Federal Court  Cour fédérale

Date: 20210708

Docket: T-1112-20

Citation: 2021 FC 725

Ottawa, Ontario, July 8, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**BARRY SEAFOODS NB INC., BARRY GROUP INC.,
PRIDE VENTURES INC., 039761 NB LTEE
67108 NEWFOUNDLAND & LABRADOR INC.,
AND GAUVIN AND NOEL COMPAGNIE LTEE**

Applicants

and

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY THE MINISTER OF FISHERIES,
OCEANS AND THE CANADIAN COAST GUARD,
and THE ATTORNEY GENERAL OF CANADA**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Fisheries, Oceans and the Canadian Coast Guard [the Minister] set the actual total allowable catch [TAC] for the commercial fall herring fishery in the southern Gulf of St. Lawrence for the fall of 2020 at 12,000 t, while allocating quotas for the catch to commercial

licensees based on a figure of 18,000 t [the Decision]. This Decision was communicated to license holders on August 20, 2020, in a document titled Notice to Fish Harvesters [the First Notice]. The First Notice indicated that the final TAC for the fishery would be 12,000 t and that the quota would be distributed based on the existing fleet shares for the various fleets as follows:

Fleet	2020
Inshore fleet Areas 16A-16G	13,692 t
Inshore fleet in Area 17	180 t
Gulf large purse seine fleet	4,128 t

[2] On September 1, 2020, by way of a second notice, these figures were incorporated into the Conservation and Harvest Plan for the Southern Gulf of St. Lawrence Fall Herring Fisheries [the Second Notice].

[3] The Applicants, Barry Seafoods NB Inc., Barry Group Inc., Pride Ventures Inc., 039761 NB Ltee., 67108 Newfoundland & Labrador Inc., and Gauvin and Noel Compagnie Ltee., comprise the Gulf large purse seine fleet referenced in the table above. They seek judicial review of the Decision on the basis that it was:

A. an administrative decision, which is unreasonable or was made contrary to principles of procedural fairness; or

B. in the alternative, an unreasonable legislative decision made in bad faith, without adherence to natural justice requirements, or through consideration of factors irrelevant or extraneous to the statutory purpose.

[4] By way of relief, the Applicants seek an order quashing the Decision and referring the matter back to the Minister with directions to reconsider the Decision after providing proper notice and disclosure to the Applicants and affording a reasonable opportunity for the Applicants to provide advice and relevant information to the Minister.

[5] As explained in greater detail in these Reasons, this application is dismissed, because I find that the Decision is a discretionary policy decision and, having considered the parties' arguments in the context of the principles governing judicial review of such decisions, I find that the Decision is reasonable.

II. **Background**

[6] In support of their position in this application, the Applicants have filed affidavits sworn by officers of several of the Applicants. However, they rely principally on the affidavit of William Barry, Director, Chairman and Chief Executive Officer of Barry Group Inc. and Barry Seafoods NB Inc. The Respondents rely on an affidavit of Marc Lecouffe, an employee of the Department of Fisheries and Oceans [DFO] currently holding the position of Associate Regional Director, Fisheries and Harbours Management. The following description of the background to this application is based on this affidavit evidence including exhibits thereto.

A. *The Southern Gulf of St. Lawrence Fall Herring Fishery*

[7] The southern Gulf of St. Lawrence Fishery [the Fishery] is exploited by two commercial fleet sectors: (a) an inshore fleet that fishes primarily with fixed gear; and (b) a fleet that fishes

with mobile purse seine gear in deeper waters. There are approximately 3000 commercial inshore licence holders and seven licenced purse seiners. The Applicants collectively hold all seven of the purse seiner licences. In addition to the commercial licence holders, bait licence holders also fish for herring in the region, but their role is not relevant to the issues in this application.

[8] Since 1984, the Minister has set separate TACs for the spring and fall seasons for the Fishery. The fall season TAC, to which this application for judicial review relates, is pursued at different times by the two fleet sectors. The inshore fleet fishes mainly from August to September. The purse seine fleet fishes from September or October to November. There is little overlap between the times that the two fleets fish.

[9] The TAC for the fall season is subdivided into fleet sector quotas, the inshore component of which is further divided between licence holders for different herring fishing areas [HFAs] numbered 16A-G and 17. These HFAs are depicted in Figure 1 below, taken from the 2014 Integrated Fisheries Management Plan for the Fishery. Once the TAC is reached, fishing is closed for the season. However, between 2010 and 2019, neither fleet sector caught the share of the TAC that was allocated to it. Since 2015 (but prior to 2020), less than 70% of the TAC had been landed.

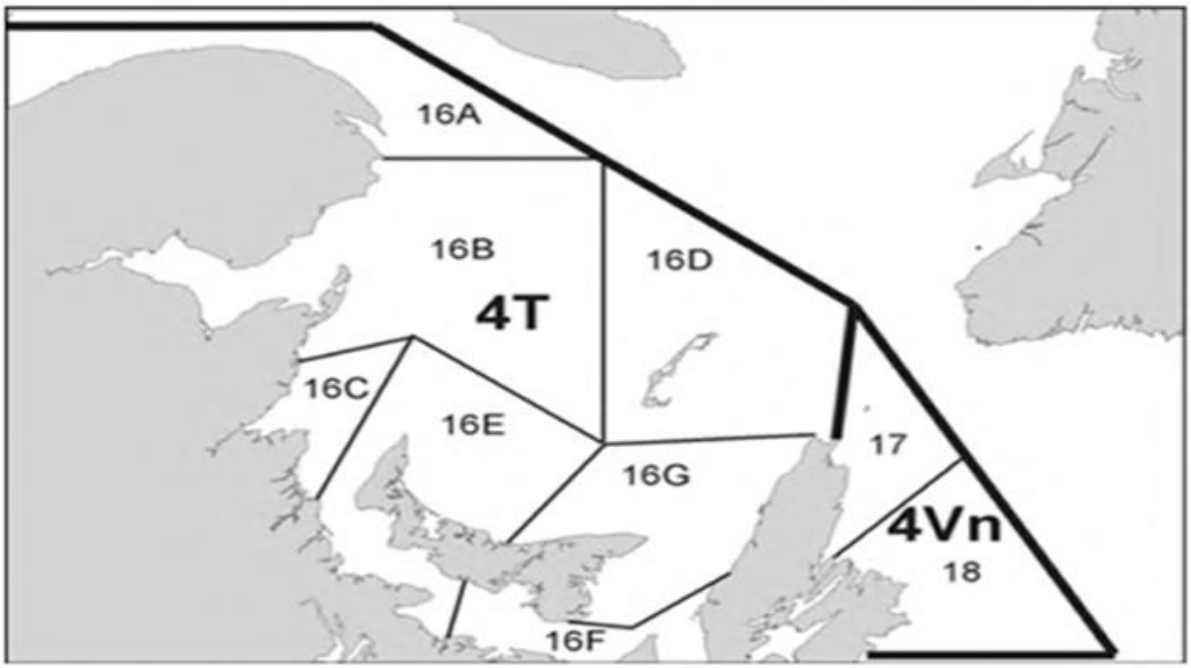

Figure 1: Map of Herring Fishing Areas in the southern Gulf of St. Lawrence

[10] Since 1996, 76.83% of the TAC has been allocated annually to the inshore fleet and 23.17% to the mobile purse seine fleet. The quota for the inshore fleet is fished competitively among the fleet, while the quota for the purse seine fleet is allocated to each licence holder based on individual catch limits, known as Individual Transferrable Quotas [ITQs]. Subject to the discretion of the Minister, ITQs are transferable among licence holders and are considered by license holders to be valuable assets capable of being bought and sold among them.

B. *The Precautionary Approach Framework*

[11] The United Nations Agreement on Straddling and Highly Migratory Fish Stocks commits Canada to use the Precautionary Approach in managing fish stocks. The Precautionary Approach calls for measures and actions that ensure prudent foresight and reduce or avoid risk to a

resource, the environment, and people to the extent possible, explicitly taking uncertainties and potential consequences of being wrong into account.

[12] DFO has adopted a fishery decision-making framework that incorporates the Precautionary Approach. This framework applies where decisions are made to determine the TAC for a stock or other measures are taken to control harvests. The framework describes three stock status zones: the healthy zone, the cautious zone and the critical zone. In accordance with the Precautionary Approach, when stock is in the cautious zone, fisheries management actions should promote stock rebuilding towards the healthy zone.

C. *Fall 2020 Commercial Herring Fishery TAC Decision-Making Process*

[13] Ahead of the Minister designating the TACs for the Fishery for the spring and fall of 2020, a science peer review meeting was held on March 12 and 13, 2020. Modelling of the natural mortality of herring in the southern Gulf of St. Lawrence over time indicated that the fall herring stock component had been in the cautious zone of the Precautionary Approach framework since 2017 and that spawning stock biomass had been declining annually since 2011. The fall TAC for 2019 was 22,500 t. Scientific advice indicated that the spawning stock biomass declined in all options for setting catch levels, but that setting a 12,000 t catch in the fall of 2020 would be consistent with the same fish mortality as in 2019, while an 8,000 t catch in the fall of 2020 would decrease fish mortality.

[14] DFO consulted with members of the Gulf Small Pelagic Advisory Committee [GSPAC], including representatives of Indigenous groups, harvesters, processors, environmental non-

governmental organizations [ENGOs], the Maritime Provinces and Quebec. The consultation was held on May 28, 2020, conducted by conference call due to the COVID-19 pandemic. The results of the latest stock assessment were presented, and GSPAC members were asked to provide recommendations on the TAC for the fall of 2020. A majority of the GSPAC recommended a roll-over of the existing 2019 TAC of 22,500 t. ENGOs recommended keeping catches below 8,000 t. The Prince Edward Island Fishermen's Association called for a moratorium on purse seine activities for the fall 2020 Fishery.

[15] DFO officials subsequently drafted a memorandum to the Minister recommending how the fall TAC should be set. The final version of the memorandum was sent to the Minister on August 19, 2020, summarizing the scientific recommendations and the GSPAC recommendations and attaching the following three options for setting the TAC, along with the pros and cons of each option [the Memorandum]:

A. Establish the fall TAC at 12,000 t, representing a significant (47%) reduction from the 2019 TAC;

B. Establish the fall TAC at 12,000 t, but over-allocate quota to the various HFAs to allow the entire TAC to be captured, with the understanding that the fishery will be closed should the TAC be captured [Option 2]; or

C. Establish the fall TAC at 18,000 t, with targeted catches expected to be at approximately 12,000 t based on historical catch data.

[16] The Memorandum recommended that the Minister adopt Option 2, because it represented a 47% reduction and would be consistent with the Precautionary Approach. On August 20, 2020, the Minister signed the Memorandum, indicating that she concurred with the recommendations therein.

[17] DFO issued the First Notice and Second Notice to license holders, including the Applicants, on August 20, 2020, and September 1, 2020, respectively [the Notices]. The Notices explained that a decrease in TAC for the fall herring fishery was necessary to promote stock rebuilding, which was currently in the cautious zone of the Precautionary Approach framework. The Notices advised that the 2020 fall TAC was set at 12,000 t and then listed the quota allocations for the inshore and purse seine fleets.

[18] The Notices did not expressly state that the quotas were an over-allocation, although the sum of the quotas set out therein totalled 18,000 t. On August 21, 2020, Mr. Barry contacted the Minister by email to raise concern about the Decision. He explained that, by over-allocating from 12,000 t to 18,000 t, the inshore fleet were provided with the opportunity potentially to catch the entire 12,000 t TAC, leaving the purse seine fleet with no access to the TAC. Mr. Barry did not receive a response to his inquiry until November 4, 2020, when DFO's Regional Director General for the Gulf Region wrote to him to advise that DFO would not be commenting, because the matter was before the courts. This was a reference to the Applicants having commenced this application for judicial review on September 18, 2020, challenging the Decision.

D. *Results of Fall 2020 Commercial Herring Fishery*

[19] On or about October 20, 2020, DFO informed Mr. Barry and other representatives of the Applicants that the inshore fleet had caught approximately 11,300 t of the 12,000 t TAC. By the time Mr. Barry swore his affidavit in this matter on October 30, 2020, the purse seine fleet had caught 500 t of herring in areas of the southern Gulf in which the inshore fleet had already finished fishing. Mr. Barry explained that this represented 4.2% of the 2020 TAC, in contrast with the 23.17% allocated to the seiner fleet historically.

[20] The Fishery closed on November 4, 2020, once the entire TAC had been caught. The inshore fleet's landings totalled 11,287 t, and the purse seine fleet's landings totalled 708 t.

III. **Issues and Standard of Review**

[21] The parties' arguments raise the following issues for the Court's consideration in this application:

A. Is the Decision a legislative/policy decision or an administrative decision?

B. If the Decision is a legislative or policy decision, is it reviewable, because it was made in bad faith, without adherence to principles of natural justice, or based on consideration of factors irrelevant or extraneous to the statutory purpose?

C. If the Decision is administrative in nature, is it reviewable, because it was substantively unreasonable or was it made without adherence to principles of procedural fairness?

[22] In considering these issues, I will explain the applicable standards of review that are contemplated by the above articulation of the issues.

IV. **Analysis**

A. *Is the Decision a legislative/policy decision or an administrative decision?*

[23] Characterizing the nature of the Decision under review is significant, because it affects the standard of review, i.e. the circumstances under which it could be appropriate for the Court to overturn the Decision and send it back to the decision-maker for reconsideration. The Applicants take the position that the Decision is administrative in nature, a result that would expand the circumstances in which the Court could find the Decision to be in error. The Respondents submit that the Applicants are challenging a policy decision, closer to the legislative end of the spectrum, which can only be reviewed in more narrow circumstances. The details of the different standards of review will be explained later in these Reasons.

[24] In support of their position that the Decision is administrative, the Applicants rely on the following formulation of the test, for determining whether a decision is administrative or legislative, set out in by S. A. de Smith and J. M. Evans, *de Smith's Judicial Review of Administrative Action*, 4th ed, (London: Stevens, 1980), at page 71:

> A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice. Legal consequences flow from this distinction.

[25] The Applicants note that this formulation of the test has been relied upon in *R v Corcoran*, [1999] NJ No 311, 181 Nfld & PEIR 341 (NLSCTD) and *Ecology Action Centre Society v Canada (Attorney General)*, 2004 FC 1087, albeit in the context of decisions surrounding fisheries close times rather than TAC or quota allocation decisions. While the Applicants have not identified any authorities in which a decision setting a TAC has been characterized as an administrative decision, they submit that the authorities establish that it is necessary to consider the context of the decision in arriving at the appropriate characterization.

[26] Against that jurisprudential backdrop, the Applicants raise for the Court's consideration what they submit is one of the principal factual disagreements between the parties. The Applicants argue that the Decision affected them in particular, while the Respondents submit that the Decision affected both the inshore and purse seine fleets. The Applicants submit that, if their position on this factual dispute is accepted, this militates in favour of characterizing the Decision as administrative.

[27] The Applicants recognize that, on its face, a decision to set a TAC applies to all license holders in the relevant fishery. However, they compare the effect of the Decision on them to the

effect upon the inshore license holders and argue that this demonstrates that the Decision affected them in particular.

[28] In 2019 and earlier years, the Fishery was managed so that the inshore license holders were in a competitive fishery. In the particular HFA for which it was licensed, each inshore participant could fish until the fleet caught its share of the TAC. The Applicants submit that this dynamic for the inshore fleet was unchanged in 2020 as a result of the Decision.

[29] In contrast, again in 2019 and earlier years, the purse seine license holders were not in competition either with the inshore fleet or with each other. Each purse seine license holder was assured that it would be entitled to catch the portion of the TAC represented by its particular ITQ. However, in 2020, as a result of the over-allocation component of the Decision, these license holders found themselves in competition both with the inshore fleet and with each other. In other words, the over allocation of 6000 t above the 12,000 t TAC permitted the inshore fleet, or indeed another purse seine license holder, to catch enough fish that the TAC could be reached without each of the purse seine license holders catching its ITQ.

[30] The Applicants submit that, because the Decision affected them in this manner, without a comparable impact upon the inshore fleet, it should be characterized as administrative in nature.

[31] The Respondents argue that the Decision affected all license holders who participated in the Fishery, not just the Applicants, and the fact that the TAC and over-allocation of the quota

negatively affected the Applicants does not alter the characterization of these measures as a discretionary policy decision.

[32] At a factual level, I agree with the Applicants that the Decision had the potential to affect them, and in the result did affect them, adversely and in a manner different from the effect upon the inshore fleet. However, I do not consider this impact to translate into a conclusion that the Decision is administrative in nature. The fact that a fisheries management measure of general application has a particular effect upon a particular participant or set of participants in the fishery, or affects some participants more than others, does not in itself change the nature of that decision such that it can be characterized as an administrative act (see *Barry Group Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2017 FC 1144 at para 28).

[33] In my view, the effect of the Decision upon the Applicants is not a basis to depart from the substantial body of jurisprudence holding that decisions regarding fish quota allocations are discretionary decisions in the nature of policy or legislative action, not administrative decisions (see, e.g. *Carpenter Fishing Corp v Canada*, [1998] 2 FC 548, [1997] FCJ No 1811 (FCA) [*Carpenter*] at para 28; *Malcolm v Canada (Minister of Fisheries and Oceans)*, 2014 FCA 130 [*Malcolm*] at para 34; *Arsenault v Canada (Attorney General)*, 2009 FCA 300 [*Arsenault*] at paras 41-42; *Association des crevettiers acadiens du Golfe inc v Canada (Attorney General)*, 2011 FC 305 [*Association des crevettiers*] at para 58).

B. *If the Decision is a legislative or policy decision, is it reviewable, because it was made in bad faith, without adherence to principles of natural justice, or based on consideration of factors irrelevant or extraneous to the statutory purpose?*

[34] Having found that the Decision is a legislative or policy decision, I must apply the standard of review applicable to a decision of this nature. There is little disagreement between the parties on the standard of review. They agree that the standard is reasonableness and rely on the same authorities for that conclusion (see, e.g., *Malcolm* at para 34) and for the principles governing the application of the reasonableness standard to a discretionary policy decision. Relying on *Maple Lodge Farms Ltd v Government of Canada*, [1982] 2 SCR 2 [*Maple Lodge Farms*] at pp 7-8, the Applicants submit that such decisions are unreasonable on judicial review in three circumstances: bad faith; non-adherence to statutorily mandated natural justice; or consideration of factors irrelevant or extraneous to the statutory purpose. They also note the statement in *Malcolm* (at para 35) that a discretionary policy decision can also be unreasonable if it is found to be irrational, incomprehensible or otherwise an abuse of discretion.

[35] While these authorities, and others cited by the parties for the articulation of the applicable standard of review, pre-date the recent and seminal decision of the Supreme Court of Canada on standard of review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], neither party suggests that *Vavilov* has altered the analysis that must be undertaken in the case at hand. *Vavilov* notes that the decisions to which the reasonableness standard applies range from matters of "high policy" on one end of the spectrum to "pure law" on the other. Reasonableness remains a single standard, in the sense that it involves the same degree of scrutiny in all contexts, although what is reasonable in a given situation will be a contextual determination that takes into account the constraints imposed by the legal and factual context of the particular decision under review (at paras 88-90).

[36] In the case at hand, the legal context of the Decision is the power of the Minister to manage fisheries in accordance with the *Fisheries Act,* RSC, 1985, c F-14 [the Act]. In particular, under s 7 of the Act, the Minister has absolute discretion to issue licences to fish. It was in that context that the articulation of the principles, surrounding the standard of review applicable to discretionary policy decisions in the management of the fishery, was developed in the authorities pre-dating *Vavilov*¸ and I find no basis to depart from those authorities in the present case.

[37] I therefore turn to the Applicants' arguments as to how the Decision offends these principles. First, they submit that there is no closed or definitive list of behaviours that will constitute bad faith, non-adherence to natural justice, or consideration of factors that are irrelevant, extraneous, or arbitrary. They also argue that bad faith does not necessarily require malice on the part of DFO. Rather, an absence of good faith in the Minister's decision-making can be sufficient to warrant judicial review. The Applicants also rely in particular upon the explanation in *Malcolm* that a discretionary policy decision is unreasonable if it is incomprehensible (at para 35).

[38] Relying on those submissions, the Applicants urge the Court to conclude that the Decision is unreasonable, because it is opaque, confusing, crafted in such a way as to obscure rather than reveal its purposes, goals and intended effects, or otherwise incomprehensible. In advancing this submission, the Applicants rely on the differences in the manner in which the Notices, on the one hand, and the Memorandum, on the other hand, describe the fisheries management measures represented by the Decision. This submission also engages a

disagreement between the parties on whether it is the Notices (as argued by the Applicants) or the Memorandum (as argued by the Minister) which represents the Decision.

[39] The Memorandum begins with a summary section, which explains to the Minister that the purpose of the Memorandum is to seek the Minister's approval on the TAC for the Fishery. After referring to the basis for DFO's recommendation (which will be addressed in more detail later in these Reasons), the recommendation is summarized as follows (referencing Option 2 as the recommended option):

> We recommend that the 2020 TAC be set at 12,000 t, and that the department over-allocate quota to the various HFAs to allow the entire 12,000 t to be captured, with the understanding that the fishery will be closed should the TAC be captured (option 2, Tab 5). This represents a 47 per cent decrease and would result in an annual fishing mortality below the removal reference point and would be in line with the [Precautionary Approach].

[40] The Applicants note that the Memorandum expressly sets out that the Decision is based on an over-allocation of quota, i.e. an allocation of quota to the participants in the Fishery at levels that total an amount in excess of the TAC. In contrast, the operative content of each of the Notices reads as follows:

> The quota will be distributed based on the existing fleet share for the various fleets involved and the following allocations were established in order to reach the TAC of 12,000 t.

Fleet allocations established based on historical sharing arrangements (metric tons) in order to reach catch of 12,000 t

Fleet	2020
Inshore fleet Areas 16A-16G	13,692 t
Inshore fleet in Area 17	180 t
Gulf large purse seine fleet	4,128 t

[41] While the figures in the above table total 18,000 t (which is obviously greater than the 12,000 t TAC), the Notices do not use the term "over-allocation" or, in the Applicants' submission, otherwise clearly identify how the historical allocations identified in the Notices are intended to operate in the context of the reduced TAC. In their oral submissions, the Applicants also pointed out that, in past years, the Notice to Fish Harvesters included the total overall allocation at the bottom of the table listing the allocation of the TAC. In the Applicants' submission, the Notices are not transparent or intelligible in conveying the nature of the Decision. They also assert that, when they sought clarification from representatives of DFO, including the Minister, they received no timely response.

[42] It is necessary at this stage in the analysis to address another area of factual disagreement between the parties, as to what communications took place between DFO and the Applicants as to the nature of the Decision. After receiving the First Notice on August 20, 2020, Mr. Barry emailed Mario Gaudet, Senior Regional Fisheries and Aquaculture Management Officer with DFO and asked if the reference to a 12,000 t TAC was a typographical error. On August 20, 2021, Mr. Gaudet responded by email that it was not an error and asked that Mr. Barry call him.

The only evidence before the Court of the resulting conversation is Mr. Barry's testimony in cross-examination, in which he said that Mr. Gaudet referred to the Decision as "crazy".

[43] On August 21, 2020, Joseph Barry, another representative of Barry Group Inc. and Barry Seafoods NB Inc., emailed Mr. Gaudet with the following inquiry:

> The announcement says 12,000 mt and the fleet shares add up to 18,000 mt? I assume 18,000 mt is correct?

[44] Mr Gaudet responded by email the same day as follows:

> Cap of 12,000 t for catches … but provide allocation using 18,000t … I know it is confusing.

[45] Also on August 21, 2020, Mr. William Barry sent the Minister and Mr. Gaudet an email with the following content:

> TOP URGENT;
>
> Minister Jordan /Mario Gaudet: this over allocation of a quota makes absolutely NO SENSE to our >65 ft fleet:
>
> The >65 ft seiners have licences and quota allocation for 40 years in the southern gulf. We have 23.6% of the TAC. If the TAC is 12,000 mt: then our Allocation /quota is 2832 mt.
>
> By over allocating from 12000 mt to 18000 mt, you are providing the first fishers to access the fishery (ie the inshore gill net fleet the next six weeks), the opportunity to over fish their legitimate quota share of 12,000 mt. As a result the TAC can potentially be caught and our fleet have NO access.
>
> The Department potentially has re allocated or confiscated our quota shares and made our licences valueless. We have tens of millions of dollars invested in this access and customers who rely on our supply.

> Are my concerns correct ??? What am I missing here ???
>
> Minister; I request your timely response to my URGENT MEMO and the Department to address our concerns.
>
> Bill Barry

[46] The Applicants submits that the next answer they received to their inquiries surrounding the Decision was a November 4, 2020 letter from the Regional Director General, responding to Mr. Barry's inquiry sent to the Minister and stating that it would be inappropriate to comment because the matter was before the courts. As previously noted, this is a reference to the within application for judicial review challenging the Decisions, which the Applicants commenced on September 18, 2020.

[47] The Respondents dispute the Applicants' assertion that they received no more information from DFO representatives as to the nature of the Decision. The Respondents submit that the Applicants' representatives speak with DFO representatives all the time, that they are not shy about making inquiries, and that it is disingenuous to suggest that they did not understand the Decision. The Respondents also note that, after commencing this application for judicial review, the Certified Tribunal Record [CTR] containing the Memorandum was sent to the Applicants' counsel on October 7, 2020.

[48] I will return shortly to the significance of the CTR, and other materials filed in this application, to the question of the Applicants' understanding of the Decision. However, on the more narrow factual dispute as to what communications took place between DFO and the Applicants on the nature of the Decision, I find that the evidence favours the Applicants. While

the Court cannot rule out the possibility that there were discussions other than those revealed by the record, I agree with the Applicants' counsel's submission that it was available to either party to lead evidence of such communications. In the absence of any such evidence, the Court must work with the record, which reveals no relevant communications on this issue subsequent to the conversation between Mr. Barry and Mr. Gaudet on or about August 20, 2021. There is also no evidence as to the content of that conversation, other than Mr. Barry's cross-examination testimony as identified above.

[49] However, I take the Respondent's point that the Applicants, or at least their counsel, were in possession of the Memorandum once the CTR was provided on October 7, 2020. Also, I note that their Notice of Application commencing this application for judicial review is dated September 16, 2020. In my view, the Notice of Application describes the Decision in a manner that demonstrates that, at least as of mid-September 2020, the Applicants understood the Decision.

[50] More importantly, I am not convinced that the communications between DFO and the Applicants, or when the Applicants understood the Decision, are particularly germane to addressing the Applicants' challenge to the reasonableness of the Decision. The Applicants' argument that the Decision is not transparent or intelligible, and is therefore unreasonable, is based on its position that it is the Notices, and not the Memorandum, which represent the Decision. As previously noted, the Respondents disagree and argue that the Memorandum is the Decision. The Respondents submit that this document, signed by the Minister on August 20, 2020, represents the Minister's approval of DFO's recommendations on the level at which the

TAC should be set and the associated management measures, including the over-allocation of the TAC at 18,000 t. This documents sets out the basis for the recommendations and therefore the reasons for the Decision.

[51] The Applicants argue that it must be the Notices that represent the Decision, because only the Notices were communicated to them at the time the Decision was made. They did not receive the Memorandum until after they commenced their application for judicial review. The Applicants submit that, because s. 18.1 of the *Federal Courts A*ct, RSC 1985, c F-7 [FCA] affords a party affected by a federal decision only 30 days to seek judicial review of that decision, it would not be logical to interpret the Decision in the present case to be the Memorandum that they did not receive until October 7, 2020.

[52] In my view, for the reasons articulated in the Respondents' arguments, it is clear that it is the Memorandum that documents the Decision or at least the reasons for the Decision. The Notices are the means by which the Decision was communicated to the Applicants, and the Applicants are correct that the 30 day time period prescribed by s 18.1 of the FCA begins to run from the time the decision was first communicated to the party affected by it. In this case, that was on August 20, 2020, when the First Notice was issued. I appreciate that the Applicants did not then have the benefit of the full explanation for the Decision, including the Minister's reasons, as set out in the Memorandum. However, that is sometimes a feature of the judicial review process, where the full reasons for a decision are found in components of the record other than the communication of the decision to the affected party (see, e.g., *Interlake Reserves Tribal Council v Canada (Environment and Climate Change)*, 2019 FC 1067 at para 24) and may not

be available to the affected party until steps are taken to pursue review of the decision (see, e.g., *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 at para 44).

[53] My conclusion on this point is also a function of the purpose of the judicial review process, as informed by the nature of the reasonableness standard of review. In *Vavilov*, the Supreme Court emphasized that reasonableness review is primarily about examining the reasoning underlying a decision (at paras 84-87). It would be inconsistent with this guidance to focus upon the Notices, assessing whether they sufficiently articulate the Decision and the Minister's reasoning therefor, when that detail is available in the Memorandum.

[54] Examining the Memorandum, the reasons for the Decision are fully intelligible. Relying on the paragraph of the Memorandum summarizing DFO's recommendation, recited earlier in these Reasons, it is clear that the Decision set the TAC at the 12,000 t level, because that level was considered sound from a conservation perspective, and that the over-allocation component of the Decision was intended to allow the entire TAC to be captured. As explained later in the Memorandum, where the "pros" and "cons" associated with this recommended option (Option 2) were canvassed, the reasoning was that the over-allocation would serve to increase the allocation for the fleets fishing in the most productive HFAs and thereby increase their economic benefit. In other words, the reasoning behind the Decision was to set a biologically sound TAC while achieving the economic benefits of having the entire TAC caught.

[55] In challenging the reasonableness of the Decision, the Applicants also take the position that the Decision affects them adversely and in a manner differently than it affects the inshore

fleet, having the effect of depriving the Applicants of their ITQs. Their counsel's oral submissions focused significantly on what their counsel described as a significant area of factual dispute between the parties related to this argument. The Respondents submit that all fleets can fish at the same time, subject to their license conditions and fishing regulations, such that when the Applicants chose to fish during the season was their own decision, not a decision imposed on them by DFO. The Applicants dispute this assertion, arguing that, as a consequence of their gear type, the particular type of herring they require for their market, certain regulatory restrictions, and the history of conflict between the inshore and mobile gear fleets, they are necessarily restricted to fishing after the inshore fleet has finished its fishing effort.

[56] On this factual point, I agree with the Applicants' position. The evidence establishes that their gear requires deeper water than the fixed gear of the inshore fleet. Also, their market is for fish fillets rather than the roe that is sold by the inshore fleet. Early in the fall season, the herring are spawning, which takes place in shallow water. At this early stage, the seiners' physical inability to use their gear in the waters where the fish are found, and the fact that the flesh of the fish is affected by the spawning process and unsuitable for fillets, means that the seiners cannot compete with the inshore fleet. Combined with geographic regulatory requirements restricting the seiners' access to certain fishing grounds, prohibitions against mobile gear being operated within a certain distance of previously set fixed gear, and a history of conflict between the fleets including incidents of violence, the result is that the purse seine fleet necessarily begins fishing after the inshore fleet has completed or largely completed its fishing.

[57] However, this factual finding has no particular impact on the outcome of this application. Recall that, in order to succeed in this application, the Applicants must demonstrate that the Decision took into account irrelevant or extraneous considerations or otherwise offended the principles from *Maple Lodge Farms* or *Malcolm.* The "cons" portion of the analysis related to Option 2 in the Memorandum demonstrates that the Minister was aware that the Decision would affect some fleets within the Fishery adversely. There is an express reference to Option 2 resulting in a significant change in sharing arrangements between the eight HFAs, which the parties appear to agree represents a reference to sub-fleets within the inshore fleet. There is also a more general reference to the likelihood that Option 2 will result in DFO not respecting the shares of certain fleets, i.e. if some fleets cannot access the fishery. This concern appears capable of encompassing both the inshore sub-fleets and the purse seine fleet. While the purse seine fleet was not entirely prevented from accessing the Fishery, the concern expressed in this portion of the Memorandum is consistent with the adverse effect ultimately experienced by that fleet, i.e. that they were able to catch only 708 t or 5.9% of the TAC, as opposed to their historical share of 23.17%, before the Fishery was closed.

[58] Therefore, the Memorandum demonstrates that the likely effect of the Decision was contemplated by the Minister when it was made. It is of course understandable that the Applicants feel aggrieved by this effect of the Decision. However, the fact that a quota allocation decision favours the interests of some license holders or fleets over others is not a basis for the Court to interfere with the decision (see, e.g., *Carpenter* at para 28; *Arsenault* at paras 41-42). The division of the resource among different groups is part of the Minister's discretionary role and power (see, e.g., *Association des crevettiers* at para 63).

[59] The fact that the Applicants' participation in the Fishery is managed through a system of ITQs does not alter this analysis. I accept that a market exists for ITQs, subject of course to the discretion of the Minister. However, as explained by the Federal Court of Appeal in *Anglehart v Canada*, 2018 FCA 115, quotas do not confer property rights. While they may be viewed as valuable assets capable of being the subject of commercial transactions, ultimately their value depends on discretionary ministerial decisions (at paras 35-36).

[60] Finally, I have considered the Applicants' argument that the process leading to the Decision offends principles of natural justice. I note that the Applicants' submissions surrounding natural justice or procedural fairness were advanced principally in the context of the Decision being found to be an administrative decision, as opposed to a legislative or policy decision. I will nevertheless address this issue briefly.

[61] *Maple Lodge Farms* identifies that discretionary policy decisions are subject to review for non-adherence to statutorily mandated natural justice requirements (at pp 7-8). The Applicants have identified no statutorily mandated natural justice requirements that apply to the matter at hand.

[62] The Applicants' written submissions raise the doctrine of legitimate expectations. Even if I had found the Decisions to be administrative in nature, such that the Applicants could invoke procedural fairness requirements more broadly than those mandated by statute, I would not find the doctrine of legitimate expectations applicable to this matter. The Applicants' argument under that doctrine is based on the history of DFO consulting with participants in the Fishery, including

the May 2020 consultation with the GSPAC. However, the doctrine of legitimate expectations requires that a government official made clear, unambiguous and unqualified representations that they would follow a particular administrative process (see *Mavi v Canada (Attorney General),* 2011 SCC 30 at para 68). The facts of this matter do not support invocation of that principle.

[63] I should note that I am conscious of DFO's statements in the Memorandum, to the effect that a significant change in TAC sharing arrangements would normally require industry consultation and that the lack of consultation could jeopardize the integrity of the process. However, these statements are not the sort of representation, that a future opportunity for consultation will be afforded, to which the doctrine legitimate expectations responds. I am not persuaded that these statements have any particular legal effect on the reasonableness of the Decision or the fairness of the process leading thereto.

[64] As I have not found that the Decision is administrative in nature, it is unnecessary for the Court to address the Applicants' arguments that were premised on such a finding. Regardless, those arguments focused almost entirely on procedural fairness, which I have addressed above.

[65] Having considered the Applicants' arguments and finding no reviewable error in the Decision, this application for judicial review must be dismissed. It is therefore unnecessary for me to consider the Respondents' alternative argument that, even if there were a reviewable error in the Decision, there would be no benefit to referring the matter back to the Minister for reconsideration, because the Fishery is over and the matter is therefore moot.

V. **Costs**

[66] Each of the parties seeks costs in the event it is successful in this application. At the conclusion of the hearing, the parties requested an opportunity to consult with each other in an effort to reach agreement on a lump sum costs figure that would be payable to the successful party. I afforded them time to advise the Court in writing whether such agreement had been reached or, alternatively, to provide brief written submissions on costs.

[67] Counsel subsequently advised that the parties have agreed that the unsuccessful party shall pay to the successful party costs in the amount of $6,668.48. I consider this amount reasonable. My Judgment will therefore award costs in that lump sum amount to the Respondents.

JUDGMENT IN T-1112-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The Respondents are awarded costs in the lump sum amount of $6,668.48.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1112-20
STYLE OF CAUSE:	BARRY SEAFOODS NB INC., BARRY GROUP INC., PRIDE VENTURES INC., 039761 NB LTEE 67108 NEWFOUNDLAND & LABRADOR INC., AND GAUVIN AND NOEL COMPAGNIE LTEE v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD, and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARING CONDUCTED BY VIDEOCONFERENCE VIA HALIFAX
DATE OF HEARING:	MAY 20, 2021
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JULY 8, 2021

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