Federal Court  Cour fédérale

Date: 20231025

Docket: T-2291-22

Citation: 2023 FC 1418

Ottawa, Ontario, October 25, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

GRAND MANAN FISHERMENS ASSOCIATION, INC.

Applicant

and

ATTORNEY GENERAL OF CANADA AND FUNDY NORTH FISHERMENS' ASSOCIATION INC.

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This Judgment and Reasons address an application for judicial review of a decision by the Minister of Fisheries and Oceans [Minister], dated October 4, 2022, changing access by commercial lobster fishing license holders to Lobster Fishing Area 37 [LFA 37] on an interim basis for the 2022-2023 fishing season [Decision]. This application is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[2] As explained in greater detail below, this application for judicial review is dismissed, because the Applicant's arguments do not undermine either the reasonableness or the procedural fairness of the Decision. While the Applicant also argues that the Minister failed to discharge her duty to consult Indigenous interests, I agree with the Respondent that the Applicant does not have standing to raise this issue.

II. **Background**

A. *Regulation of the Lobster Fishing Industry*

[3] In Canada, the fishing industry, including the lobster fishing industry, is managed by the Department of Fisheries and Oceans [DFO] under the authority of the *Fisheries Act*, RSC 1985, c. F-14 [*Fisheries Act*]. Fundamental to this authority, section 7 of the *Fisheries Act* provides that, subject to limited exceptions, the Minister has the absolute discretion, wherever the exclusive right of fishing does not already exist by law, to issue or authorize to be issued leases and licenses for fisheries or fishing, wherever situated or carried on.

[4] The *Fishery (General) Regulations*, SOR/93-53 [*General Regulations*] and the *Atlantic Fishery Regulations, 1985*, SOR/86-21 [*Atlantic Regulations*], enacted under the *Fisheries Act*, provide a regulatory framework for the management of Canadian fisheries.

[5] Section 2(1) of the *Atlantic Regulations* defines the term "Lobster Fishing Area" to mean a Lobster Fishing Area illustrated and enumerated in Schedule XIII to the *Atlantic Regulations*. Schedule XIII identifies these Lobster Fishing Areas [LFAs] as particular geographic areas

delineated by points of latitude and longitude. Sections 57 to 61.1 of the *Atlantic Regulations* in turn reference particular LFAs in identifying certain prohibitions and other regulatory measures relevant to the management of the lobster fishery.

[6] Subsection 22(1) of the *General Regulations* provides that, for the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a fishing license any condition that is not inconsistent with regulations enacted under the *Fisheries Act*, including conditions respecting the waters in which fishing is permitted to be carried out (ss 22(1)(c)) and the specific location at which fishing gear is permitted to be set (ss 22(1)(i)).

[7] Also relevant to some of the history of LFA 37 to which this application relates, section 6 of the *General Regulations* provides that, if a close time, fishing quota, or limit on the size or weight of fish or fishing gear equipment is fixed by regulation in respect of an area, a Regional Director-General of DFO may vary such matters in respect of that area or any portion thereof.

[8] The LFAs involved in this application are LFA 36, 37, and 38, all of which are located in the Bay of Fundy. LFA 37 borders LFA 36 to the north and LFA 38 to the south. Lobster licenses for LFA 36 and LFA 38 are issued to separate sets of license holders. However, DFO does not issue lobster licenses solely for LFA 37. Rather, in recent decades, authorization to fish for lobster in LFA 37 has been included in licenses that authorize fishing in either LFA 36 or LFA 38. LFA 37 was established by DFO in 1986 as an area to which both LFA 36 and LFA 38 license holders have shared access, in response to disagreements among groups of commercial lobster harvesters active in the Bay of Fundy as to how their geographic access should be

divided. However, the details surrounding this shared access by these groups has remained a source of disagreement.

B. *Parties to this Application*

[9] The Applicant in this proceeding, the Grand Manan Fishermens Association, Inc. [GMFA], is an organization that has represented the interests of LFA 38 license holders on issues relating to access to the lobster fishery since 1982. The interests of LFA 36 license holders are similarly represented by an organization named the Fundy North Fishermens' Association Inc. [FNFA].

[10] While the FNFA has been named as a Respondent in this proceeding, it has not filed a Notice of Appearance or otherwise participated. Rather, the response to this application has been provided by the other Respondent, the Attorney General of Canada [AGC]. In these Reasons, references to the Respondent refer to the AGC.

[11] In addition to the members of the GMFA and the FNFA, two First Nations (the Peskotomuhkati Nation and communities comprising the Wolastoqey First Nations) either have access to the lobster resource in LFA 37 (and have been issued communal commercial licenses and food, social and ceremonial licences by DFO) or are contemplated to potentially have such access in the future. These First Nations are not parties to this application, although one of the Wolastoqey Nations, the Tobique (Neqotkuk) First Nation, is a member of the GMFA. Food, social and ceremonial licences are not the subject of the parties' arguments in this application.

C. *Events Leading to the Decision under Review*

[12] As noted above, in the decades prior to the commencement of the 2022-2023 lobster fishing season in November 2022, fishers licensed for either LFA 36 or LFA 38 were also licensed to fish throughout LFA 37. The shared access of LFA 37 resulted in competition between LFA 36 license holders and LFA 38 license holders for access to the LFA 37 resource. Moreover, DFO's regulation of access to LFA 37 was not identical for the two groups. In particular, DFO varied the opening time, such that it began at different times for the two groups, which has contributed to concerns about equitable access to the LFA 37 resource.

[13] As representatives of license holders in LFA 36 and LFA 38, respectively, the FNFA and the GMFA have been encouraged by DFO over the years to identify a consensual resolution of their disagreements surrounding access to LFA 37. These efforts have been unsuccessful, although neither group completely opposed the possibility of splitting LFA 37 geographically, such that the groups would have access to different portions of LFA 37.

[14] The initiatives that led most directly to the Decision now under review commenced in December 2021, when DFO provided to both the GMFA and the FNFA a draft of a document entitled Terms of Reference - Division of Lobster Fishing Area 37 [TOR], described as intended to provide DFO with a framework for dividing the shared LFA 37 so as to separate LFA 36 and 38 into neighbouring but autonomous fishing areas. In January 2022, DFO received feedback from both the GMFA and the FNFA on the draft TOR. In February 2022, DFO hired a former employee named Michael Cherry under the terms of the TOR to work with the stakeholders,

gather and analyse relevant information, and prepare for DFO a report recommending an equitable distribution of the fishing grounds in LFA 37 based on relative productive capacity.

[15] Following consultations with both the GMFA and the FNFA on the TOR, DFO provided the final version of that document on April 7, 2022. Also following consultations with both the GMFA and the FNFA, Mr. Cherry provided a draft of his report on a distribution of the LFA 37 fishing grounds (excluding his conclusion and recommendations) to the GMFA and the FNFA on June 6, 2022. Following further consultations related to that draft report, Mr. Cherry finalized his report, and on or about June 19, 2022, he provided his report to Mr. Harvey Millar, who was then employed as the Area Director for the Southwest New Brunswick Area Office, Maritimes Region, of DFO. Mr. Cherry's report [the Report] recommended a particular dividing line for LFA 37, intended to separate the LFA 36 and LFA 38 fleets into two different geographic areas within LFA 37, which Mr. Cherry concluded to be the best option for equitable distribution of access based on the relative productive capacity of different portions of LFA 37.

[16] DFO prepared for the Minister a Memorandum dated September 26, 2022 [the Memorandum] with a recommendation that the Minister adopt Mr. Cherry's recommendation as an interim measure for the 2022-2023 lobster fishing season, applicable to commercial licenses but not to Indigenous communal commercial licences. Attachments to the Memorandum included the Report, as well as a document entitled Summary of Indigenous Consultations and Feedback. On October 3, 2022, the Minister concurred with DFO's recommendation and endorsed the Memorandum to reflect that decision, which represents the Decision under review in this application.

[17] On October 4, 2022, DFO advised the GMFA and the FNFA of the Decision, and on October 6, 2022, DFO advised the individual license holders in LFA 36 and LFA 38 of the Decision.

[18] To implement the Decision, for the fishing season that commenced in early November 2022, the license conditions issued by DFO for both LFA 36 and LFA 38 limited the areas within LFA 37 that each group was authorized to fish. No changes were made to the Indigenous communal commercial licenses for that season.

III. **Issues and Standard of Review**

[19] This application for judicial review raises the following issues for the Court's determination:

A. Does the Applicant have standing to assert a breach of the Minister's constitutional duty to consult and, if so, is the Decision invalid because the Minister failed to discharge that duty?

B. Was the Applicant afforded appropriate procedural fairness?

C. Is the Decision on its merits reasonable?

[20] As suggested by the articulation of the third issue above, the parties agree (and I concur) that the standard of review applicable to the merits of the decision is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[21] The procedural fairness issue is subject to judicial scrutiny to ensure that a fair and just process was followed, an exercise best reflected in the correctness standard even though, strictly speaking, no standard of review is being applied (see *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46-47).

[22] In relation to the GMFA's arguments based on the Minister's duty to consult with Indigenous stakeholders, the GMFA argues that the standard of correctness should apply, on the basis that these arguments raise either constitutional questions or questions of law of central importance to the legal system as a whole (see *Vavilov* at para 53). I adopt the guidance of the Federal Court of Appeal in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*]. The existence and extent of that duty are legal questions reviewable on the standard of correctness. The adequacy of the consultation is a question of mixed fact and law which is reviewable on the standard of reasonableness (see *Tsleil-Waututh* at para 225).

IV. **Analysis**

A. *Does the Applicant have standing to assert a breach of the Minister's constitutional duty to consult and, if so, is the Decision invalid because the Minister failed to discharge that duty?*

[23] The constitutional duty to consult in the course of governmental decision-making, which the GMFA seeks to invoke, is a principle grounded in the honour of the Crown and the protection provided for "existing aboriginal and treaty rights" in subsection 35(1) of the *Constitution Act, 1982*. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing (see *Tsleil-Waututh* at para 486).

[24] In seeking to invoke this duty, the GMFA notes that section 2.4 of the *Fisheries Act* expressly provides that, when making a decision under that statute, the Minister shall consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by subsection 35(1) of the *Constitution Act, 1982*. The GMFA argues that section 2.4 represents a constraint on the Minister's broad discretion in managing the fishery and includes in the grounds raised in its Notice of Application, seeking to set aside the Decision, an assertion that the Minister has acknowledged that consultation with Indigenous communities is incomplete.

[25] Before turning to the issue of the GMFA's standing to advance this argument, I will explain some of the factual background to this argument that I understand to be largely undisputed between the parties.

[26] In his Report, Mr. Cherry identifies what he describes as four salient factors needing consideration for moving forward on the division of LFA 37: (a) what would be an equitable distribution of LFA 37 based on relative productive capacity; (b) whether there is need for further Indigenous consultation and how to consider established Aboriginal or treaty rights or concerns of Indigenous organizations and their communities; (c) whether there is compelling reason to alter an equitable distribution of LFA 37 based on social, economic or cultural criteria; and (d) careful consideration given to any change in season lengths and times of the current LFA 37. However, Mr. Cherry explains that only the first of these factors is within the scope of the Report.

[27] In the Memorandum to the Minister, DFO explained that it was seeking the Minister's decision to approve the recommended reallocation of LFA 37 as described in the Report as an interim measure until consultations with Indigenous groups had been completed. As previously noted, the Memorandum attached a Summary of Indigenous Consultations and Feedback. In connection with such consultations, the Memorandum explained that, while it was not anticipated that the proposed boundary would have a significant effect on Indigenous rights if applied to their communal commercial licenses, DFO would need to complete its consultations with Indigenous communities to validate that assumption. Therefore, DFO was not proposing any changes to the communal commercial licenses for the 2022-23 season while those consultations continued.

[28] Consistent with that recommendation, the effect of the Decision was to divide the fishing ground within LFA 37, such that the LFA 36 and LFA 38 commercial license holders were entitled to fish only on their respective sides of the dividing line. However, those fishing under the communal commercial licenses issued to First Nations communities in relation to both LFA 36 and LFA 38 remained entitled to fish in the entirety of LFA 37.

[29] Notwithstanding that the Decision did not change the access afforded under the communal commercial licenses, the GMFA seeks to invoke subsection 35(1) of the *Constitution Act, 1982* and section 2.4 of the *Fisheries Act* in support of an argument that the Decision is invalid, because it was made before the Minister had completed consultations with the First Nations communities holding those licenses. GMFA seeks to argue that, even though the Decision did not apply to the communal commercial licenses, those who fish under those

licenses were affected by the Decision because they fish in the same waters as the commercial license holders.

[30] The Respondent takes the position that the GMFA does not have standing to advance an argument based on the Minister's constitutional duty to consult. In response, the GMFA submits that no particular Indigenous standing should be required to advance an argument based on a provision of the *Fisheries Act* (section 2.4). The GMFA also notes that the Tobique First Nation is one of its members and that the GMFA also has members who fish under communal commercial licenses. The GMFA submits that that there should be no impediment to both First Nations interests and commercial interests being represented by the same regional industry association.

[31] While both parties spoke to the standing issue at the hearing of this application, neither party made any submissions on jurisprudence or principles to be taken into account by the Court in addressing the issue. The GMFA's counsel noted that she had been unable to identify any relevant jurisprudential consideration of section 2.4 of the *Fisheries Act*.

[32] In *Behn v Moulton Contracting Ltd*, 2013 SCC 26 [*Behn*], the Supreme Court of Canada considered the question of who can assert rights under section 35 of the *Constitution Act, 1982*, in circumstances where individual members of a First Nation community sought to defend a tort action by a logging company on the basis that the licenses granted to that company to harvest timber on the First Nation's territory had been issued in breach of the constitutional duty to

consult. The Supreme Court addressed as follows the question whether the individual defendants were in a position to assert section 35 rights (at paras 30-31):

> 30. The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: *Beckman*, at para. 35; *Woodward*, at p. 5-55. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: see, e.g., *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517, 55 Admin. L.R. (4th) 236.
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> 31. In this appeal, it does not appear from the pleadings that the FNFN authorized George Behn or any other person to represent it for the purpose of contesting the legality of the Authorizations. I note, though, that it is alleged in the pleadings of other parties before this Court that the FNFN had implicitly authorized the Behns to represent it. As a matter of fact, the FNFN was a party in the proceedings in the courts below, because Moulton was arguing that it had combined or conspired with others to block access to Moulton's logging sites. The FNFN is also an intervener in this Court. But, given the absence of an allegation of an authorization from the FNFN, in the circumstances of this case, the Behns cannot assert a breach of the duty to consult on their own, as that duty is owed to the Aboriginal community, the FNFN. Even if it were assumed that such a claim by individuals is possible, the allegations in the pleadings provide no basis for one in the context of this appeal.

[33] In the case at hand, in addition to the absence of any submissions by the parties on the law governing the standing question, there is little evidence before the Court surrounding the role or mandate of the GMFA in relation to the interests of communal commercial license holders. At the hearing, the GMFA's counsel referenced the affidavit of its General Manager, Ms. Melanie Sonnenberg, who explained that the GMFA represents its members on issues affecting the local commercial fishing industry, provides support through client services, and acts as a liaison to government. In submissions, the GMFA's counsel described the association as having a role in relation to operational matters as they affect those fishing under both commercial licenses and

communal commercial licenses. However, counsel confirmed that the GMFA's role does not include a mandate to speak for First Nations' interests in a section 35 sense.

[34] Against that backdrop, which is itself based on limited evidentiary support, and relying on the analysis in *Behn*, I agree with the Respondent's position that the GMFA does not have standing to advance arguments based on section 35 of the *Constitution Act, 1982* or section 2.4 of the *Fisheries Act*. To the extent the statutory incorporation of the section 35 duty to consult into the *Fisheries Act* may support any analysis or conclusion distinct from that in *Behn*, that should be left to another case where the Court has the benefit of a more robust evidentiary record and submissions on jurisprudence relevant to the constitutional duty.

[35] My conclusion that the GMFA does not have standing is sufficient to dispose of this issue.

B. *Was the Applicant afforded appropriate procedural fairness?*

(1) Legitimate Expectations

[36] The GMFA argues that it was not afforded appropriate procedural fairness in the process leading to the Decision. It bases this position principally on the doctrine of legitimate expectations. Pursuant to this doctrine, if a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have

been (see *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 94).

[37] The GMFA argues that it had a reasonable expectation that it would be consulted throughout the Minister's decision-making process, including being afforded an opportunity to comment on the particular proposed division of LFA 37 before the Minister made the decision to adopt that division. While the GMFA was consulted at various stages in the process leading to the Decision (including commenting on the TOR and the draft report Mr. Cherry prepared in early June 2022), it argues that it was denied procedural fairness when it was not afforded an opportunity to comment on either the final Report or at least the proposed division of LFA that the Report recommended to DFO and that DFO in turn recommended to the Minister.

[38] To a significant extent, the GMFA bases its legitimate expectations argument on the fact that that DFO invited the GMFA to participate in the overall process leading to the Decision. For instance, it references the TOR and related correspondence from DFO, which expressed DFO's intention to consult with and obtain submissions from stakeholder groups in the course of its decision-making process related to the division of LFA 37.

[39] However, in order to invoke the doctrine of legitimate expectations, the representations by a public authority upon which an applicant seeks to rely must have been clear, unambiguous and unqualified (see *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 67). The GMFA has identified nothing in the TOR or DFO's overall conduct of the decision-making process that

can be characterized as a representation that the GMFA would be given an opportunity to comment on the particular proposed division of LFA 37 before the Minister made her Decision.

[40] At the hearing of this application, the Court asked the GMFA's counsel to identify any particular representations by DFO upon which it seeks to rely as giving rise to its expectations.

[41] The GMFA refers the Court to the affidavit of its Project Manager, Ms. Bonnie Morse, who deposes as to her recollections of a meeting that Mr. Cherry attended on Grand Manan on June 12, 2022. Ms. Morse states that Mr. Cherry said at that meeting that he hoped the GMFA would have an updated draft of his report to review prior to his final submission to DFO.

[42] Before turning to Ms. Morse's evidence, I note that, as judicial review proceedings are conducted on the basis of the material before the decision-maker, extrinsic evidence is normally inadmissible (see, e.g., *Chin Quee v Teamsters Local #938*, 2017 FCA 62 at para 5). Although the categories of exceptions to this rule are not closed, the recognized exceptions generally involve only three types of evidence: (a) general evidence of a background nature that is of assistance to the Court; (b) evidence that is relevant to an alleged denial of procedural fairness by the decision-maker that is not evident in the record before the decision-maker; or (c) evidence that demonstrates the complete lack of evidence before a decision-maker for an impugned finding (see, e.g., *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at paras 18-20.)

[43] I accept that the evidence of Ms. Morse upon which the GMFA wishes to rely falls within one of the recognized exceptions described above, as it is relevant to the GMFA's procedural fairness argument.

[44] Turning to the merits of that argument, the Respondent argues that, as Mr. Cherry is a third-party consultant retained by DFO, his statements are not those of a public authority capable of informing the application of the doctrine of legitimate expectations. However, neither party has provided the Court with any authority or submissions to guide an analysis of that argument. In the absence of any such submissions, I decline to adjudicate that argument. Such adjudication is unnecessary, because I agree with the Respondent's position that the statement attributed to Mr. Cherry, as to what he "hoped" would occur, cannot in any event be characterized as a clear, unambiguous and unqualified representation as to the process that would be followed.

[45] The GMFA also relies on the October 4, 2022 correspondence through which DFO communicated the Decision to the GMFA, which summarized the Decision and explained its interim nature. The paragraphs of this correspondence most relevant to analysis of the GMFA's legitimate expectations argument read as follows:

> After careful review and consideration, the Minister has accepted the recommended set of coordinates from the consultant's report, referred to his Option 2 (Page 37). This change will be implemented for the fall season, for commercial license holders.
>
> As consultations are ongoing with Indigenous communities, the Minister has decided to accept the report on an interim basis this year, pending the conclusion of those consultations. As a result, there will be no changes to communal commercial licenses for the 2022-23 season while consultations continue and the potential impact of boundary changes are better understood in advance of the 2023-24 season.

> Additionally, where commercial fishing associations and harvesters have not reviewed the full consultant's report and recommendation, the Minister making this decision interim allows for further input from your association and harvesters. It is the Minister's intent to start the regulatory process to make the LFA change permanent, at the conclusion of Indigenous consultations. The regulatory process change is anticipated to take a couple of years.

[46] The GMFA submits that the reference, in the last paragraph above, to further input from the GMFA and harvesters, was not particularly clear but could amount to a representation that the GMFA would be afforded an opportunity to comment on the particular division of LFA 37 before implementation of that division for the 2022-23 fishing season.

[47] I have difficulty with the GMFA's argument that this statement can be read in this manner. I read these paragraphs above as conveying that the Minister has made and will implement a decision on the division of LFA 37, but only in relation to commercial licenses and only on an interim basis, such that at that stage the division applied only to the upcoming 2022-23 season. These paragraphs explained that the division was being implemented on an interim basis, without application to communal commercial licenses, to allow DFO to complete its consultations with Indigenous communities. Also, while it was the Minister's intention to make the division permanent, the interim nature of that division allowed for further input from commercial license holders before doing so.

[48] I have not identified any particular ambiguity in this correspondence. However, even if there was ambiguity as the GMFA submits, this would not assist it in invoking the doctrine of

legitimate expectations, which requires a clear, unambiguous and unqualified representation by the public authority.

(2) Reasonable Apprehension of Bias

[49] While not emphasized in its oral submissions at the hearing of this application, the GMFA's Memorandum of Fact and Law advances an argument that DFO and the Minister demonstrated bias, or that the structure of their decision-making process or its operation gave rise to a reasonable apprehension of bias, against LFA 38 interests.

[50] To establish a reasonable apprehension of bias, an applicant must demonstrate that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it is more likely than not that the decision-maker would not decide fairly. In the absence of any evidence to the contrary, it must be presumed that a decision-maker will act impartially. To rebut this presumption, the applicant must present more than vague allegations as to bias (see *Bhallu v Canada (Solicitor General)*, 2004 FC 1324 at para 12).

[51] However, the GMFA's submissions in support of this allegation simply identify disagreements with the Decision, its timing, other decisions made by DFO in the management of the fishery in LFA 37, and what the GMFA describes as failing to ensure that the parties providing recommendations and advice to the Minister were free from conflict of interest. In relation to the conflict of interest allegation, the GMFA relies on the cross-examination testimony of Mr. Millar, who swore an affidavit included in the Respondent's Record. The GMFA submits that, while acknowledging that each of the GMFA and the FNFA felt that DFO

was biased against it, Mr. Millar was not able to identify any specific measures taken to ensure no bias on the part of Mr. Cherry or others within DFO who assisted with the decision-making process.

[52] While I consider this evidence admissible as relevant to a procedural fairness issue, I find no merit to the GMFA's submissions, which fall significantly short of what would be required to meet the test for a reasonable apprehension of bias.

C. *Is the Decision reasonable?*

(1) Authority for the Decision

[53] The substance of the Decision was to divide LFA 37 in a particular manner, on an interim basis for the 2022-23 fishing season, and restrict the LFA 36 and LFA 38 commercial license holders to fishing on one side or the other of the dividing line. As explained earlier in these Reasons, the Minister implemented the Decision through the license conditions, issued by DFO for both LFA 36 and LFA 38 commercial license holders, which limited the areas within LFA 37 that each group was authorized to fish.

[54] In its Notice of Application, the GMFA asserts that the Decision is unreasonable because the Minister did not have statutory authority to divide an LFA defined by the *Atlantic Regulations* without effecting a regulatory amendment. I note that the GMFA did not focus upon this argument in its oral submissions. However, for the sake of good order, I will briefly address this argument.

[55] In its submissions in response to this argument, the Respondent relies on explanations in Mr. Millar's affidavit on the role of LFAs in DFO's management of the lobster fishery. Components of Mr. Millar's affidavit fit comfortably within the *Access Copyright* exceptions to the rule against introduction of extrinsic evidence in judicial review, as either general background evidence or evidence relevant to allegations of procedural unfairness. However, I am conscious not to rely on Mr. Millar's evidence to the extent it may stray into the arena of either legal opinion or submissions on the operation of the *Fisheries Act* and the regulations made thereunder. Rather, the Respondent's submissions in response to the Applicant's argument can be supported by the legislation itself and do not require reliance upon Mr. Millar's affidavit.

[56] As noted earlier in these Reasons, the *Atlantic Regulations* define a number of LFAs, by reference to geographic coordinates, and then employ those LFAs in provisions imposing various measures related to the management of the lobster fishery. In addition to those provisions, subsection 22(1) of the *General Regulations* provides that, for the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a fishing license any condition that is not inconsistent with regulations enacted under the *Fisheries Act*, including conditions respecting the waters in which fishing is permitted to be carried out (ss 22(1)(c)) and the specific location at which fishing gear is permitted to be set (ss 22(1)(i)).

[57] Subsection 22(1) of the *General Regulations* provides the necessary regulatory authority for the Minister's implementation of the Decision through license conditions. I find nothing inconsistent with the *Atlantic Regulations* in the Minister's use of license conditions to restrict the waters within LFA 37 that LFA 36 and LFA 38 license holders were entitled to access in the

2022-23 season. To be clear, I find no basis for an assertion the Minister was without authority to implement this management measure in the absence of a regulatory amendment redefining the geographic parameters of LFA 37.

(2) Reasons for the Decision

[58] Relying on the principles governing judicial review of administrative decision-making for reasonableness, as explained in *Vavilov* at paragraphs 14 to 15, the GMFA argues that the Decision does not set out reasons satisfying the need to demonstrate transparency, intelligibility and justification. The GMFA submits that the Minister's reasons do not explain why she chose to accept the particular division of LFA 37 recommended in the Report and to proceed to implement that change for the 2022 fall season for commercial license holders only.

[59] The Respondent submits that the reasons for the Decision are evident from the Memorandum to the Minister, with its supporting material including the Report. I agree with the Respondent that these are the documents that the Court should examine in an effort to understand the reasons for the Decision (see, e.g., *Barry Seafoods NB Inc v Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 725 at para 52). I also agree that those reasons are readily available from such examination. In endorsing the Memorandum, which recommended the particular division of LFA 37 recommended by the Report, the Minister was adopting the analysis in those documents underlying their conclusion that such division represented an equitable split of the LFA 37 fishing grounds between the LFA 36 and 38 fleets based on the relative productive capacity of different components of those fishing grounds.

[60] The Decision to implement this division for the 2022 fall season and for commercial license holders only is also explained in the Memorandum. As canvassed earlier in these Reasons for Judgment, the division was applied on an interim basis to commercial license holders only and only for the fishing season commencing in the fall of 2022, in order to permit time for further consultations to take place before implementing a change on a more permanent basis.

[61] In my view, there are no grounds for the Court to interfere with the Decision on the basis of a lack of reasons.

(3) Evidence of Conflict in the Lobster Fishery

[62] The GMFA argues that the Decision was unreasonable because it was based on a concern to address conflict between the LFA 36 and LFA 38 fleets, without supporting evidence of such conflict. In advancing this argument, the GMFA seeks to rely on evidence given by Mr. Millar in cross-examination, which the GMFA submits demonstrates that Mr. Millar was not able to articulate any specific examples of conflict between these fleets in relation to LFA 37. In its Memorandum of Fact Law, the Respondent takes issue with this characterization of Mr. Millar's evidence, arguing that he testified as to what he heard from fishers about conflict with the potential to escalate to harm.

[63] At the hearing of this application, I raised with counsel for both parties whether Mr. Millar's cross-examination evidence was admissible on this issue, given that it was generated after the Decision and was not before the Minister when making the Decision. The Respondent took the position, after considering the Court's question, that this evidence was not admissible.

The Applicant recognized the admissibility concern but also raised the possibility that the evidence was admissible under the *Access Copyright* exception for evidence that demonstrates a complete lack of evidence before a decision-maker for an impugned finding.

[64] I have considered the GMFA's evidentiary argument but do not find it compelling. At paragraph 20 of *Access Copyright*, the Federal Court of Appeal cites *Keeprite Workers' Independent Union v Keeprite Products Ltd* (1980), 29 OR (2d) 513 (ON CA) [*Keeprite*] as authority for this particular exception. As I read *Keeprite*, the evidence that the Ontario Court of Appeal held to be admissible consisted of affidavits and transcripts of cross-examination thereon, which showed what evidence was before the decision-maker and, therefore, what evidence was not.

[65] This interpretation of *Keeprite* is consistent with that of the British Columbia Court of Appeal in *SELI Canada Inc v Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353 [*SELI*] at paragraph 65. *SELI* relied on *Keeprite* and other authorities in finding that an unofficial transcript of a tribunal hearing was admissible on judicial review (see paras 1, 65-85).

[66] The evidence on which the GMFA seeks to rely is not of the same nature as the evidence under consideration in these cases. The GMFA is not arguing that Mr. Millar's evidence assists in demonstrating the record that was before the Minister. I do not find this evidence admissible under the relevant *Access Copyright* exception.

[67] Rather, the GMFA is arguing that the Memorandum to the Minister and its attachments (including the Report) referred to conflict and tension between the two fleets without any supporting evidence and that it was therefore unreasonable for the Minister to take such concerns into account in making the Decision. I will analyse that argument based on the record before the Minister.

[68] I note the Respondent's submission that a minister is entitled to make a decision based on a departmental memorandum (see *Turp v Canada (Foreign Affairs)*, 2018 FCA 133 [*Turp*] at paras 63-65). *Turp* involved a different minister, acting under different federal legislation. However, particularly given the high level of discretion afforded to the Minister to make fisheries licensing decisions under section 7 of the *Fisheries Act*, I accept that the principles explained in *Turp* apply. It is up to the Minister to decide whether to consider only a departmental memorandum or whether to ask for further information or documentation underlying the content of the memorandum.

[69] Moreover, *Vavilov* teaches that, for an administrative decision to be reasonable, it must be justified in relation to the constellation of relevant law and facts, which operate as constraints on the powers of the decision-maker (at para 105). Such constraints include the evidence before the decision-maker and the particular submissions of the parties (at para 106). Related to these principles, an applicant for judicial review should not be permitted to raise new arguments before the Court that were not before the decision-maker (see, e.g., *Vitale v Canada (Attorney General)*, 2021 FC 1426 at para 27). However, as I read the record of the GMFA's communications in the

course of the consultations leading to the Decision, it did not take the position that there was no conflict between the LFA 36 and LFA 38 fleets that required resolution.

[70] The draft TOR provided to the GMFA in December 2021 referred to shared access to LFA 37 having being a continual source of conflict and disagreement between the LFA 36 and LFA 38 user groups, which had compounded in more recent years as fishing activity within LFA 37 increased. In its December 12, 2022 comments on the draft TOR, the GMFA addressed this reference to LFA 37 having been a continual source of conflict and disagreement. The GMFA explained that LFA 38 fishermen did not take issue with the principle of competing for access in a shared space, as this was typical in the lobster fishery. Rather, the GMFA regarded the source of increased conflict as the provision of priority access to one group of stakeholders to the exclusion of others, as a result of the LFA 36 fleet's access to LFA 37 opening earlier than that of the LFA 38 fleet.

[71] As I read this communication, the GMFA was expressing its views as to the source of the conflict between the fleets and potentially how that could be addressed. However, it was not taking the position that there was no conflict to address.

[72] Similarly, the GMFA had an opportunity to comment on Mr. Cherry's draft report (excluding his recommendation). That draft again referenced conflict and tension among fishers, resulting from a race for key fishing locations. GMFA commented on the draft report in an email from Ms. Morse dated June 13, 2022. Again these comments expressed GMFA's concern about the LFA fleet's early access to LFA 37, and they expressed other concerns about Mr. Cherry's

methodology and analysis. However, they did not take issue with the draft report's reference to the existence of conflict and tension. The final version of the Report retained these references.

[73] The GMFA's input into the impugned Decision demonstrates that it would have preferred that the Minister employ fisheries management measures different than those ultimately adopted in the Decision. However, the record does not indicate that it was taking the position that there was no conflict to be resolved in the lobster fishery in which the LFA 36 and LFA 38 fleets are engaged. As such, when making the Decision based on the Memorandum and supporting materials, including the final version of the Report, the Minister cannot be faulted for taking into account the references therein to conflict and tension. Applying the administrative law principles canvassed above, this argument does not undermine the reasonableness of the Decision.

(4) Report's Assessment of Relative Productive Capacity in LFA 37 - Heat Map

[74] In the Report, Mr. Cherry employed a visual representation of the relative productive capacity of different portions of LFA 37 as a tool in identifying what he considered to be an equitable division of LFA 37 between the two fleets. Mr. Cherry referred to this representation as a "heat map", intended to depict through the use of colour the relatively more productive versus less productive areas of LFA 37 [Heat Map]. The Heat Map shows different areas of LFA 37 (which is also subdivided into grids identified as 39 to 42) described as poor, fair, good, better or best, in terms of productive capacity. Based on his assessment of relative productive capacity, including as depicted in the Heat Map, Mr. Cherry developed his proposed division.

[75] In its oral submissions at the hearing of this application, the GMFA did not focus on arguments related to the Heat Map. However, as its Memorandum of Fact in Law does raise such arguments, I will address them. In challenging the reasonableness of the Decision, which is ultimately based on DFO's recommendation that the Minister adopt Mr. Cherry's proposed division, the GMFA's written submissions dispute the accuracy of the Heat Map. The GMFA argues that: (a) Mr. Cherry's conclusion that highest landings happen in deep water is contrary to a presentation by DFO science that demonstrated that shallow water is more productive across multiple LFAs; (b) Mr. Cherry identified the upper portion of grid 39 as including poor bottom even though both GMFA and FNFA identified this area as good; and (c) there is no data supporting Mr. Cherry's finding that the best fishing grounds are concentrated toward the southern section of LFA 37.

[76] The portion of the Report that contains the Heat Map identifies a variety of sources of information used in its development. These include bathymetry (including not only water depth but also complexity structure of the multibeam contour data), substrate information, catch data, gear and vessel sightings, and data provided by DFO conservation and protection officers, fishers, scientists and resource managers. In relation to water depth in particular, Mr. Cherry explains that deeper waters tend to hold the productive capacity longer than more shallow waters, critically in the fall season. He also explains that the Heat Map was developed based on the multiple layers of information identified in his report, including discussions and meetings with industry and departmental representatives.

[77] Specifically in relation to the input of the GMFA and the FNFA, Mr. Cherry observes that fishers from LFA 36 and LFA 38 have provided somewhat varying yet similar views of the productive areas within LFA 37, and his report includes visual representations of those respective views. I also note that the record demonstrates that the GMFA was given an opportunity to comment, and did comment, on an earlier draft version of the Heat Map, and that Mr. Cherry made changes before the final version of the Heat Map was included in his Report.

[78] It is trite law that it is not the Court's role in judicial review to engage in a reweighing of the evidence that was before the administrative decision-maker. As such, the GMFA's argument asks the Court to engage in an exercise that is not within its mandate. The contents of the record canvassed above demonstrate that Mr. Cherry took into account multiple sources of information in developing the Heat Map, and I find no basis to conclude that the Report upon which the Decision was based was generated without regard to the information available.

(5) Timing of Decision

[79] The GMFA argues that the Minister unreasonably made the Decision only a month before the opening of the fall 2022 lobster season, which gave license holders inadequate time to understand the new coordinates defining the LFA 38 fleet's access to a portion of LFA 37 and to prepare to prosecute the fishery in that context.

[80] In support of this argument, the GMFA seeks to rely on evidence in Ms. Morse's affidavit, explaining that an error in the new coordinates occurred in October and November 2022. Ms. Morse deposes that LFA 38 license conditions for the fishing season scheduled to

commence on November 8, 2022, were initially released by DFO on or about October 20, 2022. However, she explains that on November 1, 2022, she and Ms. Sonnenberg received an email from DFO, advising the DFO had discovered an error in how the coordinates for the new boundary line were printed in the license conditions and that DFO would be reissuing license conditions as a result. Ms. Morse states that this last-minute change resulted in a cost to the GMFA in notifying that fishers and reprinting documents and that it caused frustration and cost to fishers themselves who had to pay to have the coordinates re-entered in their navigation systems.

[81] GMFA's counsel did not provide submissions as to how this evidence, relating to events that postdate the Decision, could be admissible and relevant to the reasonableness of the Decision. I find no basis to admit this evidence or, even if it were to be considered, to conclude that these events that occurred after the Decision could undermine its reasonableness.

[82] The GMFA also refers to the evidence of Ms. Sonnenberg, who explains that during a meeting with DFO on June 14, 2022, she expressed concern that a decision regarding LFA 37 be made on a timely basis in order for harvesters to react. She suggested that a decision was required by the middle of September 2022, and the DFO representative acknowledged her concern. I am prepared to admit this evidence, as it predates the Decision. However, I find no basis to conclude that the Decision is unreasonable because the Minister did not make it within the timeframe that the GMFA had requested.

(6) Whether the Decision Accomplished its Stated Purpose

[83] At the hearing of this application, the GMFA's counsel advanced an argument that the Decision is unreasonable because it failed to accomplish its stated purpose. In making this submission, the GMFA relies on the October 4, 2022 correspondence that communicated the Decision to Ms. Sonnenberg on behalf of the GMFA. This correspondence referenced the Report, explained that the Minister had accepted the division of LFA 37 proposed therein, and further explained that this change would be implemented for the fall season for commercial license holders. In the course of that explanation, this correspondence described the Report as follows:

> The report proposes multiple sets of coordinates for revising access to LFA 37 by allocating part of the LFA to holders of licenses for LFA 36, and the other part to holders of licenses for LFA 38. The end result would be the equitable distribution of the fishing grounds in LFA 37 based on relative productive capacity, creating two neighbouring, fully independent fishing areas. The report also presents sets of coordinates proposed previously by FNFA and GMFA.

[84] The GMFA argues that the Decision is unreasonable, because the above paragraph's description of its effect is inaccurate, in that it did not create two fully independent fishing areas, as the division of LFA 37 was applied only to commercial license holders and not to communal commercial license holders.

[85] I have difficulty concluding that this correspondence can play a role in informing the Court's review of the reasonableness of the Decision. While this correspondence is clearly intended to summarize the Decision for its recipient, it was authored by a DFO representative, not the Minister, after the Minister had made the Decision.

[86] However, regardless of that point, it is not possible to conclude that the Minister was unaware that the effect of the Decision was to accomplish a separation that applied only to the commercial license holders. Certainly that point is abundantly clear from the Memorandum endorsed by the Minister, which explains DFO's recommendation that the separation be implemented, on an interim basis for the upcoming season, in relation only to the commercial license holders. Even if the Court were to take into account the October 4, 2022 correspondence upon which the GMFA relies, the conclusion would be the same, as that correspondence also clearly communicates that there will be no changes to the communal commercial licenses for the 2022-2023 season.

[87] The Decision demonstrates the transparency, intelligibility and justification required by *Vavilov* and therefore withstands reasonableness review.

V. **Costs**

[88] Each of the parties has claimed costs in the event of its success in this application. As the Respondent has prevailed in this application, it is entitled to its costs.

[89] As to the quantification of costs, the GMFA proposes a lump sum amount of $2500.00. The Respondent proposes a lump sum amount of $5000.00. The parties provided minimal submissions in support of their respective figures, other than the Respondent submitting that its proposed figure is consistent with Tariff B, taking into account that this application involved a full day of cross examinations and a full day hearing.

[90] I agree with the Respondent's position. Even employing the bottom of the range of Column III of Tariff B would support a cost quantification in the range of $5000.00. My Judgment will award this amount to the Respondent.

JUDGMENT IN T-2291-22

THIS COURT ORDERS that:

1. This application for judicial review is dismissed.

2. The Applicant shall pay the Respondent, the Attorney General of Canada, lump sum costs of this application in the amount of $5000.00.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2291-22
STYLE OF CAUSE:	GRAND MANAN FISHERMENS ASSOCIATION, INC. v. ATTORNEY GENERAL OF CANADA AND FUNDY NORTH FISHERMENS' ASSOCIATION INC.
PLACE OF HEARING:	HALIFAX, NS
DATE OF HEARING:	OCTOBER 18, 2023
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 25, 2023

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