requested comments by January 21, 2008, which was the following Monday. The applicant

prepared a response letter over that weekend and delivered a letter to the Minister on January 21 which stated:

1. the Minister's decision is of great importance to Nunavut whose offshore turbot allocation in 0B remains at 27% or 1500 t, 400 t less than the proposed transfer;
2. Nunavut has been "struggling" to increase its share to the standard elsewhere in the country – 80 to 90%;
3. Nunavut is the poorest part of Canada;
4. to provide the Minister with proper advice, the applicant requires adequate notice and disclosure and a reasonable opportunity to respond. The receipt of this notice on January 18 without details, and with the request that comments be delivered the next business day, is not adequate notice or a reasonable opportunity to respond.
5. the applicant asked the Minister to postpone making the transfer decision until after adequate time for consultation between the applicant and the Minister's officials.

[48] On January 24, 2008 the applicant received an e-mail invitation to a meeting from the respondent Minister's officials. The meeting would take place on February 13, 2008 and would be "concerning discussions with Nunavut on 0B transfers". The applicant expected that this meeting was in response to its January 21st letter requesting a full briefing and a full opportunity for consultations.

[49] At the February 13, 2008 meeting one of the issues was the proposed reallocation of 1900t of turbot. However, at the meeting the Minister's officials advised that the transfer had been approved by the Minister on January 30, 2008. This was a surprise to the applicant. The applicant

sent a letter to the Minister on February 18, 2008 expressing surprise and disappointment. The applicant stated that it did not understand why the Minister disregarded its obligations to consult over the applicant's January 21st letter. The Minister did not respond to this February 18th letter.

[50] The letter dated January 18, 2008 from the Department of Fisheries and Oceans' (DFO) Associate Director General for Resource Management regarding the proposed re-allocation of 1,900t of turbot from the company allocation in NAFO Division 0B acknowledged the matter fell within the ambit of Article 15.3.4 and requested comments from the applicant by January 21, 2008, the next business day.

[51] The applicant prepared a response letter over the weekend of January 19 and 20, which stated that the NWMB did not consider they had been given appropriate notice, disclosure or reasonable opportunity to respond. The letter stated that no background or details of the proposed re-allocation had been provided and expressed the opinion that the receipt of notice on the afternoon of the business day before the NWMB's advice was expected to be delivered fell short of procedural fairness requirements. The applicant recommended that the Minister postpone making the decision until the DFO had fully briefed the applicant and the applicant had been given adequate time to consider the matter and render its advice.

[52] On January 24, 2008, the DFO's Acting Director for the Eastern Artic sent an email invitation to a meeting scheduled for February 13, 2008 entitled "Discussions with Nunavut on 0B transfers." The applicant assumed the meeting had been called in response to its request for a full briefing.

[53] The applicant states that internal DFO documents make clear that the meeting was planned by DFO officials for the purpose of consulting with the applicant. In particular, the applicant points to a memorandum to the Minister from Michelle D'Auray, Deputy Minister, dated January 28, 2008. The contents of this memorandum are outlined below. However, at the meeting, the DFO Associate Director General informed the applicant's representatives that the Minister had made the decision to re-allocate the quota on January 30, 2008.

[54] The applicant sent a letter to the Minister on February 18, 2008, acknowledging the Minister's right to make such a decision but expressing disappointment with the Minister for disregarding his obligations under Article 15.3.4 and the applicant's January 21, 2008 letter. The applicant requested that that the Minister consider "appropriate mitigation measures." The Minister did not respond to the letter.

[55] The respondent states that the Minister followed and applied the existing policy, by consulting the Applicant on the "general policy approach." The respondent submits that the decision in the case was not one which required notice under the NLCA, given that it did not impact on the harvesting rights and opportunities of the Inuit in the NSA. The respondent states that because the effect of the decision to re-allocate quota between existing non-Nunavut license holders, it had no effect on the overall amount of quota or the quota provided to Nunavut interests and thus was not subject to any additional procedural requirements under the NLCA.

[56] The details of the re-allocation were not given in the January 18, 2008 letter or provided to the NWMB at any time prior to February 13, 2008. The re-allocation involved the transfer of 1,650t of the respondent Seafreez's existing quota to the respondent Clearwater, and 250t to the respondent Labrador Shrimp Co. The respondent Barry Group Inc., the successor by amalgamation to Seafreez, requested approval of the transfer to Labrador Shrimp Co. from the Minister in October 2007. Approval of the transfer to Clearwater was requested on January 11, 2008.

<u>The January 28, 2008 Memorandum to the Minister</u>

[57] The applicant states that documents circulated internally within the Department make it clear that the Department acknowledged an extant duty to consult and initially planned to consult with the applicant at the February 13, 2008 meeting. The applicant refers to a January 28, 2008 memorandum from Michelle d'Auray, Deputy Minister dealing with the turbot quota transfer request from Seafreez to Labrador Shrimp Co. and Clearwater. In the summary, the memo stated:

> 0B turbot allocations were granted in the early 1990's to entities which had participated in the development of this fishery. Twenty seven percent (27%) of the Canadian share of the Total Allowable Catch (TAC) of 5500t was reserved for Nunavut interests.
> …
>
> Department officials plan to meet with Nunavut interests on February 13, 2008 over turbot management in northern waters and Seafreez' requests are likely going to be raised. Recommendations for decision on these requests will be forwarded to you following this meeting.

In the memo to the Minister under the heading "Background", the Deputy Minister states:

> …The Standing Senate Committee on Fisheries and Oceans' 2004 Report recommends that DFO continue its policy to the effect that no

new access should be provided in 0B turbot to non-Nunavut interests until Nunavut has achieved a major share of that fishery, as recommended by the Independent Panel on Access Criteria and accepted by the Minister in November 2002.

Consistent with the Government's commitments in the Nunavut Land Claim Agreement, a letter has been sent to the Nunavut Wildlife Management Board (NWMB) (TAB – 3) to formally request their position on the transfer requests.

On November 30, 2007, Mr. Wayne Lynch, director of Fisheries and Sealing in the Nunavut government wrote (TAB – 4) to "strongly oppose any efforts to redirect any of [Seafreez company allocation] to non-Nunavut interests". Mr. Lynch also mentions that if company allocations are to be transferred, "the first recipients and offers should be to Nunavut interests".

Mr. Lynch wrote again January 15, 2008 (TAB – 5) to reiterate the Government of Nunavut's position and to request a special meeting with DFO to address the question of Nunavut interests being involved in the transfer.

In its January 21, 2008 letter to you (TAB – 6), the NWMB emphasizes its struggle over the years to increase its share of 0B turbot, which they claim is directly linked to the development of a viable inshore fishery in Davis Strait and Baffin Bay. The NWMB expresses some displeasure with being given such a short notice to respond to a request for advice under provision of the Land Claim Agreement and recommends that you postpone making a decision on these transfers until they have the opportunity to adequately consider the transfer requests.

For the past three (3) years, Seefreez has transferred on a temporary basis 250t of 0B turbot to the LFUSC. Seafreez has also transferred 0B transferred 0B turbot to LFUSC in 2002-03 (200t) and 2004-05 (410t).

In 2007-08, Seafreez has transferred on a temporary basis 0B turbot to other companies for a total of 1,922t, while transfers from other companies to Seafreez accounted for 544t, for a net balance of 1,378t transferred from Seafreez to other companies. A table containing transfers from Seafreez to other companies and vice-versa in the last five (years) is attached for your information (TAB – 7).

Under the heading in the memo "Analysis/DFO comment" the memo stated:

> No decision should be made on these two requests prior to the meeting.

The memorandum concludes with the heading:

> Recommendation/Next Steps
>
> Recommendations for decision on the two requests from the Barry Group will be forwarded to you following the February 13, 2008 meeting.

**ISSUES**

[58] The applicant raises three issues in this application:

1. Whether the minister breached an express statutory duty to seek and consider the advice of the Applicant under Article 15.3.4 of the NLCA by failing to provide the applicant with a meaningful opportunity to provide advice prior to rendering his decision;

2. Whether the Minister breached the duty of procedural fairness and natural justice by failing to provide the applicant with sufficient notice, disclosure and opportunity to respond; and

3. Whether the minister breached his constitutional common-law obligation to consult with the applicant in relation to the contemplated decision.

[59] The respondent Minister's submissions respond to the above issues. The respondents Labrador Fisherman's Union Shrimp Company (Labrador Shrimp Co.) and Clearwater Seafood Limited Partnership (Clearwater) raise four additional issues:

1. whether the affidavit of Mr. Michael D'Eca, submitted by the applicant, contains hearsay statements that do not identify the originating source of the documents and that should therefore be struck out;

2. whether the NWMB failed to file its application for judicial review within the 30 day time limitation set out in section 18.1(2) of the *Federal Courts Act*;

3. whether the NWMB has standing to apply for judicial review, and

4. If the Court finds that the Minister breached his statutory and common law duties to the applicant, should these respondents' position as innocent third parties be considered in determining the appropriate remedy?

[60] I will deal with the issues in the following order:

1. Does the NWMB have standing to bring this application;

2. Did the NWMB fail to file the application within the 30-day time limit;

3. Does the applicant's affidavit contain hearsay statements that should be struck out;

4. Did the Minister owe a statutory duty to the applicant under Article 15.3.4 or Article 15.3.7 of the NCLA and, if so, did the Minister breach this duty by failing to consult the applicant before approving the quota re-allocation;

5. Did the Minister breach the duty of procedural fairness and natural justice by failing to provide the applicant with sufficient notice, disclosure and opportunity to respond;

6. Did the Minister breach his constitutional or common-law obligation to consult with the applicant in relation to the contemplated decision; and

7. If so, what is the appropriate remedy in light of the position of the respondents Clearwater and Seafreez as third parties in this application?Xx

**STANDARD OF REVIEW**

[61] The applicant alleges that the Minister failed to comply with procedural requirements imposed by statute and by the common law and constitutional duty of fairness. A failure to comply with a statutory requirement is an error of law subject to a standard of correctness. Likewise, this Court has repeatedly found that the standard of review for breaches of procedural fairness is correctness: see, e.g., *Martselos v. Salt River First Nation*, 2008 FC 8, per Justice Beaudry at

paragraph 18. The applicant and respondent agree that this is the applicable standard of review in this case.

## ANALYSIS

### Issue No. 1: Does the NWMB lack standing to bring this application for judicial review of the Minister's decision to approve the quota re-allocation?

[62] The respondents Clearwater and Labrador Shrimp Co. submit that the applicant does not have standing to bring this application under Section 18.1 (1) of the *Federal Courts Act,* because it is not directly affected by the decision of the Minister.

[63] The respondent Clearwater submits that the applicant is not "directly affected" by the decision, because the decision in question was a re-allocation of existing quotas between Seafreez and Clearwater. According to the respondent, Seafreez and Clearwater are the only parties directly affected by the decision.

[64] The applicant's primary substantive claim, that the Minister had a duty under Article 15.3.4 to consult the applicant, is based on the premise that the applicant's rights were affected by the decision. The applicant submits that the decision was a "wildlife management decision" within the meaning of Article 15.3.4 and therefore should not have been made prior to soliciting, and considering, the advice of the applicant. Thus, if the applicant is successful on the substantive issue, they will have been found to be directly affected by the decision.

[65] In *Canada (Royal Canadian Mounted Police Complaints Commission) v. Canada (Attorney General),* 2005 FCA 213, 256 D.L.R. (4th) 577, the RCMP Complaints Commission brought an application for judicial review of a decision by the Commissioner that certain information sought by the Commission was subject to police informer privilege and could not be disclosed. Justice Létourneau held at paragraph 58:

> Without a legal means of ensuring compliance with the Act by the Commissioner, the Commission becomes, for all practical purposes, hindered to the point of uselessness. I entirely agree with the following comments made by the learned judge when discussing the respondent's argument that the Commission has no power to initiate legal proceedings. At paragraphs 163 and 164 of his decision, he wrote:
> If the Respondent is correct in this regard it would mean that, under ss. 45.41 of the RCMP Act, the Complaints Commission has no right to compel the RCMP Commissioner to provide either a copy of the complaint or any material relevant to that complaint. Just as a right without a remedy is no right at all, so an obligation without the means to compel it is no obligation at all. It would mean, in effect, that the RCMP Commissioner would have a complete discretion, not only as regards what is and what is not relevant, but also as to whether any material is provided at all under ss. 45.41 even if it is relevant.

[66] In that case, the information sought by the Commission was ultimately found to be protected under the privilege. However, the argument advanced by the government that the commission did not have the power to compel the Commissioner to release information by means of an application to the courts was rejected for the reasons given above.

[67] Although the facts of the instant case are different, a similar rationale may be applied. The applicant has a right to be consulted when decisions of the Minister fall under Article 15.3.4. Here, the applicant submits that the decision falls under this provision, while the respondents submit that it

does not. They have come before this court to resolve this issue. If a submission by the respondents that the applicant is not directly affected by a decision is sufficient to resolve the issue at the standing stage, without considering the applicant's arguments for applying Article 15.3.4, then the obligation of the Minister to the applicant would be "no obligation at all" in any situation where it was not self-evident that Article 15.3.4 applied.

[68] The applicant will therefore be considered to have standing in order for the Court to assess the substantive merits of the applicant's application.

**Issue No. 2: Did the NWMB fail to file its application for judicial review within the 30 day time limitation set out in section 18.1(2) of the *Federal Courts Act?***

[69] Section 18.1(2) of the *Federal Courts Act* provides:

18.1 (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

18.1 (2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[70] The applicant filed for judicial review on March 14, 2008. The applicant learned of the Minister's decision on February 13, 2008, less than 30 days before filing the application.

[71] As the Court found that the applicant was "directly affected" for the purpose of standing under section 18.1(1) for the purposes of calculating the 30-day limit, the relevant date on which the decision was "first communicated" is February 13, 2008, and the applicant's filing on March 14, 2008 was timely.

[72] Therefore, there is no need for the Court to consider the submissions made by the respondent against granting the applicant an extension of time under section 18.1(2).

**Issue No. 3: Does the affidavit submitted by the applicant contain inadmissible hearsay?**

[73] The respondent Clearwater submits that paragraphs 52 to 54 of Mr. Michael D'Eca's Affidavit dated April 25, 2008 are hearsay statements that are not supported by information or belief confirming the source of hearsay.

[74] The statements in these paragraphs pertain to events that allegedly took place during a meeting held on February 13, 2008. Mr. D'Eca does not state in his affidavit that he was present at that meeting, and he is not among the attendees listed in the minutes of the meeting attached to the affidavit.

[75] Rule 81(1) of the *Federal Rules of Court* provides:

| | |
|---|---|
| 81. (1) Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefor, may be included. | 81. (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête, auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui. |

[76] The respondent cites *Air Canada v. Maley,* [1976] F.C.J. No. 516 (T.D), 69 D.L.R. (3d) 180. In that case, Justice Addy of the former Trial Division of the Federal Court held at paragraphs 3-4:

> **3** The twenty-six affidavits which were filed by the defendants around 10:30 this morning to a very large extent, insofar as they purport to relate to incidents or to questions of safety, are replete with expressions of "I am told"; "I am informed"; "I believe" without, in any way, giving the source of the information and belief.
>
> **4** Counsel for the plaintiffs did not object to these particular assertions, but I must say that to this court they are not acceptable in evidence. It is elementary law of evidence that such assertions are not acceptable, and, therefore, insofar as they do not give the source of the information and belief, and the particulars on which the belief is founded, they are to be totally and completely rejected as if they did not exist.

[77] The respondent submits that similarly, paragraphs 52-54 of the applicant's affidavit should be struck out.

[78] I agree that the affidavit violates Rule 81(1) to the extent that the affiant provides information about what transpired in the February 13 meeting.

[79] In *Trans-Pacific Shipping Co. v. Atlantic & Orient Trust Co.,* 2005 FC 566, Justice Dawson held at paragraphs 15-17 that hearsay in an affidavit is "not necessarily fatal" if there is no challenge to the accuracy of the hearsay information and no request for cross-examination:

> As to the fact that hearsay evidence was provided to the effect that the applicant's representative, after careful inquiry, knew of no impediment to registration, Rule 81(1) provides that, except on motions, affidavits are to be confined to facts within the personal

> knowledge of the deponent. However, non-compliance with any Rule does not by that fact render a proceeding, or a step in it, void (Rule 56). Rather, that non-compliance is an irregularity that may be attacked under Rule 58. Motions to attack on the ground of non-compliance with the Rules are to be brought as soon as practicable (Rule 58(2)).
>
> …Reliance upon evidence based on information and belief in an application is not necessarily fatal. See: Canada v. Olympia Interiors Ltd. (2001), 209 F.T.R. 182; affirmed (but not specifically on this point) (2004), 323 N.R. 191 (C.A.). The rationale for requiring a deponent to have personal knowledge of matters set out in his or her affidavit is that any affiant's evidence should be capable of meaningful testing on cross-examination. Where no challenge is made to the accuracy of the hearsay information, and where no request for cross-examination was ever made, that rationale is not violated by accepting evidence given on information and belief.

[80] In this case, the respondent has not challenged the accuracy of the information in paragraphs 52-52. Moreover, this information is substantiated by the minutes of the meeting included in the exhibits to the affidavit.

[81] Rule 55 of the *Rules of the Federal Courts* provides:

| | |
|---|---|
| 55. In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule. | 55. Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application. |

[82] I will strike out paragraph 52 to 54 of the Affidavit, but allow the attached minutes of the February 13, 2009 meeting to be introduced by the deponent in his capacity as the solicitor for the applicant. The minutes speak for themselves and were not contradicted by the witness for the respondent Minister who attended the meeting. The information in paragraphs 52-54 briefly summarizes the issues addressed at the February 13, 2008 meeting and the decision that was

communicated to the NWMB representative. Given that the accuracy of this information is not disputed and there is "no substantive basis for objection" to the inclusion of this evidence, the Court will dispense with compliance with Rule 81 to the extent that the Minutes attached to the applicant's affidavit will be admitted.

**Issue No. 4(a): Did the Minister breach a statutory duty under Article 15.3.4 of the NLCA?**

[83] The NLCA is an agreement negotiated between the Government of Canada and the Inuit of Nunavut. It was ratified by Parliament under the *Nunavut Land Claims Agreement Act.* Article 15.3.4 of the NLCA provides:

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

[84] In its submissions, the applicant has relied in part on the acknowledgement in the Minister's January 18, 2008 letter to the applicant stating that the proposed re-allocation fell under the ambit of Article 15.3.4 (Applicant's Record, p. 306). The letter stated:

> As you know, Article 15.3.4 of the Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Agreement) requires the Government to 'seek advice of the NWMB with respect to any wildlife management decisions in Zones I and II which would affect the substance and value of Inuit harvesting rights and opportunities within the marine areas of the Nunavut settlement area'. Therefore, I would appreciate if you could provide your comments on this request by January 21, 2008, so that a recommendation can be made to the Minister for his decision.

Similarly, the Deputy Minister, in a memorandum to the Minister dated January 28th, stated that the applicant must be consulted about this matter.

[85] The respondents state that this statement in the letter was an error. It is trite law that the Crown is not bound by the errors of its employees including the Deputy Minister. Thus, the January 18, 2008 letter does not establish that Article 15.3.4 applies in this case. Unless the applicants can establish before the Court that Article 15.3.4 should apply here, the Minister will not be found to have breached his duty to the applicant on the basis of the statement in the letter.

[86] According to the applicant, the decision falls under Article 15.3.4 because it relates to 1900t of turbot quota in NAFO sub-area 0B, which is located within Zone I. Article 15.3.4 "relates to wildlife management decisions in Zones I and II." However, Article 15.3.4 also stipulates that the wildlife management decisions requiring consultation with the NWMB are those that "affect the substance and value of Inuit harvesting rights and opportunities within the marine areas of the Nunavut Settlement Area."

[87] The applicant states that the Inuit of Nunavut use revenue from the offshore fishery to cross-subsidize the Inuit fishery within the NSA. This cross-subsidization is offered as evidence that the decision of the Minister to approve the transfer of quota reallocation in Sub-Area 0B affects the substance and value of Inuit harvesting rights and opportunities within the marine areas of the NSA. With respect, the Court must disagree. The cross-subsidization of the inshore fishery by the offshore fishery is indirect and too remote. The Inuit could cross-subsidize their caribou harvesting from the offshore fishery or their Inuit carving industry. The decision to cross-subsidize another segment of

the Inuit life is completely within the discretion of the Inuit, and cannot be used to say that decisions in the offshore fishery therefore affect the inshore fishery.

[88] The respondent Clearwater submits that the decision of the Minister was not a "wildlife management decision" because it did not increase the total quota or change the methodology used to harvest the quota, and was a purely administrative decision based only on "economic or commercial factors." The respondents take the position that the transfers "simply allow for rationalization of the industry and ensure more efficient operations." The respondents further submit that the re-allocation did not "affect the substance and value of Inuit harvesting rights" because the re-allocation was a transfer between two existing non-Nunavut interests and, therefore, that Article 15.3.4 is not applicable to this decision.

[89] The applicants also rely on *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans)*, in which the Federal Court of Appeal, discussing the scope of Article 15.3.4, concluded that it applied to allocations of quotas for turbot fishing in Zone 1:

> Article 15.3.4 of the Agreement aims at ensuring that Nunavut Inuit will be consulted with respect to wildlife management decisions in Zones I and II which would affect the substance and value of their harvesting rights within the marine areas of the NSA. Because turbot are migratory fish, the allocation of turbot fishing quotas and licenses in Zones I and II is such a decision.

[90] The re-allocations in this case were also for turbot fishing in Zone 1. However, the *Nunavut Tunngavik* case dealt with the Minister's decision setting the overall quota for the harvest of turbot in the area and the allocation of the quota between various groups, including Nunavut interests. The decision increased the Total Allowable Catch ("TAC") in Zone 1, and decreased the percentage of

the Nunavut Inuit share of the TAC from 27.3% to 24% (*Nunavut Tunngavik,* paragraphs 7-9). Thus, the decision clearly had an effect on the substance and value of Inuit harvesting rights in two ways. It reduced the percentage quota of the TAC allocated to Nunavut Inuit interests and, by increasing the TAC, affected the availability of turbot in the adjacent waters belonging to the Nunavut Settlement Area.

[91] The respondents submit *Nunavut Tunngavik* is easily distinguished from the facts of the instant case, where there is neither a decrease in Nunavut fishing interests nor an increase in the overall TAC. The transfer of an existing quota from one non-Nunavut interest to another has no similar impact on the substance and value of Nunavut fishing interests in Zone I.

[92] Similarly, the respondents submit that the examples given by the applicant of previous instances where the Minister has consulted with the NWMB under Article 15.3.4, giving the applicant substantial disclosure and notice, are not analogous because the Nunavut interests were clearly affected in all those instances. The issues on which the NWMB was consulted pursuant to Article 15.3.4 during the 2007-8 fiscal year include: the proposed establishment of Enterprise Allocations in the NAFO Division 0B competitive turbot fishery, guaranteeing a specific percentage of the formerly competitive allocation in order to reduce over-harvesting; the proposed *Fishery Management Plan Greenland Halibut NAFO Sub-area 0 2006-2008*; and a proposal to develop a closed area in NAFO Division 0A for the preservation of deep sea corals and narwhal. These and the other examples given by the applicant clearly affect the overall fishing quotas and practices and all the parties with fishing licenses and interests in Zone I.

[93] The reallocation approved by the Minister in this case does not, on its face, affect the substance and value of Inuit harvesting rights. It does not change the overall quota, increase the total quota held by non-Nunavut interests, or decrease the quota held by Nunavut fishing interests. However, the applicant submits that had the Minister consulted the NWMB, it would have been able to advise the Minister on the process used in reallocating existing quotas and the possibility that these reallocations could give rise to opportunities to increase Nunavut fishing interests in Zone I and II.

[94] In particular, the applicant states that it would have requested information about the possibility that the Minister would consider approval of the transfer to Nunavut fishing enterprises willing to pay fair market value for the allocation. If there was a possibility that a quota license belonging to a non-Nunavut enterprise could be reallocated to a Nunavut fishing interest, then the approval of a transfer to another non-Nunavut interest does potentially affect the substance and value of Inuit harvesting rights. Given the Minister's 2002 commitment that no additional access would be granted to non-Nunavut interests in the area until Nunavut had achieved access to a major share of the fishery resources, if a transfer to a Nunavut fishing interest was possible, the Minister should have explored this goal with the NWMB, and perhaps could have facilitated a transfer through consultation with the NWMB.

[95] The respondent Labrador Shrimp Co. states that a refusal by the Minister to approve the transfers would not mean that Nunavut interests would be able to fish the quota. If the Minister

refused to approve the transfer, the quota would remain with the original quota holders, who "could not be forced by the Minister to give up their rights to the quota to a Nunavut interest." The Court agrees that the Minister cannot force any non-Nunavut quota holders to give up their rights to a Nunavut interest, and also recognizes that the respondent parties Clearwater, Labrador Shrimp Co. and Seafreez came to the Minister to approve a re-allocation that had already been negotiated between the parties. However, the applicant has not stated that they would have recommended against the transfer if they had been given an opportunity to advise the Minister. Had they been able to discuss the proposed transfer with the Minister, they may have been able to enquire about the possibility of becoming involved in the transfer negotiations with these or other non-Nunavut interests wanting to transfer their quota. The Minister may have been able to facilitate such a goal. Alternatively, after consulting with the NWMB, the Minister could have decided it was in the best interests of the industry to approve the transfers. The applicant does not dispute that the Minister had the right to approve this particular transfer. To the extent that the Minister has a stated goal of improving Nunavut access to the fishing quota in Zones I and II, when opportunities arise where fishing quota in the area is available because a company wants to sell its quota in waters off the coast of Nunavut, the NWMB should be aware of the opportunity.

[96] The respondent Clearwater submits that if the Court concludes the transfer is a wildlife management decision affecting Inuit fishing rights, it would turn a "common and routine commercial transaction into a[n] extensive and needlessly time consuming process for both the DFO and the parties that hold quota" in the area. The duty to consult the applicant is not supposed to be onerous. The Minister has the power to approve transfers without restriction.

[97] The Minister submits in the alternative, that if Article 15.3.4 is found to apply, the Minister satisfied the requirement to give the applicant an opportunity to advise the Minister about the transfer. I cannot agree with the Minister. In *Nunavut Tunngavik,* the Federal Court of Appeal held at paragraph 35 that Article 15.3.4 requires not only that the Minister seek the advice of the NWMB but also that he consider the advice:

> Although it is not expressly mentioned in Article 15.3.4, it is to us implicit in that Article that the Government shall consider the advice that it must seek...Otherwise, the duty imposed upon the Government to seek advice is absolutely meaningless. Consequently, Article 15.3.4 puts procedural restrictions on the Minister's exercise of discretion which are satisfied when the Minister in good faith seeks and considers the views of the NWMB.

[98] The Minister's January 18, 2008 letter did not contain any information beyond stating that the Minister had received a request “from an offshore groundfish licence holder to transfer the totality of its Division 0B Greenland halibut company allocation (1,900t) to two different offshore companies (non-Nunavut interests)”. The letter requested the NWMB's feedback by January 21, 2008, the next business day. The Minister clearly did not comply with Article 15.3.4 in any meaningful way. The applicants were given no information about the proposed re-allocation and insufficient notice to respond.

[99] Further, the Minister did not respond to the NWMB's January 21, 2008 letter requesting additional details and time to respond. Rather, the next communication by the Minister to the NWMB was to inform it that the Minister had approved the transfer re-allocation.

[100] These actions clearly do not meet the requirements to seek and consider the advice of the NWMB.

[101] The Court's conclusion is that the Minister did not breach a statutory duty under section 15.3.4 of the NLCA for the following reasons:

1. the transfer of company quotas within sub-area 0B did not affect the substance and value of Inuit harvesting rights and opportunities within the marine areas of the Nunavut Settlement Area. Sub-area 0B is outside the NSA, and even if the Nunavut interests were able to purchase company allocations of quota, this would not affect their fishing rights in the NSA; and
2. while the Minister says he consulted with the applicant, the facts disclose that this consultation was a sham. However, under Article 15.3.4 the Minister had no duty to consult under the Settlement Agreement with respect to the transfer of quota outside the NSA.

If the respondent was allocating an increase in the quotas to the companies in areas adjacent to the NSA, however, Article 15.3.4 would be engaged, because that would affect the number of migratory turbot which may be in the NSA.

**Issue No. 4(b): Did the Minister breach a statutory duty under section 15.3.7 of the NLCA?**

[102] As discussed above, the NLCA was ratified by Parliament under the *Nunavut Land Claims Agreement Act*. Article 15.3.7 of the NLCA provides:

> 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 licenses within Zones I and II. Adjacency means adjacent to or within a reasonable geographic distance of the zone in question. The principles will be applied in such a way as to promote a fair distribution of licences between the residents of the Nunavut Settlement Area and the other residents of Canada and in a manner consistent with Canada's interjurisdictional obligations.
>
> (Emphasis added)

[103] Does the failure to consult with the applicant about the transfer of the company allocations breach Article 15.3.7? Under this Article the Government of Canada:

1. recognizes the importance of the principles of adjacency;
2. recognizes the importance of the economic dependence of communities in the NSA on marine resources;
3. shall give "special consideration" for these abovementioned two factors when allocating commercial fishing licenses within Zone 1, i.e. the relevant area in this case; and
4. shall apply principles in such a way as to promote the fair distribution of licenses between the residents of the NSA and other residents of Canada.

[104] In the case at bar the Minister did not give consideration, let alone "special consideration", to these factors when approving the re-allocation of company quotas, and did not consider whether the re-allocation is a "fair distribution" of licenses between the Inuit in Nunavut and the commercial fishing companies adjacent to Nunavut.

[105] The evidence that the Minister authorized the transfer on January 30, 2008 without regard to the Memorandum to the Minister from the Deputy Minister dated January 28, 2008, or the recommendation that the Minister not decide until after the meeting on February 13, 2008, shows that the Minister did not give "special consideration" or any consideration to these factors when

approving the re-allocation of the company quotas. In fact, the Minister blatantly disregarded the applicant's representations and his own Deputy Minister's advice in this regard.

[106] While Article 15.3.7 does not provide an express duty on the part of the Government to consult, it does impose an obligation to give "special consideration" to the Inuit when allocating commercial fishing licenses so as to promote a fair distribution of licenses between the Inuit and other residents of Canada. This Article imposes on the Government a duty to develop a policy in order to:

1. give "special consideration" to the "principles of adjacency" and "the economic dependence of the Inuit on marine resources" when re-allocating commercial fishing licenses within Zones 1 and 2; and
2. ensure that this policy describes what is a fair distribution of licenses between the Inuit in Nunavut and the other residents of Canada. However, this latter point has been established in a policy by the Independent Panel on Access Criteria (IPAC) referred to above.

[107] In the IPAC report dated March 2002 stated:

1. Nunavut does not enjoy the same level of access to its adjacent fisheries as do the Atlantic Provinces;
2. the government must make every effort to remedy this anomalous situation; and
3. <u>no additional access should be granted to non-Nunavut interests in waters adjacent to the territory until Nunavut has achieved access to a major share of its adjacent fishery resource</u>.

[108] The Minister has already accepted this recommendation and said:

1. Nunavut interests will receive all increases in fishing quota for turbot in Sub-Areas 0A and 0B; and
2. fulfillment of this recommendation will not affect the current status of other participants in these fisheries.

[109] According to the current evidence before the Court, Nunavut has 68% of the turbot quota in sub-areas 0A and 0B. (8,500 tonnes of turbot quota of the 12,500 tonne total).

[110] Is 68% a fair distribution of the licences to Nunavut interests? According to a federal-provincial fisheries committee working group set up in 1995, the fishers in the Atlantic provinces "normally receive 80 to 95% of the allocations". The question is, when a commercial fishing company no longer wants its turbot allocation in sub-area 0B, does the government have an obligation under Article 15.3.7 of the Settlement Agreement to promote the transfer (i.e. sale) of unwanted quota from a non-Nunavut resident to a Nunavut resident until Nunavut fishers receive 80% to 95% of the allocations in the waters adjacent to their territory?

[111] The Department of Fisheries and Oceans already has a policy for the offshore ground fish allocation program entitled "Framework for the North Atlantic Offshore Groundfish Enterprise Allocation Program dated June 17, 2004 as amended May 30, 2006". The applicant was consulted about this policy in 2006, and did not express any concern or objection.

[112] The policy sets out a number of important principles:

1. the fishery is a common property resource for the people of Canada to be managed for the benefit of all Canadians;
2. the Minister of Fisheries and Oceans is responsible for the allocation and sustainable use of fishery resources;
3. the best use of the resource will be made by the Minister consistent with conservation objectives and the constitutional protection afforded Aboriginal and treaty rights;
4. the offshore access requires certainty to licence holders;
5. the offshore ground fish licence holders have been in place for many years and their allocation of Canadian quota is part of the stable and efficient management of the resource;

6. the policy allows for the permanent and temporary transfers of allocations;
7. the fluctuation of fishery stocks over time can result in declines and increases in stocks which will be shared on a proportionate basis in accordance with each company's share of the offshore quota;
8. the policy allows for temporary transfers which are transfers within the fishing fleet greater than 100 feet and they are considered temporary if they are applicable to that fishing year only; and
9. permanent transfers are subject to the approval of the Minister of Fisheries and Oceans on a case by case basis. The policy is that permanent transfers in the category of vessels greater than 100 feet, can only be made to an existing participant in the greater than 100 feet sector or to a new entrant in the greater than 100 foot sector on the following conditions:

    1. "An Enterprise Allocation (EA) holder may apply to permanently transfer part of all of his/her licence access/EAs to any existing participants in the greater than 100 feet sector, without restriction". (Emphasis added.)

[113] The Court finds that the inter-company transfers in this case are in compliance with this policy and the Court will not set aside the Minister's decisions approving the transfers in accordance with this policy.

[114] However, the evidence demonstrates that this policy must be reconsidered in accordance with the new concerns raised by the applicant and the Minister's statutory obligation under Article 15.3.7. The obligation to give special consideration to Nunavut interests when allocating commercial fishing licenses in Zone 1 includes an obligation to consider and act upon concerns raised by the applicant regarding such allocations. Here, the concerns raised by the applicant create a duty to consult with the applicant before further transfers (i.e. sales) of company quotas are approved in sub-area 0B, and to provide the applicant with a rationale for the Minister's decision.

[115] In *Nunavut Tunngavik Inc.,* above, the Federal Court of Appeal held at paragraph 49 that Article 15.3.7.:

> …evidences an intention of the parties … to establish a principle of equity, not one of priority, in the distribution of commercial fishing licenses.

However, the Minister has a policy that Nunavut interests will receive all increases in fishing quota yet the fulfillment of this recommendation will not affect the current status of other participants in these fisheries. The unanswered question is when a commercial fishing company no longer wants its turbot allocation and wants to transfer it, does the government have an obligation to promote the transfer of unwanted quota from a non-Nunavut resident to a Nunavut resident until Nunavut fishers receive their fair share of the allocations in the waters adjacent to their territory?

[116] Since the transfers in this case are in compliance with the existing government policy and since a change in this policy will require time and consultations with the applicant, the Court will not set aside the two transfers in this case. However, 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 Article 15.3.7 before future transfers of company quotas are approved.

**Remaining Issues**

[117] In view of the Court's conclusion above, the Court will briefly address the remaining issues.

[118] Since the Court has found that the Minister's approval of the transfers did not affect the value and substance of Nunavut interests in the NSA, the Minister did not breach his common law duty to consult.

[119] The duty to consult under section 35 of the *Constitution Act, 1982* is similar to the obligation on the Minister to consider the new concerns raised by the applicant under Article 15.3.7 before further transfers of company quota are approved in sub-area 0B. For greater clarity, the Court notes that there is no constitutional obligation under Article 15.3.4 because the transfers did not affect the value and substance of the Nunavut interests in the NSA.

[120] With respect to the submission that it would be inequitable to set aside the transfers because the respondents Clearwater and Labrador Shrimp Co. have been fishing these waters for many years and were never notified that the applicant opposed the transfers, the Court has held above that these transfers should not be set aside but that no further inter-company transfers of allocation should be approved in sub-area 0B until the Minister has considered the new concerns raised by the applicant.

**COSTS**

[121] The applicant has shown that the Minister blatantly ignored the concerns of the applicant and the recommendation from the Deputy Minister. While the applicant was mistakenly consulted under Article 15.3.4, the Minister has an obligation under Article 15.3.7 to carefully consider these concerns before approving transfers in the future. For this reason, the application will be allowed in part with costs payable by the Minister.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is allowed in part with costs payable by the Minister; and

2. The Minister has a statutory obligation under Article 15.3.7 of the Settlement Agreement to consider the new concerns raised by the applicant before future transfers of company quota are approved in sub-area 0B.

"Michael A. Kelen"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-426-08 |
| **STYLE OF CAUSE:** | Nunavut Wildlife Management Board v. Minister of Fisheries and Oceans, Barry Group Incorporated, Seafreez Foods Inc., Clearwater Seafood Limited Partnership, and Labrador Fishermen's Union Shrimp Company |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | November 26, 2008 and December 2, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | KELEN J. |
| **DATED:** | January 7, 2009 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Martin Masse | FOR THE APPLICANT |
| Mr. John Tyhurst | FOR THE RESPONDENT, MINISTER OF FISHERIES AND OCEANS |
| Mr Tom Hart and Mr. Alex Benitah | FOR THE RESPONDENT, CLEARWATER SEAFOOD LTD. PARTNERSHIP |
| Mr. Norman Whalen, Q.C. | FOR THE RESPONDENT, LABRADOR FISHERMEN'S UNION SHRIMP CO. |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Mr. Martin G. Masse,<br>Lang Michener LLP | FOR THE APPLICANT |
| Mr. John H. Sims, Q.C.,<br>Deputy Attorney General of Canada | FOR THE RESPONDENT,<br>ATTORNEY GENERAL OF CANADA |
| Mr. Alexander Benitah,<br>McInnes Cooper | FOR THE RESPONDENT,<br>CLEARWATER SEAFOOD LIMITED PARTNERSHIP |
| Mr. Norman J. Whalen, Q.C.<br>Martin Whalen Hennebury Stamp | FOR THE RESPONDENT,<br>LABRADOR FISHERMEN'S UNION SHRIMP COMPANY |