

Federal Court



Cour fédérale

Date: 20230829

**Dockets: T-866-22
T-923-22
T-1804-22**

Citation: 2023 FC 1166

Ottawa, Ontario, August 29, 2023

PRESENT: Madam Justice Walker

Docket: T-866-22

BETWEEN:

SHELBURNE ELVER LIMITED

Applicant

and

**HIS MAJESTY THE KING (MINISTER OF
FISHERIES, OCEANS AND THE
CANADIAN COAST GUARD)**

Respondent

Docket: T-923-22

AND BETWEEN:

WINE HARBOUR FISHERIES LIMITED

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1804-22

AND BETWEEN:

SOUTH SHORE TRADING CO. LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] At issue in this consolidated proceeding is the issuance of commercial elver fishing licences by the Minister of Fisheries and Oceans (the Minister) for the 2022 spring/summer fishing season. Elvers are juvenile American eels.

[2] The Applicants, Shelburne Elver Limited (Shelburne Elver), Wine Harbour Fisheries Ltd. (Wine Harbour) and South Shore Trading Co. Ltd. (SST), have for a number of years each held an annual commercial fishing licence to fish an individual quota (IQ) or catch limit of 1,200 kilograms (kg) of elver. Each Applicant filed a Notice of Application seeking judicial review of the Minister's decision (the Decision) to reduce its allocated IQ for the 2022 fishing season by 13.7% to support increased First Nations access to the fishery. The reduction of IQ was implemented without financial compensation to the licence holder. The same Decision was made to reduce the IQ of eight of the nine commercial licence holders and I refer to the eight

Decisions, including those affecting the Applicants, in the singular throughout this judgment.

The Decision was communicated to each of the Applicants in an April 6, 2022 letter from Ms. Jacinta Berthier, Regional Director of Fisheries Management, Department of Fisheries and Oceans (DFO).

[3] The applications for judicial review of Shelburne Elver (T-866-22) and Wine Harbour (T-923-22) were consolidated on June 15, 2022. SST's application for judicial review (T-1804-22) was consolidated with those of Shelburne Elver and Wine Harbour on August 29, 2022. The consolidated proceeding was heard by me on February 28 and March 1, 2023.

[4] The Decision is the culmination of a process involving the Minister, her representatives, DFO and licence holders that began in February 2021. The timeline of the process from that date to the date of the Decision is critical to the arguments presented by the Applicants and a chronology of the relevant events is included in this judgment for ease of reference.

[5] It is important at the outset to establish what is not at issue in this proceeding. None of the Applicants questions the importance of providing increased access by First Nations to the elver fishery. The Applicants' dispute lies with the Minister. They focus on the process that resulted in the Decision and the substance of the Decision itself, specifically the Minister's departure from the "willing-buyer, willing-seller" (WBWS) model and the reduction in their respective IQs of prior years without financial compensation.

[6] The Applicants submit that the Decision is an administrative decision reached in a procedurally unfair manner when the Minister abandoned the WBWS model at the last minute. They also submit that the Decision lacks transparency and is unreasonable. The Respondent disagrees and argues that the Decision is a policy decision that is subject to review only in very narrow circumstances. The Respondent submits that the process leading to the Decision was fair and resulted in a reasonable, polycentric Decision that the Court should not disturb.

[7] I disagree with the Respondent's first argument and find that the Decision is administrative in nature. However, I find that (1) the process through which the Minister made the Decision was fair; and (2) the Decision is reasonable in light of the Minister's broad discretion to manage Canadian fisheries and the comprehensive reasons for which she made the Decision.

[8] Accordingly, I will dismiss the Applicants' applications for judicial review.

II. **Background**

A. *The Elver Fishing Industry*

[9] American eel is a single population born in the Caribbean that makes its way annually to Atlantic Canada in the spring/early summer. The Maritimes Region is home to Canada's only commercial elver fishery.

[10] The commercial elver fishery is a limited entry fishery for conservation reasons based on a "one-out one-in" principle. Unless the Minister exercises her discretion to increase the number

of licences, entrance to the fishery is only possible by replacing an existing licence holder. No new elver licences have been issued since 1998 and no person is authorized to fish for elvers without a valid licence.

[11] The total aggregate catch (TAC) for the elver fishery has remained at 9,960 kg since 2005.

[12] The fishery is managed by DFO (Maritimes Region) using an enterprise allocation model in which each licence authorizes a non-transferable IQ that can be harvested in exclusive fishing area(s) and caps the amount that can be taken from any individual river. Licences are issued annually and it has been DFO's practice to re-issue a licence to the same holder year-after-year.

[13] DFO has been concerned about the conservation status of eels for many years. The Committee on the Status of Endangered Wildlife in Canada (COSEWIC) designated American eel as 'threatened' in a 2012 report (2012 COSEWIC Report) and, as of July 2022, Canada was considering whether to list the species under the *Species at Risk Act*, SC 2002, c 29.

[14] The elver fishery has become increasingly lucrative over the past decade, with landed value rising from \$450/kg in 2009 to \$3,800/kg in 2021, having peaked in 2019 at \$5,100/kg.

[15] During the period relevant to this proceeding (2021-2022), there were nine commercial elver licences. Eight of the licences were issued under the *Maritime Provinces Fishery Regulations (MPFR)*, SOR/93-55, and were held by commercial enterprises, including the

Applicants. Seven of the eight *MPFR* licences were issued with IQs of 1,200 kg each and one with an IQ of 360 kg. The remaining commercial licence was issued under the *Aboriginal Communal Fishing Licences Regulations (ACFLR)*, SOR/93-332, to We'koqma'q First Nation with an IQ of 1,200 kg.

[16] In recent years, due to ease of harvesting, the high value of the elver fishery and the limited access to the fishery held by First Nations, DFO officers observed a marked increase in unlicensed fishing of elver, impacting the conservation, orderly management and safety of the fishery. In DFO's opinion, greater access for First Nations could assist in mitigating the risk of unauthorized fishing outside the existing commercial fishery.

B. *First Nations access to the elver fishery*

[17] Since 2016, several First Nations have sought access to the elver fishery and have asserted that the right to fish and sell catch in pursuit of a moderate livelihood applies to the elver fishery (see, *R v Marshall*, [1999] 3 S.C.R. 456, a case involving adult eel harvesting). Beginning in 2019 and continuing into 2022, DFO received proposals from two First Nations requesting access to approximately 3,200 kg of elver under moderate livelihood fishing plans (MLFPs).

C. *The Applicants*

[18] Shelburne Elver operates as a 17-member cooperative and has held an elver fishery licence every year since 1998. From 2005 to 2021, the Minister allocated an annual IQ of 1,200 kg to Shelburne Elver.

[19] Wine Harbour operates a commercial fishing enterprise in Sherbrooke, Nova Scotia, and has held an elver fishery licence every year since 1995. In the years prior to the 2022 elver season, the Minister allocated an annual IQ of 1,200 kg to Wine Harbour.

[20] SST has been involved in the American eel fishery since 1984 and has held an elver fishery licence every year for many years. From the late 2000s to 2021, the Minister allocated an annual IQ of 1,200 kg to SST.

[21] Each of the Applicants filed affidavits in this proceeding:

- (1) Shelburne Elver: Mr. Brian Giroux, sworn on June 6, 2022.
- (2) Wine Harbour: Mr. Blair Golden, sworn on June 6, 2022.
- (3) SST: Mr. Mitchell Feigenbaum, sworn on June 27, 2022.
- (4) Respondent: Ms. Jacinta Berthier, sworn on July 4, 2022.

[22] Each of the affiants was cross-examined on their affidavit and the transcripts of the cross-examination are included in the record.

D. *Chronology*

[23] The chronology of meetings and communications among DFO, the Minister's representatives and licence holders is central to the parties' respective positions in this application. The following summary sets out the important dates and events of that chronology.

The content of certain meetings and memoranda to the Minister is discussed in the analysis section of this judgment.

Date	Event
February 17, 2021	<u>Elver Advisory Committee (EAC) Meeting:</u> <ul style="list-style-type: none"> <li data-bbox="597 453 1279 520">– Attended by representatives of DFO, Shelburne Elver, Wine Harbour and SST, <i>inter alia</i>. <li data-bbox="597 541 1279 680">– DFO gave an overview on the potential for voluntary relinquishment of existing access in the elver fishery to be used in negotiations with Indigenous communities.
March 3, 2021	<u>Minister’s statement:</u> <ul style="list-style-type: none"> <li data-bbox="597 764 1279 903">– The federal government will work with <i>Marshall</i> communities to develop MLFPs and will increase First Nations’ access through existing licences and a WBWS approach.
March 10, 2021	<u>Conference call - DFO and licence holders:</u> <ul style="list-style-type: none"> <li data-bbox="597 982 1279 1121">– DFO stated that it was looking for ways to provide access to the fishery to First Nations without increasing TAC. The preferred method would be a voluntary relinquishment - WBWS. <li data-bbox="597 1142 1279 1209">– Interested licence holders were invited to send draft proposals to DFO.
April 6, 2021	Proposals submitted to DFO by each of the Applicants.
August 31, 2021	<u>TriNav Report:</u> DFO received an independent valuation analysis and report regarding elver from TriNav Fisheries Consultants Inc. (TriNav).
January 20, 2022	<u>EAC Meeting:</u> DFO confirmed that it was working on MLFPs, maintaining TAC and looking for voluntary relinquishment-WBWS. DFO stated it intended to issue a second call for proposals.

Date	Event
February 22, 2022	<p><u>DFO, Canadian Committee for a Sustainable Eel Fishery (including five of the nine licence holders) and Fisheries Council of Canada meeting:</u></p> <p>DFO informed those present that voluntary relinquishment-WBWS was the preferred model but not the only possible model.</p>
February 24, 2022	<p><u>DFO memorandum to the Minister:</u></p> <ul style="list-style-type: none"> - For the 2022 elver season, DFO may have to issue interim IQs to licence holders. DFO will undertake consultations and internal analysis to inform a longer-term decision in advance of the 2023 season. - A summary of the February 22, 2022 meeting was provided and the Minister informed that (1) the proposals received from licence holders did not contain acceptable offers for voluntary relinquishment, and (2) licence holders had strong concerns regarding a non-voluntary process.
February 24, 2022	<p><u>Berthier letter to all licence holders stating that:</u></p> <ul style="list-style-type: none"> - Licence holders' proposals were significantly in excess of the TriNav valuation and DFO would not proceed with a second round of proposals for the 2022 season. - DFO was considering an interim IQ reduction of approx. 14% without financial assistance. - Licence holders were invited to respond by March 4, 2022.
March 3, 2022	<p>The Applicants each responded to the Berthier letter expressing clear and unequivocal opposition.</p>

Date	Event
March 11, 2022	<p><u>DFO memorandum to the Minister:</u></p> <ul style="list-style-type: none"> – The request for voluntary relinquishment did not result in financially feasible proposals and a second process would almost certainly not result in a more favourable outcome. – As an interim approach for the 2022 season, DFO recommended that current licence holders, except We'koqma'q First Nation, receive an IQ of 86.3% of their 2021 season IQ. The remaining 13.7% would be used to increase First Nations participation in the fishery.
March 15, 2022	<p><u>DFO meeting with licence holders:</u></p> <ul style="list-style-type: none"> – A licence holder/industry proposal for unequal redistribution of 14% of TAC for 2022 was tabled but did not have the support of all licence holders.
March 18, 2022	<p><u>DFO memorandum to the Minister:</u></p> <p>DFO summarized the March 15, 2022 meeting with licence holders and reiterated its intention to issue interim IQs totalling 86.3% of the TAC for 2022.</p>
March 23, 2022	<p><u>DFO meeting with licence holders:</u></p> <ul style="list-style-type: none"> – DFO, representatives of the Minister's office and the Department of Justice, and licence holders met for a final discussion. – DFO again asked licence holders to consider submitting a consensus proposal to reallocate 14% of the TAC for the 2022 season, while reaffirming its commitment to pursuing a long-term approach to the fishery through discussions with First Nations and licence holders.

Date	Event
March 24, 2022	<p data-bbox="597 247 1268 352"><u>Proposal for 2022 season submitted to DFO on behalf of seven licence holders, including Shelburne Elver and SST:</u></p> <p data-bbox="597 373 1263 478">The interim proposal set out two options for a conditional reduction of existing licence holders' IQ for the 2022 season:</p> <ul data-bbox="597 499 1279 919" style="list-style-type: none"> <li data-bbox="597 499 1279 720">– <u>Industry-preferred proposal:</u> When a licence holder approaches 86% of their 2021 quota, they may request permission from DFO to fish additional quota, subject to specific conditions. DFO will not authorize additional quota if the TAC is likely to be exceeded. <li data-bbox="597 741 1279 919">– <u>Secondary proposal:</u> Two or more quota holders may submit a plan detailing how much each party will relinquish to satisfy the 14% quota reduction (e.g., licence holder A could reduce IQ by 7% and licence holder B could reduce IQ by 21%).
March 25, 2022	<p data-bbox="597 940 1219 1010"><u>DFO memorandum to the Minister regarding the March 24, 2022 interim proposal:</u></p> <p data-bbox="597 1031 1284 1136">DFO recommended incorporating elements of licence holders' March 24, 2022 proposal into planning for the 2022 season:</p> <ul data-bbox="597 1157 1279 1661" style="list-style-type: none"> <li data-bbox="597 1157 1279 1335">– A percentage of each licence holders' IQ would be allocated for 2022. The remaining IQ, within the 9,960 kg TAC, would be held by DFO in a bank for use in negotiation with Indigenous communities. <li data-bbox="597 1356 1279 1535">– If there is remaining quota within the TAC that has not been allocated for new Indigenous access in 2022, DFO could reallocate the remaining TAC to current licence holders who have reached or are likely to reach their reduced IQ allocation. <li data-bbox="597 1556 1279 1661">– DFO would support licence holders voluntarily reducing any unfished portion of their IQ, which could be added to the bank for redistribution.
March 28, 2022	<p data-bbox="597 1686 1230 1894">The Minister signed the March 25, 2022 Memorandum, concurring with the recommended reduction of the respective IQ of eight of the nine commercial licence holders (not including We'koqma'q First Nation) by 13.7%, without financial compensation.</p>

III. **The decision under review**

[24] The critical paragraphs of Ms. Berthier's April 6, 2022 letters communicating the

Decision to the Applicants state:

The Minister has carefully considered your representations on the proposal set out in the February 24, 2022 [letter]. As you know, the Minister supports an increase in First Nations participation in the commercial elver fishery, without increasing the overall effort in this fishery.

As such, the Minister has decided for the 2022 season to allocate licence holders (not including We'koqma'q First Nation) 13.7% less quota this year as compared to individual allocations from last year, as an interim measure to support an increase in First Nations participation for the 2022 fishing season. For the 2022 season, this decision is not coupled with the provision of any financial arrangement for licence holders. This year's quota is reflected in 2022 conditions of licence (2022 quota allocation are 1035.60 kgs) with no other adjustments being made, such as changes or reduction of the river access locations and changes in gear type allowance, for the 2022 season.

[25] The letter confirms that DFO will carefully monitor the TAC during the season and that licence holders may be able to apply for available quota if they have reached or will likely reach their IQ allocation for 2022. Prior to the 2023 season, DFO will engage with licence holders to explore a longer-term approach to supporting an increase in First Nations participation in the fishery that may include a second call for proposals.

IV. **Issues**

[26] The parties' arguments raise the following issues:

- A. Is the Decision a policy or administrative decision?
- B. Were the Applicants afforded procedural fairness?
- C. Is the Decision reasonable?

V. **Analysis**

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

[27] The determination of whether the Decision is a policy decision or is administrative in nature is an important threshold issue because it affects the circumstances in which the Court will intervene. In very general terms, a decision maker who exercises a broad policy authority is subject to fewer procedural and substantive constraints than one who makes a highly legal determination (see *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras 24-36 (*Entertainment Software*), *Barry Seafoods NB Inc. v Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 725 at para 23 (*Barry Seafoods*)).

[28] The Applicants submit that the Decision is an administrative decision, albeit one that seeks to implement the federal government's commitment to facilitating increased access to the commercial elver fishery for First Nations. The Applicants argue that the Decision does not impose a general rule of conduct without reference to a particular case. Rather, it is a licensing decision. The Applicants emphasize that the Decision does not apply to all commercial licence holders in the fishery. Most notably, the Decision excludes from any reduction in IQ the licence held by We'koqma'q First Nation. The Applicants state that DFO and the Minister treated all nine commercial licence holders, including We'koqma'q First Nation, as part of the same fishery from the outset of discussions regarding the 2022 fishing season.

[29] The Respondent submits that the Decision is a policy decision taken by the Minister in the exercise of her broad discretionary powers to manage Canadian fisheries under the

Department of Fisheries and Oceans Act, RSC 1985, c F-15, the *Fisheries Act*, RSC 1985, c F-14, and related regulations. The Respondent characterizes the Decision as a decision regarding quota allocation that applies to the entire class of non-communal, commercial elver licences and not to the Applicants individually. The Respondent notes that the eight commercial licences that were subject to the reduction of IQ were issued under the *MPFR* while the licence held by We'koqma'q First Nation was issued under the *ACFLR*, a different regulatory regime.

[30] The jurisprudence of this Court and the Federal Court of Appeal (FCA) has consistently held that the imposition of a quota policy or quota allocation is a legislative/policy decision but the granting of a specific licence is an administrative decision (*Carpenter Fishing Corp. v Canada*, [1998] 2 FC 548 (CA) at para 28 (*Carpenter Fishing Corp.*); *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 at paras 32, 34 (*Malcolm*); *Barry Seafoods* at para 33; *Munroe v Canada (Attorney General)*, 2021 FC 727 at paras 29-31 (*Munroe*); contrast *Mowi v Canada West Inc. v Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 588 at para 153 (*Mowi*)).

[31] The question in each case that comes before the Courts is whether the decision in issue imposes a “general rule of conduct without reference to a particular case” (*Munroe* at para 37, citing (*R. v Corcoran*, 181 Nfld & PEIR 341 at paras 12-15, 20-21; *Gulf Trollers Assn v Canada (Minister of Fisheries and Oceans)* [1987] 2 FC 93 (FCA) at p 743-44).

[32] I find that the Decision in this case does not impose a rule of general application. In substance, the Decision is a licensing decision applicable solely to the 2022 elver fishing season

following a process and for reasons that consistently reference the individual interests and circumstances of the nine existing commercial licence holders. I make this finding based on the Decision, the process culminating in the Decision and the documentary record.

[33] The Decision, communicated to each of the eight affected licence holders by way of a letter from Ms. Berthier, reduces the IQ of the named licence holder for the 2022 elver fishing season by 13.7% without compensation, subject to application by the licence holder for access to additional IQ in certain circumstances. The Decision does not establish a TAC and allocate quota to fishery sectors (*Barry Seafoods*), reallocate TAC between fishery sectors (*Malcolm*), provide a formula for the attribution of quota within a fishery (*Carpenter Fishing Corp.*), or change the method of calculating quota for a defined group of licence holders (*Munroe*).

[34] The Respondent states that the Decision imposes the same IQ reduction on all commercial licence holders except We'koqma'q First Nation but does not address the second element of the Decision. Ms. Berthier's letter informs the recipient licence holder that they may be able to ask DFO to allocate to them additional, unfished quota from a bank of unallocated TAC as they approach their reduced 2022 IQ, provided that "individual quotas in the fishery will not exceed the maximum amount that was allocated to a licence holder in 2021". The possibility of recouping forfeited IQ was extended to each of the eight licence holders equally but reinforces DFO's focus on each licence holder and the effects of the IQ reduction on the particular holder.

[35] Consultations for the 2022 season began in February 2021 with a request in March to each commercial licence holder, We'koqma'q First Nation included, to provide a proposal

regarding its willingness to relinquish IQ under the WBWS model. DFO stated that it was looking for:

1. How much individual Quota?
2. Which associated fishing locations?
3. What are you seeking to be compensated and rationale for what you are requesting?

[36] In January 2022, DFO contemplated a second round of proposals from interested licence holders. Through February and March 2022, DFO and the Minister initiated consultations with licence holders regarding the reduction of each holder's IQ without financial compensation. We'koqma'q First Nation participated in the discussions, received the February 22, 2022 letter from Ms. Berthier and furnished its own response to the letter, in parallel with the other licence holders. The Minister stated in mid-March 2022 that she would consider a consensus proposal from licence holders but did not specify that the proposal must treat all licence holders equally.

[37] The Decision is informed by four memoranda to the Minister (February 24, 2022, March 11, 2022, March 18, 2022 and March 25, 2022 (the latter includes the concurring signature of the Minister on March 28, 2022)). The February 24 and March 11, 2022 memoranda provide insight on DFO's understanding of the nature of the Decision and the mechanics of the proposed reductions of existing licence holders' IQ. In the February 24 memorandum, DFO's description of the March 2021 call for proposals refers to licence holders who wished to voluntarily reduce their participation in the fishery. Following a summary of the history of discussions with licence holders in the March 11 memorandum, DFO continues "[r]egarding the approach of how to reduce the individual quota of each licence, two further considerations were made regarding distribution" (emphasis added).

[38] The Respondent argues that the solicitation by DFO of initial submissions from licence holders in 2021 did not indicate that the ultimate decision would necessarily be made on an individualized basis. It is true that the minutes of the March 10, 2021 conference call do not include a statement from DFO that any IQ reduction for 2022 would be made on a licence by licence basis. The converse is also true. The invitation was extended to licence holders on an individual basis. Licence holders then replied in kind and submitted proposals specific to their businesses. It is telling that, at no point, did DFO respond that it was expecting a uniform proposal or that any final decision would affect licence holders' IQs equally. I find that DFO's conduct strongly suggests that it anticipated an individual licensing decision with respect to each licence holder's IQ for the 2022 fishing season.

[39] The Respondent emphasizes that the Court in *Mainville v Canada (Attorney General)*, 2009 FC 720, held that a decision allocating specific IQs was legislative in nature even though it targeted a particular subset of fishers. The impugned decision was one that allocated "each Eastern New Brunswick groundfish-dependent competitive fisher" a share of the TAQ of snow crabs. The allocation was not applicable to specific licences or licence holders; it applied to the group as a whole, similar to the decision under review more recently in *Munroe*. Here, however, the Decision stemmed from specific facts associated with individual cases, which is characteristic of an administrative decision. As late as March 23, 2022, DFO was willing to consider a disproportionate, or licence-by-licence, distribution of the proposed 14% reduction across the TAC if it had unanimous support of the licence holders.

[40] The Respondent argues that We'koqma'q First Nation was treated differently from the other commercial licence holders because its licence was issued under the *ACFLR* but this argument finds no support in the record. There is no indication that the Minister exempted We'koqma'q First Nation from a reduction of IQ based on their status as a communal commercial licence holder under the *ACFLR*. There is also no mention in the record that the Decision was to apply to all licences issued under the *MPFRs*.

[41] I find no evidence that the regulatory regime factored in the advice provided by DFO or in the Decision. We'koqma'q First Nation's response to Ms. Berthier's February 22 letter highlights the fact that its exclusion from any reduction of IQ would be consistent with the Minister's commitment to increasing First Nations access to the fishery but emphasizes the impacts of an IQ reduction on Band members. The "Advice to the Minister" in the Certified Tribunal Record (CTR) supports the position that We'koqma'q First Nation's IQ was maintained at 1,200 kg in large part for economic reasons:

The response letter from [We'koqma'q] First Nation is also what led the department to remove them from the list of licences which must give up the 13.7% of quota, where they cited what the social impact that the revenue from elvers has for their community.

[42] Ms. Berthier appends to her affidavit an undated memorandum entitled "Initial Considerations Concerning the Potential Redistribution of Access". Setting the parameters for the proposal and the inclusion of We'koqma'q First Nation as one of nine commercial licence holders, DFO wrote:

The existing total allowable catch (TAC) is 9,960 kg; eight (8) licence holders with 1,200 kg and one (1) licence holder with 360kg. One of the licences with 1,200 kg is We'koqma'q First Nation's communal commercial licence, which will be subject to

the interim approach of redistribution as well as any potential future expressions of interest process.

[43] In summary, I find that the Decision is an administrative licensing decision for the 2022 elver fishing season that does not treat the class of commercial licence holders equally. It was made following a process centred on the licence holders and their respective business and licences. Beginning with the March 10, 2021 call for proposals, DFO contemplated a reallocation of TAC based on each licence holder's appetite for the voluntary relinquishment of all or part of its respective IQ. The result of the process is a Decision that applies a reduction of IQ across eight of the nine commercial licence holders, subject to increase depending on each licence holder's circumstances during the 2022 season. The uniform approach was adopted to avoid possible disproportionate effects on licence holders pending further consideration and not for policy reasons. The ninth licence holder was treated differently based primarily on its own economic circumstances and submissions. The fact that the impetus for the Decision was the government's desire to increase First Nations participation in the fishery is not determinative of its characterization as a policy or administrative decision.

B. *Were the Applicants afforded procedural fairness?*

[44] While the Applicants challenge both the fairness of the process culminating in the Decision and the substance of the Decision, their fundamental disagreement with the Respondent centres on dissatisfaction with the process led by DFO. The Applicants concentrate their arguments on the period from January to late March 2022 and what, in their opinion, was an unfair about-face by DFO and the Minister from their stated intention to pursue voluntary relinquishment of IQ using the WBWS model. The result, in the Applicants' view, is an

unreasonable Decision issued on the eve of the 2022 fishing season solely because the Minister ran out of time.

[45] As I have found that the Decision is administrative in nature, it attracts the usual procedural safeguards. My review of the Applicants' procedural fairness arguments asks "whether the procedure was fair having regard to all of the circumstances", including the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (SCC) (*Baker*), "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual" (*Canadian Pacific Railway Company v Canada*, 2018 FCA 69 at para 54; *Mowi* at para 156).

[46] The duty of procedural fairness is variable and depends on an appreciation of the context of the particular statute and the rights affected: "the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker" (*Baker* at para 22; *Carasco v Canada (Attorney General)*, 2022 FC 1665 at para 34).

[47] The Applicants rely principally on three of the five non-exhaustive *Baker* factors as most relevant to the content of procedural fairness owed to them by DFO and the Minister: (1) the importance of the Decision to the Applicants; (2) their legitimate expectations as to process; and (3) the choice of procedure adopted by DFO and the Minister.

[48] SST submits that the Minister was not properly advised by DFO of SST's serious concerns with 2012 COSEWIC Report on the American eel and that this omission gives rise to a reasonable apprehension of bias in the decision making process.

[49] As a starting point, I agree with the Applicants that the Decision is of significant importance to them. There can be no doubt that the relinquishment of a material percentage of their respective IQs without financial compensation impacted the Applicants' revenues.

[50] The Applicants lean heavily on their legitimate expectations and the choice of procedure made by DFO and the Minister. The Applicants state that they were blindsided by DFO's move away from the WBWS model in late February 2022 and by its refusal to entertain a second round of proposals. In the Applicants' view, DFO's representation that it would follow the WBWS model meant that they were owed heightened procedural rights when DFO backtracked from its representation (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 94). The Applicants argue that they were afforded no adequate opportunity to respond to what was a fundamental change in approach immediately before the season would open.

[51] The doctrine of legitimate expectations is an extension of the principle of procedural fairness and does not create substantive rights (*Baker* at para 26):

As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness [...]. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be

accorded [...]. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain.

[52] A legitimate expectation arises only when a government representative makes “clear, unambiguous and unqualified” procedural representations within the scope of their authority to an individual about an administrative process that the government will follow (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68).

[53] On March 3, 2021, the then Minister of Fisheries and Oceans issued a statement affirming the federal government’s focus on working with First Nations to reach agreements implementing their right to fish in pursuit of a moderate livelihood. In describing the government’s intention to respect Indigenous rights and balance the need for conservation, the Minister stated:

Second, fishing effort will not increase. The Government of Canada will balance additional First Nations access through already available licences and a willing buyer-willing seller approach, protecting our stocks and preserving the industry for generations to come.

[54] To varying degrees, the Applicants characterize this statement as a commitment by the Minister (and subsequent Ministers) to the WBWS model and the payment of compensation for any relinquishment of IQ. I do not agree and find that the Minister’s statement, issued as a press release, was not a binding commitment. The statement was one of policy or intention couched in aspirational terms, with no timelines, details or references to specific fisheries. It is fair to say that the statement set the stage for discussions regarding the 2022 elver season but it did not fetter the Minister’s discretion to manage the fisheries or, ultimately, to pursue a different model.

[55] Discussions between DFO and licence holders regarding the 2022 fishing season began in earnest on March 10, 2021. In response to a question of whether relinquishment would be voluntary, the minutes of the conference call indicate that DFO stated “[t]he preferred method of acquiring access will be through voluntary relinquishment of existing commercial licences – from a willing buyer to a willing seller”. DFO also stated that it would need to demonstrate the reasonableness of using public funding for any compensation.

[56] The Applicants each submitted a proposal for voluntary relinquishment of IQ for the 2022 season in early April 2021.

[57] There was no response or communication from DFO through the remainder of 2022, despite its receipt of the TriNav Report on valuation on August 31, 2022.

[58] Discussions resumed in January 2022:

January 20, 2022: EAC meeting with DFO. The minutes of the meeting indicate that DFO was seeking to mirror the lobster industry and that “[o]ur intention is to do a second call (new information today)”. DFO stated it would be interested in pursuing a meeting regarding valuation. When asked what would happen if voluntary relinquishment were not achieved, a DFO official responded:

Preferred approach is through willing buyer-willing seller. If this approach is not working we don’t currently have an alternative approach.

February 22, 2022: Senior DFO officials met with licence holders. The minutes of the meeting are not in the record. According to Ms. Berthier, DFO stated WBWS and voluntary relinquishment is the preferred method but not the only possible method. Mr. Giroux states in his affidavit that a senior DFO official took the position that they were not required to pay licence holders for a reduction in IQ and that DFO was not constrained in what it could do regarding quota.

February 24, 2022: Mr. Berthier sent a letter to licence holders informing them that DFO would not move forward with voluntary relinquishment and would not issue a second call

for proposals. The letter set out a proposed 14% reduction in IQ for the 2022 elver fishing season without compensation and invited licence holder responses by March 4, 2022.

March 3, 2022: Each of the Applicants responded to the February 24, 2022 letter expressing their strong opposition to the proposal, alleging abuse of process, demanding a halt to any action on the proposal and a failure to meet DFO's obligation to consult, among other objections.

March 15, 2022: DFO met with licence holders in response to a request from the industry to discuss a potential proposal for IQ redistribution. The new proposal had majority but not unanimous support among licence holders. DFO stated that they could not speak to quota in light of the Minister's pending decision but a discussion regarding the new proposal took place. The proposal was described for the Minister in the March 18, memorandum.

March 23, 2022: DFO, DOJ and the Minister's office met with licence holders for a final discussion, in part to provide licence holders an opportunity to present a unified proposal to reallocate 14% of the TAC for 2022. DFO confirmed that it would consider a unanimous proposal for disproportionate distribution of the required 14% reduction and committed to monitoring 2022 landings closely with a view to possible distribution of unallocated TAC to an affected licence holder by the end of May.

March 24, 2022: Seven of the nine licence holders, including Shelburne Elver and SST, sent a proposal to DFO that set out two alternatives, with the industry preferred alternative allowing licence holders who approach their reduced IQ to request access to additional quota, subject to conditions. Wine Harbour's counsel was not able to read the proposal due to a schedule conflict; We'koqma'q First Nation was not able to respond due to the necessity of consulting with the Chief and Council. This proposal was communicated to the Minister in the March 25, 2022 memorandum with DFO's recommendation that she incorporate elements of the preferred alternative into her decision for the 2022 fishing season.

[59] I am not persuaded that DFO or the Minister made "clear, unambiguous and unqualified" procedural representations to the Applicants that the WBWS model for relinquishment by existing licence holders would be pursued in all circumstances. DFO officials consistently characterized the WBWS model as the preferred approach. They gave no guarantee that payment would inevitably be made to compensate for relinquished IQ. I acknowledge DFO's statement in January 2022 that WBWS was then the only approach contemplated but this language is not a commitment or promise. The Applicants had no right to a certain IQ (*Anglehart*

v Canada, 2018 FCA 115 at para 44) or to compensation arising solely from a loss of IQ, nor was the Minister bound irrevocably to use the WBWS model (*Canada (Attorney General) v Arsenault*, 2009 FCA 300 at para 57). Licence holders cannot assert a substantive right to compensation through a WBWS process in reliance on the doctrine of legitimate expectations.

[60] With respect to DFO's statement at the January 20, 2022 that they intended to request a second round of proposals, the Applicants argue that it was unfair of DFO to renege on its intention to do so. The Applicants state that the Minister was required to provide them significant procedural safeguards in the face of this abrupt change in process and that neither the Minister nor DFO did so.

[61] Ms. Berthier communicated DFO's decision that it would not proceed to a second round of proposals and requested licence holders' responses to the proposed 14% reduction of their respective IQs without compensation on February 24, 2022. I agree with the Applicants that the letter signalled a critical point in the Minister's choice of procedure and I have considered carefully the participatory rights of the Applicants from that date forward.

[62] The Applicants each provided a response to Ms. Berthier's February 24, 2022 letter and their responses were summarized for the Minister in the memorandum of March 11, 2022. DFO wrote that there was general support for increasing First Nations' participation in the fishery but significant opposition to the approach being considered for the 2022 season. A summary of the responses was attached as an Appendix to the memorandum together with the responses themselves. DFO noted that the opposition focussed on the conduct of the expression of interest

process, “that communication was inadequate throughout the process and that DFO did not undertake negotiations”.

[63] DFO met with licence holders on March 15, 2022 to consider a licence holder proposal regarding redistribution of quota and summarized the meeting and proposal in the March 18, 2022 memorandum to the Minister. At the request of the Minister, DFO and representatives from the Minister’s office again met with licence holders on March 23, 2022 to attempt to obtain a consensus proposal on unequal reallocation. One day later, DFO received a proposal supported by seven of the nine licence holders. This development was communicated to the Minister in the March 25, 2022 memorandum. This latter memorandum incorporated DFO’s recommendation that the Minister adopt the preferred alternative proposed by the seven licence holders.

[64] I find that the process followed by DFO and the Minister to arrive at the Decision was fair. The Applicants were afforded the opportunity to express their procedural and substantive objections to the February 24, 2022 proposal and to have their views and evidence considered. They were involved in two sets of consultations. The record reflects DFO and the Minister’s *bona fide* attempts to reach a compromise decision for the 2022 fishing season. I do not agree with the submission that the meetings and discussions subsequent to February 22, 2022 were artificial consultations. It remained open to the Minister at that point to consider all alternatives, including a return to some form of WBWS model. DFO and the Minister’s office stated clearly at the March 23, 2022 meeting that the Minister had not yet made a decision. This statement is borne out by the inclusion in the Decision of the industry’s preferred March 24 proposal for possible IQ reallocation.

[65] There was undoubtedly delay through the fall of 2021 when DFO did not communicate with licence holders after its receipt of the TriNav Report. It is fair to say that it would have been preferable if DFO had continued consultations with licence holders during that period but the delay is not determinative of fairness. DFO was unable to pursue consultations with elver licence holders until January 2022 because it was consumed with issues in the lobster fishery. As the 2022 fishing season approached, however, the Minister was required, in the public interest, to act promptly to make a decision and issue licences. The statutory, institutional and social context of the Decision frames the need for a decision. With the elver season nearing, DFO “determined that it was not reasonable to delay support for increased First Nations participation any further”.

[66] SST submits that DFO did not adequately advise the Minister of the serious allegations of bias it had raised regarding the 2012 COSEWIC Report that classified the American eel as threatened. SST argues at some length that DFO ignored the industry’s concerns about the Report and should have ensured that the Minister receive an objective eel stock assessment. In SST’s view, DFO and the Minister acted arbitrarily in relying on the 2012 COSEWIC Report and insisting that increased participation by First Nations in the elver fishery would be accommodated with no increase in TAC.

[67] I am not persuaded by SST’s arguments. SST’s March 3, 2022 response to the February 24, 2022 proposal sets out SST’s bias allegations and concerns in full. The response was included as an attachment to the March 11 memorandum to the Minister, as was a DFO summary of all licence holder responses. As a result, the Minister was aware of SST’s bias concerns and of its argument that TAC could viably be increased for the 2022 fishing season.

C. *Is the Decision is reasonable?*

[68] The framework for conducting reasonableness review of an administrative decision is set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*). The Court's role is to examine the reasons given by the decision maker and to determine whether the decision "is based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The burden is on the party challenging the decision to show that it is unreasonable, such that the Court is satisfied that any shortcomings relied on by that party are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[69] The Applicants submit that the Decision is unreasonable for a number of reasons, some of which are based on DFO's inaction from its receipt of the TriNav Report on August 31, 2021 until the meeting of January 20, 2022 that resuscitated discussions for the 2022 fishing season. They argue that the resulting delay led to an unreasonable decision to abandon the WBWS model as the 2022 season fast approached, effectively foreclosing any opportunity for revised second proposals from licence holders or meaningful consultation. In the Applicants' view, DFO and the Minister simply ran out of time to make a reasoned and intelligible decision.

[70] The Applicants also submit that the Decision is unreasonable because (1) DFO's refusal to provide the TriNav Report to licence holders undermines the transparency and intelligibility of the Decision; (2) DFO did not solicit a second round of proposals and its peremptory conclusion that such a course of action would inevitably be futile was unreasonable; and (3) more generally, the Decision does not reflect a rational and coherent chain of analysis.

[71] The Decision under review is the decision to reduce each Applicant's IQ of prior years by 13.7% without financial compensation, subject to the possibility of requesting additional quota from any available bank of unallocated TAC. The Minister's departure from the WBWS model for the 2022 fishing season and the decision to forego a second round of proposals are not the decisions under review. These issues, and DFO's failure to communicate with licence holders between August 31, 2021 and January 22, 2022, are considerations primarily relevant to the fairness of the process leading to the Decision. They do not themselves undermine the Minister's reasons or her chain of analysis. The Applicants' arguments in this regard are effectively an assertion that, even if the process leading to the Decision was fair, the Decision is nonetheless unreasonable because it departs from the WBWS model. I do not agree. Having found the process was fair, my review analyzes the Decision actually made and the reasons justifying it.

[72] The governing statutory scheme within which a decision is made is an important aspect of the legal context of the decision (*Vavilov* at para 108). The starting point for my analysis of the Decision is the Minister's broad statutory authority to manage the fisheries reflected in the opening sections of the *Fisheries Act*. The purpose of the *Fisheries Act* is to provide a framework for the management and control of the fisheries and the conservation and protection of fish and fish habitat (section 2.1). Section 2.3 recognizes the rights of Indigenous peoples of Canada and section 2.4 requires the Minister to consider any adverse effects of a decision made under the *Fisheries Act* on Indigenous peoples.

[73] The Minister has broad discretion and authority to issue licences to fish pursuant to subsection 7(1) of the *Fisheries Act*:

7 (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

7 (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, délivrer des baux et permis de pêche ainsi que des licences d'exploitation de pêches — ou en permettre la délivrance —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.

[74] This statutory framework sets the stage for the Court's reasonableness review as “the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case” (*Vavilov* at para 89).

[75] In the present case, the Minister took into account a broad range of polycentric and economic factors in making the Decision. She considered: the nature of the elver fishery and the need for ongoing conservation efforts; the government's commitment to increased First Nations access and the importance of implementing that access without further delay; the history of DFO's discussions with licence holders, including the initial proposals based on the WBWS model; DFO's advice regarding the TriNav Report; and licence holders' objections to the departure from the WBWS model. The Minister also considered the 2022 stakeholder discussions and two proposals from a subset of licence holders in March 2022.

[76] The breadth of factors relevant to the Minister's exercise of her discretion to issue licences for the 2022 elver fishing season highlights the unconstrained nature of the Decision. It is very much a decision based on policy and public interest considerations consistent with the

statutory scheme of the *Fisheries Act*, albeit with an immediate private impact on licence holders (*Entertainment Software* at paras 28-29). This impact on the Applicants means that the Minister's justification and reasons for the Decision must be scrutinized with care (*Vavilov* at para 84).

[77] Ms. Berthier communicated the Decision to the Applicants in a letter dated April 6, 2022. The letter is factual in nature, setting out the Minister's consideration of the March 2022 meetings and licence holders' representations following the February 24, 2022 letter. The letter reiterates the Minister's support for an increase in First Nations participation in the commercial elver fishery without an increase in TAC. The letter then describes the terms of the Decision and closes with DFO's statement that it will engage with licence holders to explore a longer-term approach for increasing Indigenous participation in the fishery.

[78] The reasons for the Decision include the four memoranda to the Minister in February and March 2022 (*Barry Seafoods* at paras 52-53). The memoranda situate the background to the commercial elver fishery for the Minister, including DFO's concerns regarding significant fishing outside of authorized fishing licences and the need for action in 2022 to permit First Nations access. The memoranda painstakingly lead the Minister through each stage of discussions with licence holders, provide licence holder variations to DFO's February 24 proposal and set out DFO's recommended course of action.

[79] The March 11 memorandum referred to the Ministerial statement of March 3, 2021 and DFO's request for expressions of interest from licence holders in early 2021 that resulted in proposals "substantially in excess of" the TriNav Report:

In the end, the proposals submitted were significantly in excess of the [TriNav Report] to a degree that even if negotiations were contemplated, the differential would have almost certainly remained insurmountable from a fund availability and good use of public funds perspective. Further, DFO recognized that despite the lack of viable options achieved through the expression of interest process, there remained a need to continue with efforts to increase First Nations participation in the commercial elver fishery, and in the case of this fishery, the only remaining option was to consider the creation of new licences and the redistribution of quota.

[80] DFO informed the Minister that, in its view, a second call for proposals would almost certainly not resolve the large gap between the valuations of licence holders' and that of TriNav.

[81] The March 11 memorandum also describes the February 22, 2022 meeting between senior DFO officials and licence holders and DFO's statement that the WBWS model was the preferred but not the only method of proceeding. DFO highlighted for the Minister licence holders' strong objections to a non-voluntary process and their willingness to enter into further discussions.

[82] DFO provided the rationale for setting 13.7% as the appropriate reservation of TAC to permit First Nations access to the fishery in 2022 and recommended that the reduction of IQ be made equally across eight of the nine licence holders. The recommendation recognized the need for a timely decision and the desire to make the reduction fair and operationally feasible:

Consideration was given to starting with a reduced amount for redistribution, and while this may have reduced the potential

impact on existing licence holders, it was determined that starting with a more limited amount of available quota could result in frustrating the negotiations process, damaging relationships with First Nations, and potentially increasing the risk of unauthorized harvesting.

[...]

With regards to the remaining licence holders, the recommended interim approach proposes that the reduction occur equally across all eight licences for the 2022 season. This is in recognition that timely decisions are required ahead of the 2022 season and the desire to reduce the risk of unintended disproportionate impacts. Considering the licence holder feedback on this point suggesting that those licence holders who do not typically land their full quota each year should be the only target of reductions, further analysis would be required to determine the outcomes of such an approach, which cannot be completed prior to the 2022 season. Therefore, interim equal reductions are the most fair, straight forward, and operationally feasible ahead of the 2022 season, [...].

[83] The March 18, 2022 memorandum updated the Minister on the further meeting with licence holders and the industry proposal of March 15, 2022, including the lack of consensus support for the proposal. DFO stated that the March 15 proposal was essentially a resubmission of feedback from certain licence holders recommending that access for Indigenous harvesters be taken from historically unfished allocations of specific commercial licence holders (raised in the March 11 memorandum). The March 25, 2022 memorandum addressed the March 23, 2022 meeting with licence holders following the Minister's request for one final discussion. DFO noted its statement during the meeting that it would monitor catch closely during the season and may consider a mid-season increase of IQ. The memorandum described the March 24, 2022 industry proposal of two options for reallocation, one of which was incorporated into the Decision.

[84] SST submits that the Minister could have proceeded differently and valued part of its quota or used its own valuation to compensate SST for the financial impact of the Decision. These options may have been open to the Minister. There may have been other options equally open to her in light of the discretionary nature of her licensing authority. However, the Court's focus is on the decision actually made (*Vavilov* at para 83). The Court is not to substitute its own decision or determine the range of possible decisions that could have been made.

[85] Shelburne Elver submits that the Decision cannot be transparent, intelligible or justified in the absence of production of the TriNav Report. They state that the Report formed the basis of the Minister's decision to forego the WBWS model and DFO's decision not to proceed with a second call for proposals. Shelburne Elver argues that DFO's refusal to provide the TriNav Report prevents the Applicants and the Court from assessing the Report, the authors' credentials and the methodology employed. In Shelburne Elver's view, this information is important to "the reasonableness of the Minister's ultimate decision to forego the [WBWS] seller approach and proceed with the unilateral reduction in quota without compensation". SST adds that licence holders' 2021 proposals for voluntary IQ reduction should have been provided to the Minister.

[86] This argument raises two concerns. First, I am not convinced that the Decision is unreasonable because neither the TriNav Report nor the 2021 proposals were before the Minister. In *Turp v Canada (Foreign Affairs)*, 2018 FCA 133 (*Turp*), the applicant claimed that the Minister of Foreign Affairs should have looked beyond the memorandum provided in making the impugned decision. The FCA rejected this argument at paragraph 65:

In my opinion, whether the Minister should have considered something other than the Memorandum is a question that we do

not need to answer. The Minister's responsibility under the statutory regime was to consider all the factors appropriate to the issuance of permits and, in my opinion, the Minister considered all these factors. The appellant submits that a more informed decision called for the consideration of documents other than the Memorandum. Perhaps the answer to this question should be in the affirmative, but, considering the legislation in force, it is up to the Minister to decide whether to consider the Memorandum only, or any other document that he thinks it necessary to consider in the circumstances.

[87] The Minister was entitled to rely on the memoranda in the CTR in making the Decision, provided that the Minister complied with the statutory scheme in doing so. There is nothing in the *Fisheries Act* to suggest the Minister was required to seek out particular information in making a licencing decision and I have described the breadth of factors considered by the Minister. Like the Minister of Foreign Affairs in *Turp*, the Minister in this case was aware of and could have requested a copy of the TriNav Report and/or licence holders' 2021 proposals. I find that the Minister committed no reviewable error in choosing to rely on DFO's analysis of the Report and proposals.

[88] Second, I am not persuaded that DFO's refusal to produce the TriNav Report undermines the analysis that supports the Decision and impedes the Applicants' and the Court's ability to review the Decision. I agree with the Respondent that neither the authors' credentials nor the methodologies used by the TriNav authors in formulating their valuation are necessary to the Court's review. Further, the TriNav valuation of elver licences would establish the numeric delta of the discrepancy between the third party valuation and each licence holder's proposal but I find that numeric certainty is not necessary for the Court's review. It was open to the Minister to rely

on DFO's conclusion that the significant discrepancy between the licence holders' valuations and the TriNav valuation could not be surmounted without delaying a decision for the 2022 fishery.

[89] I find that the Decision is reasonable. The analysis and information in the memoranda to the Minister are accurate, transparent and intelligible. They demonstrate the Minister's consideration of the issues and interests at stake, licence holders' objections to a forced reduction of IQ without compensation and the reasons for the adoption of the Decision. The memoranda present a clear chain of reasoning that was endorsed and adopted by the Minister. Neither the Minister nor DFO took into account extraneous considerations or ignored issues and arguments raised by licence holders against the reduction of IQ without compensation. The Minister was aware of DFO's reasons for declining to proceed with a second round of proposals. The necessity of a decision to safeguard the 2022 fishing season while moving forward on the government's commitment to increase access to authorized fishing for First Nations is a recurring theme in the reasons given by DFO for its recommendation. The impact of the Minister's decision for the 2022 season on Indigenous peoples was one of the few statutory constraints placed on her management of the fisheries. The fact that a decision had to be made because the season was about to open does not mean that the Decision was necessarily unreasonable.

VI. **Conclusion**

[90] The Applicants focus in this proceeding is their belief that DFO's inaction through the fall of 2021 and early winter 2021-2022 irreparably compromised their right to a fair process and undermined the outcome of and reasons for the Decision. I have carefully considered each Applicant's written and oral submissions but conclude that the process leading to the Decision

was fair. In addition, for all of the reasons set forth in the preceding section, I find that the Decision is reasonable.

[91] The application for judicial review of each of the Applicants is dismissed.

VII. Costs

[92] I see no reason to depart from the general rule that costs follow the event and will award costs to the Respondent as the successful party.

[93] At the conclusion of the hearing, the parties requested an opportunity to consult with each other in an effort to agree on costs. By letter dated August 25, 2023, the parties informed the Court that they had reached agreement on costs. The letter sets out the lump sums agreed to depending on the decision rendered.

[94] The parties have agreed that the Applicants will pay to the Respondent, as the successful party, costs in the lump sum amount of \$18,390.00. Payment of the lump sum will be split evenly by the three Applicants such that each Applicant will pay the Respondent the sum of \$6,130.00.

[95] The amount agreed by the parties is reasonable in light of the complexity of the three applications and I will award costs to the Respondent as agreed by the parties.

JUDGMENT IN T-866-22, T-923-22 AND T-1804-22

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review of Shelburne Elver Limited (T-866-22), Wine Harbour Fisheries Limited (T-923-22) and South Shore Trading Co. Ltd. (T-1804-22) are dismissed.
2. Costs are awarded to the Respondent in the lump sum amount of \$18,390.00, with each of Shelburne Elver Limited, Wine Harbour Fisheries Limited and South Shore Trading Co. Ltd. to pay to the Respondent the amount of \$6,130.00.
3. A copy of these reasons shall be placed in each of Court File Nos.: T-866-22, T-923-22 and T-1804-22.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-866-22, T-923-22 AND T-1804-22

DOCKET: T-866-22

STYLE OF CAUSE: SHELBURNE ELVER LIMITED v HIS MAJESTY THE KING (MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD)

AND DOCKET: T-923-22

STYLE OF CAUSE: WINE HARBOUR FISHERIES LIMITED v THE ATTORNEY GENERAL OF CANADA

AND DOCKET: T-1804-22

STYLE OF CAUSE: SOUTH SHORE TRADING CO. LTD. v THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: FEBRUARY 28, 2023, MARCH 1, 2023

JUDGMENT AND REASONS: WALKER J.

DATED: AUGUST 29, 2023

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