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Two Decades of Nunavut Fisheries Litigation and the Meaning of "Special Consideration"

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Case Commented On: *Nunavut Tunngavik Incorporated v Canada (Fisheries and Oceans)*, 2024 FC 649 (CanLII)

Ever since the ratification of the Nunavut Agreement (Agreement) in 1993, Inuit of Nunavut and especially Inuit of the Qikiqtani region of Nunavut have been attempting to use the Agreement, as well as other levers, to obtain an increased share of fisheries quota, principally for Greenland halibut (turbot) and Northern shrimp, for the waters offshore of Baffin Island. One can think of this as a process of recapturing or repatriating a resource to Nunavut and Nunavummiut that was largely appropriated by fishery interests based in the Atlantic provinces. I first wrote about this process twenty years ago: "Implementing the Fisheries Provisions of the Nunavut Claim: Re-capturing the Resource?" (2003) 12 J Environmental L & Policy 141-204. This most recent decision finally puts some teeth into the "special consideration" language of s 15.3.7 of the Agreement.

The first decision in this litigation saga is, I think, still one of the most important modern treaty cases. The case established that the massive discretionary powers of the Minister of Fisheries and Oceans under s 7 of the *Fisheries Act*, RSC 1985, c F-14 were constrained by the language of the Nunavut Agreement: *Nunavut Tunngavik Inc. v Canada (Minister of Fisheries and Oceans)* 1998 CanLII 9080 (FCA) (*Turbot # 1*), specifically s 15.3.7:

> Government recognizes the importance of the principles of adjacency and economic dependence of communities in the Nunavut Settlement Area on marine resources, and shall give special consideration to these factors when allocating commercial fishing licences within Zones I and II. Adjacency means adjacent to or within a reasonable geographic distance of the zone in question. The principles will be applied in such a way as to promote a fair distribution of licences between the residents of the Nunavut Settlement Area and the other residents of Canada and in a manner consistent with Canada's interjurisdictional obligations. (at para 16)

But while *Turbot # 1* concluded that the Agreement constrained the Minister's discretionary power, the Court was also careful to say that the Agreement established a "principle of equity, not one of priority" (at para 49). As a result, Nunavummiut continued to encounter economic and legal challenges in achieving the same level of participation in Nunavut's offshore fishery that each Atlantic province enjoys in the areas adjacent to their coasts. Here's a summary of some of those subsequent cases:

- *Nunavut Tunngavik Inc v Canada (Minister of Fisheries and Oceans)*, 1999 CanLII 8815 (FC), aff'd 2000 CanLII 16334 (FCA) (*Nunavut Tunngavik 1999*). This was another turbot quota decision in which the Court affirmed *Turbot # 1* and established that the standard of review of the Minister's decision was patent unreasonableness. The Court declined to interfere with the Minister's decision noting that "[s]ince the appellant's quota in the turbot fishery has increased over the years, both absolutely and relatively, it cannot be said that the Minister had no regard to the adjacency and economic dependency principles." (at para 4)
- *Nunavut Territory (Attorney General) v Canada (Attorney General)*, 2005 FC 342 (CanLII) (*Nunavut Territory*). This decision dealt with the allocation of shrimp quotas in the Nunavut offshore region. Justice Gibson, again applying the standard of review of patent unreasonableness, concluded that the Minister's quota decision survived scrutiny. The Court emphasized that any decision in relation to the Nunavut fishery should respect not only "the interests of the Inuit of Nunavut, but also the interests of others with an historically entrenched place in the fishery, as well as Nunavik [Inuit of Northern Quebec] interests." (at para 71)
- *Nunavut Wildlife Management Board v Canada (Minister of Fisheries and Oceans)*, 2009 FC 16 (CanLII) (*Nunavut Wildlife*). This decision, like the case at bar, dealt with the transfer of turbot quota, this time from Seafreez Foods Inc., owned by the Barry Group Incorporated, to the Clearwater Seafood Limited Partnership and Labrador Fishermen's Union Shrimp Company. The Nunavut Wildlife Management Board (NWMB) challenged the Minister's decision to approve the transfer on the grounds that the transfer breached both ss 15.3.4 and 15.3.7 of the Agreement. TheCourt concluded that the Minister's decision did not engage s 15.3.4 since s 15.3.4 only required the Minister to consult the NWMB with respect to wildlife management decisions within the Nunavut Settlement Area and not the immediately adjacent offshore areas. On the other hand, s 15.3.7 was engaged and it was clear that "the Minister did not give 'special consideration' or any consideration to [the s 15.3.7 factors] when approving the reallocation of the company quotas. In fact, the Minister blatantly disregarded the applicant's representations and his own Deputy Minister's advice in this regard" (at para 105). Yet despite that finding the Court concluded that since the transfers complied with existing government policy it would not set the transfer aside (at para 113). By any measure this was a strange conclusion given the constitutional status of the Agreement.

Since this last decision, the general case law on Indigenous rights including treaty rights has continued to evolve with greater emphasis on the honour of the Crown and the duty of diligent implementation of treaties: see, for example, *Restoule v Canada (Attorney General),* 2021 ONCA 779 (CanLII) and *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 (CanLII) (especially per Justice Greckol concurring in the result).

The present case had some parallels with the *Nunavut Wildlife* case. The decision involved an application for judicial review commenced by Nunavut Tunngavik Inc (NTI, representing Inuit of Nunavut) and the Qikiqtani Inuit Association (QIA, the regional Inuit association) seeking to question the decision to approve the reissuance (or perhaps more transparently the transfer) of one Greenland halibut and two Northern shrimp fishing licences in waters adjacent to the territory of Nunavut from Clearwater Seafoods Limited Partnership (Clearwater) to FNC Quota

Limited Partnership (FNC Quota). Clearwater is a Nova Scotia based company and one of the largest seafood companies in North America. FNC Quota is owned by seven Mi'kmaq communities in Nova Scotia (Mi'kmaq Coalition). The Mi'kmaq Coalition also owns FNC Holdings Limited Partnership (FNC Holdings). FNC Holdings, along with Premium Brands Holdings Corporation (Premium Brands) jointly and equally own Clearwater as of January 25, 2021 (at para 12).

Justice Favel described the main elements of the commercial arrangements between Clearwater, FNC Quota and FNC Holding as follows:

> On March 5, 2020, Clearwater announced a strategic review process [and] … would only seek bids for the purchase of the whole company. In August 2020, Premium Brands, a British Columbia corporation, made a joint bid along with the Mi'kmaq Coalition through FNC Holdings. On November 9, 2020, Premium Brands and FNC Holdings announced a definitive agreement for the purchase of Clearwater in which both parties would each own half of Clearwater [Transaction]. On January 25, 2021, Clearwater, Premium Brands and FNC Holdings completed the Transaction and announced it publicly.
>
> The transfer of certain mid-shore and off-shore commercial fishing licences from Clearwater to the FNC Quota [Licence Transfer] was a key part of the Transaction. The Mi'kmaq Coalition financed its contribution through the First Nations Finance Authority [FNFA] which required collateral. The Transaction required completing the Licence Transfer, including transferring the associated quota from Clearwater to FNC Quota, and FNC Quota would then pledge them as collateral to FNFA. Thereafter, FNC Quota would give Clearwater the right to use the licences, harvest, and sell the catch on its behalf. (at paras 12-13)

Qikiqtaaluk Corporation (QC) had previously been in negotiations with Clearwater and the Mi'kmaq Coalition over a joint purchase but those negotiations failed when QC concluded that a joint purchase "would not increase Inuit self-sufficiency, as it did not fit within the existing commercial fishing practices of the Nunavut Inuit" and because "Clearwater was only interested in bids for the whole company" (at para 14).

On January 26, 2021, Clearwater requested the Minister's approval of the Licence Transfer and on July 13, 2021, the Department provided a Memorandum to the Minister recommending that the Minister approve the Licence Transfer. The Memorandum outlined the transaction and the proposed licence transfer as well as "the legal and policy framework, stakeholder views, foreign ownership requirements, obligations under the Nunavut Agreement, as well as voluntary licence relinquishments and reconciliation" (at para 19). The Minister approved the Licence Transfer on July 16 (the Decision) and communicated the Decision to QIA on July 20, 2021, apparently stating that "the licences were already purchased and that there was no regulatory role for the Minister to play" (ibid). The applicants sought review of the Decision on both substantive and procedural grounds. In particular, did the licence transfer decision engage s 15.3.7 of the Agreement and if so, could the Minister's decision be reasonably justified?

Substantive Grounds

The parties and Justice Favel agreed that the standard of review of the merits of the decision (i.e., substantive review) was reasonableness. Justice Favel concluded that the decision did not meet the standard of reasonableness as prescribed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) (*Vavilov*).

Justice Favel began his assessment of the reasonableness of the decision by canvassing both the prior jurisprudence on Article 15 of the Nunavut Agreement (as above) as well as the more general case law on modern treaties. This jurisprudence includes *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 (CanLII) (*Nacho Nyak Dun*), *Makivik Corporation v Canada (Attorney General)*, 2021 FCA 184 (CanLII) (*Makivik*), and *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 (CanLII) (*Manitoba Metis*). From the general case law Justice Favel highlighted the following:

> Modern land claims agreements and treaties, as opposed to historical treaties, while still being required to be interpreted and applied in a manner that upholds the honour of the Crown, were intended to create some precision around property and governance rights and obligations (*Beckman* [*Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53 (CanLII)] at para 12). Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency and predictability (*Beckman* at para 12). (at para 60)

Applying that more specifically to the Nunavut Agreement, Justice Favel observed that:

> Article 15.3.7 must be read in light of the text of the Nunavut Agreement and the honour of the Crown, the scheme of Article 15, as well as the treaty's objectives. A treaty will not accomplish its purpose if it is interpreted in an ungenerous manner or as if it were an everyday commercial contract (*Beckman* at para 10). Article 15 is intended to reflect seven principles that largely recognize the importance of marine areas and its resources to the Inuit way of life and economy (Article 15.1.1). Article 15.3.7 specifically gives effect to these principles by providing Nunavut Inuit with a promise of special consideration of their adjacency and economic dependence when the marine resources are in Zones I or II rather than the marine areas of the Nunavut Settlement Area. Although it is not the only consideration, as the Minister must also consider other residents of Canada, it is nevertheless a guarantee of *special* consideration. Similar to how the Federal Court of Appeal stated in *Nunavut Tunngavik 1998* that Article 15.3.7 would have been worded differently if it were to be a principle of priority and not equity, "special consideration" would have been worded differently if it were not intended to be an explicit obligation in determining a fair distribution of licences. Considering the honour of the Crown, "an honorable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose" (*Manitoba Metis* at para 77; *Makivik* at para 105). (at para 66) (emphasis added)

So what did "special consideration" (not a defined term) mean? For Justice Favel it meant "particular and appropriate attention":

> … it is not enough to state the applicable principles or to state that one is giving special consideration to the Applicants' interests. It is also insufficient to treat the obligations in the Nunavut Agreement as simply contractual terms. There must be a demonstration that the Minister engaged with the evidence, with particular and appropriate attention to the treaty principles of adjacency and economic dependence, in determining whether special consideration was given in accordance with the objectives of the treaty and the honour of the Crown. (at para 67) (emphasis added)

And that was the nub of the problem for Justice Favel since in his view the Memorandum to the Minister "focuses on fairness in broad terms without addressing the special considerations of adjacency and economic dependence and the delays in upholding these principles" (at para 69). Furthermore:

> The Minister recognized the special considerations requirement in both the Memorandum and the July 30, 2021 letter to the Applicants, but the Minister provided little written analysis of how exactly the special considerations played into weighing what is a fair distribution for both Nunavut interests and other parties. In short, I find that the Minister failed to sufficiently engage with the submissions when reviewing what is required to be considered, as set out in Article 15.3.7. There is no indication that particular and appropriate attention was given to the principles of adjacency and economic dependence. Simply measuring the slow increase in allocation to Nunavut interests in Areas 0A and 0B in and of itself is insufficient, particularly when the evidence indicates that 0A is not a particularly productive fishing area. (at para 71) (emphasis added)

It was up to the Minister to engage with the evidence "to demonstrate how special considerations were determined" and that was especially the case given that the Minister was dealing with a constitutionally protected treaty requirement that engaged the honour of the Crown (at para 73). Special consideration however did not mean that the Minister was required "to broker a commercial transaction for the Applicants" (at para 77).

Justice Favel seems to have been of the view that the Minister might have been able to respond to the Applicants' concerns by showing the existence of a policy that would "provide a path to a fair distribution in the future" but there was no such policy. In the absence of such a "policy on *how* the Minister must apply the special considerations, the Minister must demonstrate meaningfully how she grappled with the principles in Article 15.3.7" (at para 72) (emphasis in original).

Justice Favel then went on to consider how the Minister's decision treated the principle of reconciliation bearing in mind that the Nunavut Agreement did not reference the principle in such terms (although the Supreme Court of Canada has several time suggested that modern treaties effectively operationalize the principle: see *Beckman* and *Nacho Nyak Dun, supra*), and further bearing in mind that the principle was potentially relevant with respect to the Crown's obligations to the Mi'kmaq Coalition's interests as well as those of Nunavut Inuit. While Justice Favel acknowledged that reconciliation would be a relevant consideration for the Minister, he noted that there was actually very little discussion of reconciliation objectives in either the

Minister's decision or the Memorandum, and such discussion as there was seemed "to provide more written justification on the economic importance of the Transaction to the Mi'kmaq Coalition for reconciliation rather than for the Applicants …" despite the "special consideration" requirement in the Nunavut Agreement (at para 75). For Justice Favel "[t]his lack of engagement between Inuit interests vis-à-vis the Mi'kmaq Coalition's interests in reconciliation further demonstrated the unreasonableness of the Decision" (*ibid*).

Procedural Fairness

Justice Favel concluded that the Minister did not breach their obligation of procedural fairness. While this conclusion turns at least in part on the basis that the applicants had abandoned their procedural fairness claims (at para 92), Justice Favel also engaged with the substance of the applicants' position. In sum, he agreed with the Minister that the applicants were owed procedural fairness somewhere in the middle of the *Baker* spectrum (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC)) but concluded that the Minister had discharged that duty:

> The Applicants had the opportunity to be heard because the Respondents specifically provided notice of and sought the Applicants' input on the Transaction, the Minister and DFO staff held meetings or had calls with the Applicants, and the Applicants provided written representations on their positions. (at para 98)

The Remedy

As for the remedy, Justice Favel allowed the application for judicial review and remitted the matter to the Minister for re-determination stating in summation that:

> The Minister's reasons are unjustifiable in light of the legal constraint of the Nunavut Agreement due to the Minister's failure to grapple appropriately with the special considerations of adjacency and economic dependency. (at para 103)

Although he does not explicitly say so it is only logical to conclude that Justice Favel has also quashed the Minister's decision and therefore the licence transfer must be null and void.

Comment

The applicants succeeded on the substantive grounds and failed on the procedural grounds. In the course of ruling in favour of the applicants on the substantive grounds, Justice Favel adopted what some might think of as a very demanding and rigorous form of reasonableness review. I am not sure that that is the case since in my view, Justice Favel is simply stating that it is not enough for the Minister to say that they recognized the importance of the principles of adjacency and economic dependence and gave special consideration to those factors; the Minister needs to demonstrate *how* they did so. I don't think that that is very demanding, since, if the Minister can simply recite the relevant provisions, special consideration is a hollow entitlement. But even if some do consider this to be demanding, it seems entirely appropriate and consistent with the honour of the Crown and the duty of diligent implementation of treaties to demand a heightened

form of scrutiny where the constitutionally protected rights of Indigenous communities are at stake.

Can the decision be reconciled with the earlier Nunavut fisheries decisions summarized above and discussed in Justice Favel's decision? I think so. Insofar as those decisions turned upon the more deferential standard of review of patent unreasonableness, they have to be reviewed not only in light of *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), which abolished patent unreasonableness as a distinct standard of review, but also in light of the much more searching reasonableness review demanded by *Vavilov,* which requires, amongst other things, responsiveness to the argument of those affected by the decision: see most recently *Trophy Lodge NWT Ltd. v Canada (Attorney General),* 2024 FC 618 (CanLII). As for the *Nunavut Wildlife* decision (a decision that is not binding on Justice Favel), that decision is problematic insofar as it seems to afford normative priority to federal policy over constitutional commitments in a most unsatisfactory way. Justice Favel's approach is far more consistent with ideas of normative hierarchy.

Does this mean that the parties will accept the result? I doubt it. Even if the federal government does not appeal, the drastic consequences of the decision for the private fisheries interests involved all but guarantee that an appeal will be launched, if only to preserve the interests of those parties pending possible negotiations.

Finally, it is interesting to observe that while the case involves the interpretation of a constitutionally protected land claims agreement or modern treaty, the case is framed as an administrative law case rather than as a breach of treaty case. It stands in contrast therefore to the Initial Decision (2023) in the Arbitral Award involving Article 23 of the Nunavut Agreement which is very much framed as a breach of treaty case (see my ABlawg post here) – a cause of action that the Supreme Court has unequivocally and unanimously affirmed in its recent decision in *Shot Both Sides v Canada*, 2024 SCC 12 (CanLII). This framing choice seems appropriate in this case since the applicants likely wanted to wind back the clock to see if that would create opportunities for a transfer of Nunavut-only licence and quota interests to Nunavut-owned interests, notwithstanding Clearwater's interest in a package deal. It is hard to see how a breach of treaty case could have achieved such a result. On the other hand, a breach of treaty approach will be more appropriate if a party is seeking monetary damages.

Both approaches involve interpretation of the treaty although the inquiry differs depending upon the framing. In an administrative law case, the interpretive inquiry arises as part of the examination of the reasonableness of the Minister's decision in terms of its internal logic and context. In a breach of treaty case, a court will need to determine whether the Minister discharged the Crown's treaty obligations. This is necessarily an inquiry into the correctness of the Minister's decision (did they, or did they not, breach the treaty) rather than the reasonableness of that decision. The framing of the case may also have other consequences including choice of forum consequences. Administrative law cases against a federal decision-maker will need to proceed, as here, in Federal Court. Breach of treaty cases on the other hand are more likely to present as arbitration cases or to commence in the Nunavut Superior Court as was the case in *Nunavut Tunngavik Incorporated v Canada (Attorney General),* 2014 NUCA 2 (CanLII).

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