Federal Court  Cour fédérale

Date: 20231012

Docket: T-1608-21

Citation: 2023 FC 1206

Ottawa, Ontario, October 12, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

REGROUPEMENT DES PÊCHEURS PROFESSIONNELS DU SUD DE LA GASPÉSIE INC.
UNION DES PÊCHEURS DES MARITIMES INC.
PRINCE EDWARD ISLAND FISHERMEN'S ASSOCIATION LTD.
GULF NOVA SCOTIA FLEET PLANNING BOARD

Applicants

and

LISTUGUJ MI'GMAQ GOVERNMENT

and

LE PROCUREUR GÉNÉRAL DU CANADA, LE MINISTRE DES PÊCHES ET DES OCÉANS, LE MINISTRE DES RELATIONS COURONNE-AUTOCHTONES

Respondents

PUBLIC ORDER AND REASONS
(Confidential Draft Issued to the Parties on September 7, 2023)

I. Introduction

[1] Two motions are before the Court for decision. Both arise in the context of a Notice of Application for judicial review filed by the Applicants, seeking to invalidate the Rights Reconciliation Agreement on Fisheries [RRA, or the Agreement] signed between the Respondent First Nation and the federal Crown on April 16, 2021.

[2] The first motion is brought by the Respondent Listuguj Mi'gmaq Government [LMG, or the Moving Party] to strike the Notice of Application thereby dismissing the application, or in the alternative to strike the portions of the Notice of Application that are doomed to fail. The other Respondent, the Attorney General of Canada [AGC] on behalf of the Ministers of Fisheries and Oceans and Crown-Indigenous Relations, supports this motion. The Applicants, who are the Responding Party on the motion to strike, oppose it.

[3] The second motion, brought by the Applicants, seeks further disclosure, pursuant to Rules 317 and 318 of the *Federal Courts Rules*, SOR/96-102 [the *Rules*]. LMG and the AGC oppose this request.

[4] To put these motions into their proper context, we must begin with the underlying Notice of Application for judicial review, which raises four fundamental questions that can be summarized as follows:

- Can Canada enter into agreements that recognize and acknowledge existing Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982* before such rights have been determined and declared by a court?

- Can the Minister of Fisheries and Oceans participate in negotiations and/or sign an agreement regarding section 35 rights, or is that authority limited to the Minister of Crown-Indigenous Relations?

- Do First Nations laws governing their members' exercise of the community's fishery impinge on, or duplicate the Minister of Fisheries and Oceans' authorities under the *Fisheries Act*?

- Does Canada have to provide an opportunity for others who have an interest in the fishery to have input into the process in the context of the negotiation of such agreements?

[5] LMG and the AGC argue that these claims should be struck because they are all bound to fail if the case proceeds to a full hearing. The Applicants submit that their Notice of Application raises important questions that deserve a full hearing on the merits.

[6] In the second motion, the Applicants seek further disclosure of documents from the Respondent Ministers, including a financial annex to the RRA, and internal memoranda and

emails relating to reconciliation efforts and fisheries management for a particular lobster fishing zone.

[7] The parties focused most of their attention on the motion to strike, and these reasons do the same. It is appropriate to begin with the motion to strike, since the motion for disclosure becomes irrelevant if the proceeding is brought to an end because the Notice of Application is struck.

[8] The background to the proceeding, including a description of the various parties involved, will be set out before moving to an analysis of the motion to strike followed by a discussion of the motion for disclosure.

[9] For the reasons set out below, the Applicants' claim regarding the process that was followed in negotiating and finalizing the Rights Recognition Agreement will not be struck, because I am not convinced that it is entirely devoid of merit or that it is doomed to fail. The other claims advanced by the Applicants will be struck, because they are so clearly improper as to be bereft of any possibility of success. The challenge to the rights recognition approach that enabled the negotiation of the RRA is misplaced, and not supported by the law; the claims about the Minister's roles and alleged unlawful delegation of authorities is not supported by the record; and their claims about the recognition and acknowledgement of the LMG's power to make laws in respect of its own members' exercise of their collective rights in the fishery both overstate the scope of the authority that the RRA recognizes, and run counter to long-accepted legal principles.

[10] As regards the motion for disclosure, it will be dismissed both because I find that Rule 317 does not apply, and the documents requested are not needed for the judicial review.

II. Background

[11] The extent to which Indigenous peoples in Atlantic Canada have access to the fishery, and on what terms, has been the source of controversy and litigation for many years. Questions have also been raised about the scope of other harvesting rights possessed by Mi'gmaq communities in Atlantic Canada, whether under the Treaties of Peace and Friendship or by virtue of existing Aboriginal rights. Some of these disputes have arisen between Indigenous and non-Indigenous people, as each seeks what they perceive to be their rightful share of a limited resource. In some respects, the underlying application in this case, as well as the motion to strike that is before the Court, represent another chapter in this story.

[12] The notice of application filed by the Applicants comprises 116 pages. It seeks declaratory relief to invalidate the RRA signed on April 16, 2021 between LMG and the Crown. The context and content of the RRA sets the backdrop for the litigation, but before reviewing that it will be useful to describe the various parties to the litigation.

A. *The parties*

(1) The Applicants

[13] The Applicants are organizations representing non-Indigenous fishers. The following descriptions are taken from their Notice of Application.

[14] The Regroupement des pêcheurs professionnels du sud de la Gaspésie Inc. (“ RPPSG ”) was founded in 1991 and represents 148 lobster fishers who pursue their trade in Lobster Fisheries Zones on the coast of the Gaspé Peninsula. Its members also possess commercial fishing licenses for other species.

[15] L’Union des pêcheurs des Maritimes Inc. (“UPM”) was created in 1977 and represents approximately 1,300 coastal fishers in New Brunswick and Nova Scotia. Its mission is to represent its membership’s interests on the major decisions that affect the commercial fishing industry in Atlantic Canada. The membership hold commercial fishing licenses for a variety of species, and the organization itself holds commercial quotas for snow crab.

[16] The Prince Edward Island Fishermen’s Association (“PEIFA”) was founded in the 1950s, and was incorporated in 1982. It represents almost 1,300 commercial fishers in Prince Edward Island, who in turn are part of various regional organizations. Its members fish commercially for a variety of species. It also holds a commercial crab quota that is allocated to its members.

[17] The Gulf Nova Scotia Fleet Planning Board ("GNSFPB") was founded in 1997 and is comprised of six organizations that represent more than 600 commercial fishers in the Gulf of Nova Scotia, who hold licenses to fish a variety of species. The organization also holds a commercial halibut quota that is fished by its members in the Gulf of St-Lawrence.

[18] Each of these organizations pursues the interests of their membership, including in relation to conservation and stewardship. For example, the RPPSG says that its mission is to assure the sustainable development of the fishery and to maintain an equilibrium between the economic interests of those involved in the fishery and the sustainability of the species.

(2) The Respondents

[19] The Respondents LMG and the Attorney General of Canada on behalf of the Ministers of Fisheries and Oceans and Crown-Indigenous Relations are parties to the RRA signed on April 16, 2021.

[20] The LMG represents Listuguj, a Mi'gmaq community with over 4,000 members. LMG cited the following description from *Martin v Province of New Brunswick and Chaleur Terminals Inc*, 2016 NBQB 138 at para 14:

> [Listuguj] holds various rights recognized and affirmed by Section 35 of the *Constitution Act, 1982* and is a "band" as defined in the *Indian Act*, R.S.C. 1985, c. I-5. The reserve is located on the banks of the Restigouche River in the Gaspé Peninsula in the province of Quebec within the Seventh District of the territory of the Mi'gmaq, known as "Gespe'gewa'gi". Geographically, Gespe'gewa'gi includes what we know today as the Gaspé Peninsula, Northern

> New Brunswick (including Belledune), part of Maine, and the Islands in the Bay of Chaleur as well as their surrounding coastal and marine areas (including much of the Gulf of St. Lawrence).

[21] LMG holds a variety of Aboriginal communal fishing licenses for several species, including lobster. LMG is one of the signatories to the RRA that is challenged in this case.

[22] The Attorney General of Canada appears on behalf of the two Ministers who signed the RRA, the Minister of Crown-Indigenous Relations (who was styled "the Minister of Indian Affairs and Northern Development" at the time the agreement was signed) and the Minister of Fisheries and Oceans. These Ministers signed the Agreement as representatives of the Crown, who was then Her Majesty the Queen in Right of Canada.

B. *The context for the RRA*

[23] The Notice of Application in issue here seeks to invalidate the RRA. It will be helpful to provide a brief outline of the context for the Agreement and an overview of its main features, before entering into an analysis of the parties' positions on the motion to strike.

[24] The modern context for the development of the RRA begins with the Supreme Court of Canada's decisions in *R v Marshall*, [1999] 3 SCR 456 [*Marshall I*] and *R v Marshall*, [1999] 3 SCR 533 [*Marshall II*] [collectively: the *Marshall* decisions]. The proper interpretation of those decisions is in dispute between the parties, as discussed below.

[25] At this stage, it is sufficient to observe that in the *Marshall* decisions, the Supreme Court recognized that the Mi'kmaq[1] signatories to the Treaties of Peace and Friendship signed in 1760-61 had certain treaty rights to fish guaranteed by section 35 of the *Constitution Act, 1982*.

[26] The first significant point from *Marshall I*, was that the treaty promises gave rise to constitutionally protected rights. The second significant point, underlined in *Marshall II*, was that the treaty right is limited. The Court found that the treaty right: "permits the Mi'kmaq community to work for a living through continuing access to fish and wildlife to trade for 'necessaries', which a majority of the Court interpreted as 'food, clothing and housing, supplemented by a few amenities" (at 538, para 4). The Supreme Court also confirmed that the treaty right was subject to restrictions that can be justified under the *Badger* test, citing *R v Badger*, [1996] 1 RCS 771 (*Marshall II* at 543, para 14).

[27] It is also relevant to note that *Marshall II* involved a motion brought by the West Nova Fisherman's Coalition (an intervener in *Marshall I*) who were concerned about the potential scope and impact of *Marshall I* on the sustainability of the fishery and the interests of non-Indigenous participants in the fishery. The Coalition filed a motion in the Supreme Court seeking a rehearing of the appeal, a stay of the judgment pending the rehearing, and a new trial to determine whether the application of the fisheries regulations to the exercise of the Mi'kmaq treaty rights could be justified on conservation or other grounds. The Supreme Court rejected the

[1] Different spellings have been used over time. This is the form that was used in the *Marshall* decisions and it will be used when making direct reference to those decisions. Otherwise, the spelling used by LMG in its pleadings will be employed.

motion, but the very fact that such an extraordinary motion was brought signals the intensity of the interests involved in cases such as the one before the Court.

[28] In *Marshall II,* the Supreme Court observed that resource conservation and management and the allocation of a permissible catch for each species raise matters of considerable complexity, and repeated its often-expressed suggestion that such matters may "best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation…" (at 550, para 22).

[29] A series of events followed the release of *Marshall I* and *Marshall II*. It is not necessary to trace the chronology of all of this. The developments most pertinent to this litigation include policy efforts by the federal government to open space for First Nations to fish for food, cultural, and ceremonial purposes, and to integrate First Nations into the existing commercial fisheries; litigation launched by LMG and others seeking to clarify the scope of their exercise of treaty rights; and the launch of a comprehensive claim by LMG and two Mi'gmaq communities in Quebec in 2007, asserting Aboriginal rights and title. In 2012, these groups signed a Framework Agreement with Canada and Quebec to establish the foundation for a final agreement.

[30] In July 2017, Canada released the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, with the goal of "achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation and partnership as the foundation for transformative change" (at 3).

[31] The *LMG-Canada Framework Agreement on Reconciliation and the Fishery* [the Framework Agreement] was signed in November 2018 by the two Respondent Ministers and the LMG Chief. The goal of this document was to establish a framework for further negotiations "towards new arrangements with the aim of greater recognition and implementation of the LMG's rights, responsibilities, and role with respect to the fisheries."

[32] Disputes between the LMG and Canada remained, however, and on October 21, 2019, LMG launched an application for judicial review seeking to overturn two decisions in which the Minister of Fisheries and Oceans refused to issue LMG commercial licenses that would have allowed the sale of lobster caught during the fall 2019 and 2020 fisheries (referred to below as 'the Lobster litigation'). Two of the Applicants in this case, RPPSG and UPM sought to intervene in that matter, but their requests were refused (the reasons are discussed in more detail below). RPPSG and UPM appealed this decision, but before their appeal was heard the LMG and Canada resolved their differences and the judicial review application was brought to an end on consent by Order of this Court dated November 8, 2021. This development made the appeal of the intervention decision moot, and so it was discontinued.

[33] The consent Order ending the Lobster litigation referred to the process under the RRA which was signed between LMG and the Crown as represented by the two Ministers who are Respondents in this matter. Many of the details of the Agreement are discussed below in the context of the analysis of the parties' submissions on the motion to strike. The following summary is limited to a broad outline of the main features of the Agreement.

[34] The Preamble sets out several key building blocks of the RRA:

> WHEREAS Canada recognizes and affirms the Listuguj Mi'gmaq First Nation's inherent right to self-determination, including the right to self-government;
>
> WHEREAS the Mi'gmaq of Gespe'gewa'gi, including the Listuguj Mi'gmaq First Nation, have existing aboriginal and treaty rights with respect to fisheries;
>
> WHEREAS the aboriginal and treaty rights of the Mi'gmaq, which section 35 of the Constitution Act, 1982 recognizes and affirms, are communal in nature and exercised by Mi'gmaq individuals on the authority of the Mi'gmaq community to which they belong;
>
> WHEREAS the Listuguj Mi'gmaq First Nation has LMG Laws by which it governs its relationship with its fisheries;
>
> WHEREAS Canada acknowledges that recognition of the inherent jurisdiction and legal orders of indigenous nations, including the Mi'gmaq, is the starting point of discussions aimed at interactions between federal and indigenous jurisdictions and laws…

[35] The Purpose clause states that the RRA aims to provide "recognition and implementation of the Aboriginal Right and Treaty Right of the [LMG] in relation to fisheries governance and fishing" as well as predictability regarding the management and conduct of the LMG fishery. The RRA also seeks to increase access for the LMG fishery as well as enhanced governance capacity to enable LMG to exercise its fisheries governance and fishing rights.

[36] The Agreement defines the LMG fishery in this way:

> "LMG's Fishery" means the fisheries governance and fishing activities undertaken by the LMG and members of the Listuguj Mi'gmaq First Nation, whether for food, social, ceremonial, or commercial purposes, in relation to any species for which the DFO

> issues the LMG an Aboriginal Communal Licence, excluding salmon.

[37] The RRA confirms that Canada acknowledges that LMG has certain Aboriginal and Treaty rights concerning fisheries governance and fishing that are protected by section 35 of Part II of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, c 11 (UK) [RSC 1985, Appendix II, No 44] [hereafter referred to as section 35]. It provides that LMG can initiate or support legal proceedings against Canada in relation to alleged breaches of the RRA, subject to the consensus building and dispute resolution process established by its terms.

[38] Topics such as fisheries access, fisheries funding and funding for governance and collaborative management of the LMG fishery are then set out. It is not necessary to review the details of these elements; it is sufficient to observe that a significant focus of this part of the RRA is on mechanisms to seek to prevent and resolve disputes regarding LMG fisheries access and the enforcement of federal laws and policies regarding the fishery. The RRA also provides a list of considerations that the Minister shall consider in setting the conditions of an Aboriginal Communal License in respect of the LMG fishery.

[39] Next, the RRA describes the LMG's obligation to designate individuals permitted to engage in fishing under its Aboriginal Communal Fishing License, and sets out an approach to compliance and enforcement that involves consultation between the Department of Fisheries and Oceans [DFO] and LMG. A further part of the Agreement discusses consensus building and dispute resolution processes, which confirm the collaborative nature of the relationship that the

parties seek to maintain. The Agreement ends with provisions regarding the process by which it may be reviewed, amended, or terminated.

[40] With this background, we turn to the issues and analysis of the merits of the two motions.

III. Issues

[41] The motions before the Court give rise to three issues:

A. Should the court grant the Applicant public interest standing?

B. Should the Notice of Application be struck?

C. Should further disclosure be ordered?

[42] As noted earlier, it will be convenient to discuss each issue in turn.

IV. Analysis

A. *Should the Applicants be granted Public Interest Standing?*

[43] The Applicants seek public interest standing to bring their application for judicial review. They argue that they meet the criteria set out in the relevant case-law, citing *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at 610, 626 and 630-634; and *Harris v Canada*, [2000] 4 FC 37 (FCA) at paras 49-50. These cases confirm a three-part test: (1) the existence of a serious question to be tried; (2) that the party seeking standing has a genuine interest in the matter before the court; and (3) there is no other reasonable manner to bring the matter before the court.

[44] In this case, the Applicants submit that they meet the test:

- the issues they are raising involve serious questions about the validity of the exercise of the powers of the Ministers under their respective enabling statutes: the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*]; the *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6; and the *Department of Crown-Indigenous Relations and Northern Affairs Act*, SC 2019, c 29 [*Crown-Indigenous Relations Act*];

- the Applicants represent commercial fishers whose rights are and will be affected by the consequences that will flow from the RRA; and

- there is no other practical means of bringing the matter to the Court, since the parties to it have no interest in contesting it.

[45] LMG argues that the Applicants should not be granted public interest standing. Their submissions weave two strands together; they say that the Applicants' arguments are political in nature and thus not justiciable, and in addition that the Notice of Application for judicial review raises no serious justiciable issues.

[46] The current approach to public interest standing was clarified in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*] at para 2:

> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[47] As discussed below, I am persuaded that one of the Applicants' claims is not so obviously bereft of merit or so clearly doomed to fail that it should be struck at this preliminary stage; however, several other claims will be struck. In light of this finding, the Applicants meet the first element of the test – there is one serious justiciable issue raised by the Notice of Application.

[48] I am also persuaded that the Applicants have a genuine interest in the outcome, given their long-standing involvement in the fishery. They are not a "mere 'busybody' litigant" and the

Court hearing the matter on the merits will have the benefit of contending points of view of those most directly affected (*Downtown Eastside* at para 1).

[49] Finally on this point, the Applicants' Notice of Application seeking declaratory relief is a reasonable and effective means of bringing the matter before the Court. Their argument rests on an almost purely legal question, and there is no need for a full trial on disputed factual matters.

[50] For all of these reasons, the Applicants are granted public interest standing in this case.

B. *Should the Notice of Application be struck?*

[51] The parties do not dispute the general legal principles that govern a motion to strike a Notice of Application for judicial review in this Court. Their arguments focus instead on the application of the test to the facts.

(1) The law on motions to strike

[52] The leading decision on the test for motions to strike notices of application for judicial review in this Court is *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*], where the Court of Appeal described the approach in the following way:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any

> possibility of success" [footnote omitted]: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 (C.A.), at page 600. There must be a "show stopper" or a "knockout punch"—an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.
>
> [48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, above, at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 18 C.C.L.I. (5th) 263. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, above, subsection 18.1(2) and section 18.4. An unmeritorious motion—one that raises matters that should be advanced at the hearing on the merits—frustrates that objective.

[53] In examining the notice of application for judicial review, the Court "must gain 'a realistic appreciation' of the application's 'essential character' by reading it holistically and practically without fastening onto matters of form…" (*JP Morgan* at para 50, citations omitted. See also: *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paras 33-34; *Bernard v Canada (Attorney General)*, 2019 FCA 144 at para 33).

[54] Affidavits are generally not admissible in support of motions to strike applications for judicial review, in large part because the flaw in the notice of application must be obvious and fatal. "A flaw that can be shown only with the assistance of an affidavit is not obvious" (*JP Morgan* at para 52). The facts alleged in a notice of application are taken to be true, assuming they are capable of proof in a court of law (*Turp v Canada (Foreign Affairs)*, 2018 FC 12 at para 20). Because an applicant is required to state the complete grounds in its notice of application, no

affidavit is required to supplement its side of the matter. One exception to the bar on affidavits is that either side may file an affidavit which provides background information that is referred to and incorporated by reference in a notice of application (*JP Morgan* at para 54).

[55] In the instant case, LMG filed an affidavit providing background documents, which are either referred to in the Notice of Application or necessary to understand it. No contentious factual matters were addressed in the affidavit, and no objection was raised to it.

(2) The Notice of Application in this case

[56] Under the *JP Morgan* framework, the first task is to examine the notice of application to gain a realistic appreciation of its essential character; this requires a practical approach that does not fasten onto matters of form, but rather seeks to identify the core elements of the claim being made by the applicant in a particular case.

[57] As noted earlier, the Notice of Application in this case is a lengthy and complex document. Certain portions will be discussed in more detail below; at this stage, my task is to glean an overall appreciation of its essential elements. It is important to underline that this is a preliminary legal analysis, and is not meant to pre-empt or foreclose arguments or findings if this matter proceeds to a hearing.

[58] I find that the Applicants are essentially raising three primary claims in the Notice of Application:

A. **The rights recognition approach:** They challenge the government's "rights recognition" approach, by which Aboriginal or Treaty rights are acknowledged and recognized before they have been determined by a court of law. The Applicants argue that this approach is based on a misinterpretation of the binding jurisprudence of the Supreme Court of Canada, and that rights under section 35 do not have constitutional value unless and until they are recognized by a court of law;

B. **The Ministers' authorities and alleged unlawful delegations:** They challenge the authorities of the respective Ministers to negotiate and enter into the agreement, and this includes the alleged unlawful delegation and the alleged restriction on the Minister of Fisheries and Oceans' power to regulate the fishery;

C. **Process claim:** They challenge the process by which the RRA was finalized, in particular that it was done without involving them as representatives of non-Indigenous fishers with an interest in the process and outcome, and without publishing it in the *Canada Gazette*.

[59] The ultimate goal of the Applicants is to obtain a declaration from this Court invalidating the RRA.

[60] For its part, LMG submits that the entire claim is essentially political rather than legal, and that the Applicants' arguments are all doomed to fail. The Attorney General agrees with the substantive arguments advanced by the Applicant that the claim should be struck.

[61] With this background, we enter into the heart of the question whether the Applicants' Notice of Application for judicial review should be struck, in whole or in part. It will be convenient to group the arguments of the parties into the three categories listed above.

(a) *The Rights Recognition Approach*

[62] Section 2(c)(iii) of the Notice of Application for judicial review alleges that the Ministers exceeded their authority by recognizing that LMG possess Aboriginal and Treaty rights concerning fishing rights for food, social and ceremonial, as well as commercial, purposes. The Applicants base this on two related claims:

- the Ministers adopted an incorrect interpretation of the principles set out in leading Supreme Court of Canada decisions, including *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*]; *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]; *Marshall II*; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 [*Lax Kw'alaams*]; and *R v Desautel*, 2021 SCC 17 [*Desautel*]; and

- Aboriginal and treaty rights do not have constitutional value under section 35(1) of the *Constitution Act, 1982* until they are claimed and their existence is recognized by a superior court under the test established in *Van der Peet* and affirmed in *Lax Kw'alaams* and *Desautel*, in the context of a civil action for declaratory judgment in which all interested parties are heard in a fair and equitable manner.

(i) The parties' submissions

[63] LMG argues that this argument is doomed to fail for two reasons: it wrongly seeks to apply the *Van der Peet* test for establishing Aboriginal rights to the existing (and already recognized) treaty rights that LMG possess; and it fails to acknowledge that section 35 protects potential rights embedded in as yet unproven Aboriginal rights claims.

[64] LMG submits that the test for establishing Aboriginal rights under section 35 was set out in *Van der Peet* at paragraph 46: "…in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." LMG contend that Canadian jurisprudence has confirmed that this test does not apply to treaty rights, which instead focus on the existence of the treaty, the meaning of its terms, and whether the individual has any basis to assert the right based on ancestry or other connection to the Aboriginal group who signed the treaty.

[65] LMG points to the body of interpretive principles applied to treaty rights in cases such as *Marshall I*, which include the requirement that treaty interpretation take the Aboriginal perspective into account in seeking to find a common meaning for the promises set out in the document. Although these principles may be similar to the requirement set out in *Van der Peet* to understand an Aboriginal right from the perspective of the group that asserts it, this does not in any way incorporate the *Van der Peet* test for establishing an Aboriginal right into treaty interpretation.

[66] LMG argue that the treaty right recognized in the *Marshall* cases, and affirmed in subsequent decisions such as *R v Marshall; R v Bernard*, 2005 SCC 43 at para 13, includes the right to fish and sell fish irrespective of species. This was confirmed in *Anglehart v Canada*, 2018 FCA 115 [*Anglehart CA*] at para 5, where the Federal Court of Appeal held that a consequence of the *Marshall* decisions was that "DFO would henceforth be required to integrate First Nations into the commercial fishing of all species." LMG asserts that the RRA simply acknowledges what already exists by law, and therefore the Applicants' argument is without any merit.

[67] The second fatal flaw in the Applicants' argument about rights recognition, according to LMG, is that it fails to recognize that section 35 protects Aboriginal and treaty rights even before their existence is confirmed by a court. As stated by the Supreme Court of Canada in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*]:

> [78] The constitutional guarantee of s. 35 of the *Constitution Act, 1982* is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests…Where, as here, a permit is sought to use or develop lands subject to an unproven Aboriginal claim, the government is required to consult with the affected Aboriginal group and, where appropriate, accommodate the group's claim pending its final resolution. This obligation flows from the honour of the Crown and is constitutionalized by s. 35.

(citations omitted)

[68] LMG argues that where, as here, the Crown has knowledge of the potential existence of Aboriginal rights, it is under a constitutional imperative to take action to ensure it does not affect those rights. The Courts have long recognized that this obligation flows from the principle of the honour of the Crown and LMG argues that the rights recognition approach reflected in the RRA embodies this doctrine in action. The Applicants describe their view of the implications of the Applicants' argument in their written submissions:

> 51. If the Applicants were correct, reconciliation through negotiation would be impossible and implementation of Aboriginal and treaty rights would stall as every Indigenous group in the country turned to the courts to have their rights determined.

[69] LMG submits that the approach urged by the Applicants is inconsistent with the duty to negotiate. As recognized by the Québec Court of Appeal in the *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at para 446: [TRANSLATION] "It is the responsibility of the Crown, at both the federal and provincial levels, to determine how Aboriginal rights interact with the individual and collective rights of the population as a whole." LMG contends that the RRA reflects the federal government's commitment to living up to its constitutional obligations, as recognized by the case-law. Because of this, LMG submits that the Applicants' argument on this point is doomed to fail.

[70] The AGC argues that the signature of the RRA constituted an important step in the implementation of the Aboriginal and treaty rights recognized by section 35. The AGC supports the LMG's motion to strike because the claim has no chance of success. In the AGC's view, the

Applicants' claim rests on a challenge to the power of the Ministers to conclude the Agreement. This is bound to fail because the Ministers were acting on behalf of the Crown, and the Crown clearly has the authority to enter into an agreement regarding Aboriginal and treaty rights with the LMG.

[71] The AGC contends that the RRA represents a collaboration between the parties to recognize the rights protected by section 35. This is appropriate, because, contrary to the Applicants' argument, courts do not recognize Aboriginal and treaty rights; rather, the Constitution does so, through section 35(1) which "recognizes and affirms" these rights. Where the Crown and Aboriginal groups do not agree on the nature, scope or implications of the rights, courts must play a role in resolving the disputes. But if the Crown and a particular Aboriginal group do agree, the AGC asks why it would be necessary – as a matter of law – to force the parties to go to court before the rights can be recognized and implemented through an agreement?

[72] The Applicants submit that their claim should not be struck at this preliminary stage, noting that such relief is highly exceptional. In the Applicants' view, the arguments of LMG and the AGC relate to the merits of the case and should be made in the context of the actual judicial review, rather than at this preliminary stage. The Applicants note the length of the record filed by LMG on its motion as an indication that the arguments being advanced go to the merits and should not be disposed of on a preliminary motion.

[73] In this case, the Applicants say that several factors support their argument that the claim should not be struck. First, they say that the already very high bar to strike a notice of application for judicial review should be raised even higher in the constantly evolving context of the law relating to Aboriginal and treaty rights: *Shubenacadie Indian Band v Canada*, 2001 FCT 181 at para 5. The development of the law should not be stifled by striking pleadings that involve new or emerging questions or that challenge new approaches by governments or Aboriginal groups.

[74] The Applicants submit that the core of their claim relates to differences in interpretation of the governing authorities, in particular the *Marshall* decisions as well as other decisions of the Supreme Court of Canada dealing with Aboriginal and treaty rights. They point out that the Federal Court of Appeal expressly found that it was not appropriate to strike out a claim where the dispute boiled down to a different interpretation of the scope of the *Marshall* decisions: *Canada (Attorney General) v Shubenacadie Indian Band*, 2002 FCA 249 at para 7.

[75] According to the Applicants, the RRA is based on a serious misinterpretation of the scope of the rights recognized in the *Marshall* decisions, and this argument should be heard by the judge on the application for judicial review. The rights that the Agreement purports to recognize have never been demonstrated in a court of law, and the recognition of these rights has important consequences for third parties, including other Indigenous groups and non-indigenous people who share the resource, as the Supreme Court of Canada has recognized: *Marshall II* at para 42; and see the discussion in *Desautel*.

[76] The Applicants also argue that the RRA does not merely recognize previously-established rights, but rather it presumes such rights exist. This argument focuses on both the scope of the treaty right to fish, and the existence of Aboriginal rights in relation to fisheries governance that is referenced in the Agreement. According to the Applicants, this presumption is contrary to well-established law that requires a clear demonstration that the specific rights of a particular Aboriginal group exist: *R v Sundown*, [1999] 1 SCR 393 at para 25.

[77] In addition, the Applicants submit that the presumed recognition of constitutionally-protected rights can have serious consequences on other parties, including other Indigenous groups as well as non-Indigenous people who share the same resource. In this case, the Applicants claim that the RRA risks creating a completely different fishery regime for Indigenous and non-Indigenous fishers, and this can multiply if the Ministers recognize Aboriginal or treaty rights for other groups.

[78] The Applicants recognize that section 35 protects Aboriginal rights in two different ways: where rights are asserted but have not been determined, the Crown has a duty to consult and accommodate; where rights have been determined, the Crown has a constitutional obligation to interfere with such rights as little as possible: *Gladstone*; *Marshall II*; *R v Sparrow*, [1990] 1 SCR 1075 at 172 [*Sparrow*]; *Tsilhqot'in v British Columbia*, 2014 SCC 44 at para 125. The Applicants argue that the Crown has gone further in the RRA by acknowledging and giving effect to rights before they have been established, based on an incorrect interpretation of the law.

[79] In response to LMG's argument that the *Van der Peet* test does not apply to treaty rights, the Applicants submit that the RRA recognizes Aboriginal rights, not only treaty rights, and therefore the position advanced by LMG should be rejected.

[80] The substantive and procedural aspects of this novel case require a full hearing on the merits, according to the Applicants.

(ii) Discussion

[81] On this point, I agree with the submissions of LMG and the AGC. The Applicants' claim that the Ministers exceeded their authority by entering into an agreement is doomed to fail. It ignores that the Ministers signed the RRA on behalf of the federal Crown, and is also based on a misinterpretation of the case-law.

[82] First, it is important to underline that the RRA was entered into between the LMG and the Crown in right of Canada. The Ministers signed the Agreement as representatives of the Crown, but the agreement itself binds the Crown in right of Canada. On this, I agree with the AGC that this is a fundamental element of the agreement and a fatal flaw in the Applicants' claim. The arguments concerning specific powers of the Ministers and the alleged unlawful delegation of authority are discussed in more detail below. The point here is a more fundamental one: the Ministers signed on behalf of, and as authorized representatives of, the Crown in right of Canada.

[83] The Applicants have not raised any argument that challenges the authority of the Ministers to bind the Crown. There is no allegation in the Notice of Application for judicial review that the Ministers were somehow not able to act in this capacity; no imposters replaced them, no forged signatures are alleged. Instead, the Applicants' entire argument on this point relates to the authorities of the respective Ministers – and this is discussed below. Whatever the specific authorities assigned by statute to the respective Ministers, there can be no question that they were authorized to act on behalf of the Crown in right of Canada, nor that the federal Crown has the authority to enter into an agreement with the LMG regarding Aboriginal and treaty rights.

[84] The second major problem with the Applicants' claim on this point relates to the scope of the Crown's authority to acknowledge and give legal effect to Aboriginal and/or treaty rights. On this, the Applicant makes two central arguments: that rights cannot be recognized until they are confirmed by a court of law through a declaration of rights in a civil proceeding involving all interested parties; and that the RRA is based on a misinterpretation of the relevant case-law, in particular the *Marshall* decisions. Both arguments are doomed to fail, in my view.

[85] The Applicants do not cite any authority that purports to limit the Crown's capacity to enter into negotiations and/or agreements with Aboriginal peoples regarding their rights and interests. In my view, whether the Crown's interpretation of the scope of the *Marshall* decisions is legally accurate or not is beside the point, at least insofar as this concerns its capacity to negotiate a resolution of a dispute about these matters with LMG. The Applicants argue that the legal scope of LMG's fishing rights, as determined by the *Marshall* Decisions and subsequent jurisprudence, somehow acts as a limit to the scope of the Crown's authority to negotiate. In

support of this, they point to the possible impact of the negotiations on the rights or interests of other Indigenous groups, as well as non-Indigenous people who also participate or seek to participate in the fishery. I will return to the procedural aspect of this below. To the extent that the Applicants' argument rests on an asserted limit on the lawful authority of the Crown to negotiate agreements with Aboriginal peoples about their rights prior to the formal recognition of such rights by a court, I cannot agree that any such limit exists.

[86] Several considerations support my finding on this point. First, the text of section 35 itself states that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The Constitution "recognizes" and "affirms" such rights, and the rights recognition approach the Applicants challenge is consistent with the text of the provision.

[87] Second, the law is abundantly clear that section 35 protects rights that have not yet been recognized or declared by a court of law. For example, in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*], the Supreme Court of Canada rejected the argument that the Crown was under no obligation to recognizes potential rights of Aboriginal groups even before they are formally established. The Court explained its reasons for rejecting this argument, as well as the practical consequences of giving effect to such an approach:

> 27 …The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. …To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to

> that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

[88] Third, the Crown's obligation to seek negotiated solutions to Aboriginal or treaty rights disputes has a constitutional dimension that invokes the concept of the honour of the Crown. Imposing a prior restraint on the scope of the Crown's authority to negotiate unless and until such rights are formally established by a court of law runs counter to that idea. As the Supreme Court noted in *Haida Nation* the duty to consult and accommodate claims prior to their formal recognition and proof is "part of the process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution" (*Haida Nation* at para 32). The Court explained:

> 33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

[89] On this point, one might observe that the delineation of reciprocal rights and obligations—before they have been formally established in any court of law—has been a constant feature of agreements between the Crown and Aboriginal peoples from the early peace and friendship treaties and similar agreements, through to the numbered treaties and continuing to modern day agreements. The Applicants have not demonstrated any reason why the clock should be turned back now.

[90] A related consideration is that my finding on this element of the Applicants' argument does not rest on any particular feature of the RRA or any exercise of authority pursuant to it. The Applicants' argument on this point is more of a matter of general principle. The Applicants raise other arguments about certain features of the RRA, which are discussed below. This aspect of their claim, however, rests on fundamental assertions about what the law requires and allows.

[91] I agree with the submission of LMG that the Applicants' challenge to the rights recognition approach runs counter to the many cases in which Courts have called for a negotiated approach rather than litigation. It is not necessary to attempt any comprehensive list of such authorities; many of the pertinent, recent references were discussed in *Desautel*, at paragraphs 87-91. In *Desautel*, the Supreme Court reviewed a series of cases that have found that the honour of the Crown requires the Crown to participate in processes of negotiation; that reconciliation requires the Crown and Aboriginal people to work together to reconcile their interests; and that negotiation can lead to better outcomes because of the procedural and evidentiary limitations inherent in civil, regulatory and criminal cases. The Court cites the observation in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 24, that "[t]rue reconciliation is rarely, if ever, achieved in courtrooms."

[92] While the Applicants may wish to debate the government's rights recognition approach or the terms and scope of the RRA through other avenues, as a matter of law I am persuaded that the Applicants' challenge to it as expressed in its Notice of Application for judicial review is bound to fail. I therefore find that this is one of the "exceptional circumstances" where allowing

this aspect of the claim to proceed to a hearing is not warranted, and the relevant paragraphs of the Notice of Application for judicial review will be struck.

(b) *The Ministers' authorities and alleged unlawful delegations*

[93] This aspect of the Applicants' case brings together several claims directed towards both Ministers. First, the Applicants say that the Minister of Crown-Indigenous Relations failed to exercise her responsibility to negotiate agreements under paragraph 7(b) of the *Crown-Indigenous Relations Act* and instead illegally delegated such powers to the Minister of Fisheries and Oceans and DFO officials.

[94] Next, the Applicants submit that the Minister of Fisheries and Oceans exceeded her authority by failing to consider all of the criteria established by section 2.5 (in particular paragraphs (a), (b), (c), (e), (f), (g) and (h)) of the *Fisheries Act*, before entering into the RRA. A somewhat related argument is that the Minister of Fisheries and Oceans exceeded her powers by unlawfully delegating certain of her regulatory authorities and failing to live up to the obligation to conserve and protect fish and fish habitat, as required by section 2.1 of the *Fisheries Act*.

(i) The parties' submissions

[95] LMG submits that these arguments are doomed to fail because no delegation of authority occurred. The Minister of Crown-Indigenous Relations signed the Framework Agreement in 2018, and this established the process under which the RRA was negotiated. The Minister of

Crown-Indigenous Relations also signed the RRA, as did the Minister of Fisheries and Oceans, and LMG argues that there is no law that forbids collaboration and cooperation between Ministers that enables them to conclude agreements concerning their respective spheres of authority. LMG submits that this is what happened in this case and the Applicants' challenge has no legal foundation.

[96] The AGC advances a similar argument, noting that section 4 of the *Department of Fisheries and Oceans Act*, RSC 1985, c F-15 makes clear that the Minister of Fisheries has responsibilities and authorities in regard to coastal and inland fisheries, and that the *Crown-Indigenous Relations Act* authorizes the Minister to enter into agreements with Indigenous peoples as well as to exercise leadership within the Government of Canada in relation to the affirmation and implementation of section 35 rights, including through the negotiation of treaties or other accords. In light of these Ministerial authorities, the AGC argues that the Applicants' argument on this point must fail. The Ministers did not exceed their respective authorities, and there is nothing that forbids them from working together to achieve a result that advances both of their mandates.

[97] In response to the Applicants' arguments that specific provisions of the RRA unlawfully delegate or restrict the authorities of the Minister of Fisheries and Oceans, the AGC submits that a careful reading of the text of the Agreement demonstrates why this argument cannot succeed. For example, the AGC points to the wording in the final "WHEREAS" clause in the Preamble, which speaks to Canada's authorities to negotiate other agreements or arrangements "with the goal of revitalizing and recognizing the mechanisms, including Mi'gmaq Laws, by which the

LMG governs and manages its fisheries." The AGC underlines that the scope of this is expressly limited to the LMG management and governance of its fisheries, not all fisheries, and it does not involve any general delegation of power.

[98] Similarly, the AGC submits that other clauses in the RRA confirm that while Canada agrees to seek to support LMG's access to the fishery as well as its capacity to govern its' members access to its communal fishery, nothing in the Agreement takes away from the authority of the Minister to regulate fisheries access on behalf of all Canadians, in the public interest. This is specifically referenced in an earlier "WHEREAS" clause in the Agreement, and the AGC submits that nothing in the Agreement takes away from this responsibility.

[99] In regard to the scope of the LMG fishery, the AGC argues that two important factors combine to mute the force of the Applicants' claims. First, the RRA defines "LMG's Fishery" as follows:

> "LMG's Fishery" means the fisheries governance and fishing activities undertaken by the LMG and members of the Listuguj Mi'gmaq First Nation, whether for food, social, ceremonial, or commercial purposes, in relation to any species for which the DFO issues the LMG an Aboriginal Communal Licence, excluding salmon…

[100] The AGC underlines the significance of the fact that the LMG fishery is limited to "any species for which the DFO issues the LMG an Aboriginal Communal License…". Related to this, the AGC submits that the scope of LMG's authority to enact laws is limited under the RRA:

> "Mi'gmaq Laws" means the rules, norms, traditions, and customs, whether elaborated in writing or in oral tradition, that govern Mi'gmaq community members, bodies, and institutions pursuant to Mi'gmaq communities' inherent right to self-determination, including the right to self-government…

[101] As the AGC observes, there is no reference to LMG laws or regulations replacing or overriding any of the provisions of the *Fisheries Act* and any applicable regulations. Rather, the RRA recognizes the right of LMG to enact laws that govern its members' exercise of their communal rights. Under the Agreement, the Minister will continue to issue fishing permits and the LMG is not authorized to do so. The AGC acknowledges that the Agreement adds to the list of considerations that the Minister must consider in making decisions regarding the LMG fishery. Nothing in the Agreement limits or displaces the ultimate authority of the Minister.

[102] Based on all of these arguments, the AGC argues that the Applicants' claims regarding the Ministers' authorities and alleged unlawful delegations must fail, and therefore that these claims should be struck.

[103] For their part, the Applicants submit that their claim raise several questions that should be determined by the judge hearing the judicial review on the merits. For example, the question of whether the Minister of Crown-Indigenous Relations unlawfully delegated authority to the Minister of Fisheries and Oceans invokes difficult and fact-based inquiries concerning the permissible scope of Ministerial delegation, and whether the legislation authorizes implicit delegation, citing: *Procureur général du Québec c Lamontagne*, 2020 QCCA 1137 at paras 38-39 and 48; *Ramawad v Minister of Manpower and Immigration*, [1978] 2 SCR 375 at 380-81. The Applicants submit that such questions should not be determined on a preliminary motion to

strike, but should rather be assessed with the benefit of the full factual record and the parties' submissions on the merits.

[104] The Applicants argue that the *Crown-Indigenous Relations Act* includes specific limits on the authority of the Minister of Crown-Indigenous Relations to provide services and to delegate powers. Under sections 8 and 9 of that statute, services and delegations can only be between the Minister of Crown-Indigenous Relations and the Minister of Indigenous Services. Based on these specific provisions, the Applicants contend that the involvement of the Minister of Fisheries and Oceans in the negotiation and signature of the RRA was invalid.

[105] Furthermore, the Applicants submit that the Minister of Fisheries and Oceans has the authority to conclude agreements with Indigenous groups regarding the fishery, but in doing so must consider a number of criteria specifically listed in section 2.5 of the *Fisheries Act*. The Minister also has obligations under section 2.1 regarding the management and conservation of the fishery and fish habitat. This embodies the exclusive federal jurisdiction allocated by section 91(12) of the *Constitution Act, 1867*, in relation to the sea coast and inland fisheries.

[106] The Applicants argue that the Minister exceeded her authority by negotiating an agreement that recognizes the right of LMG to manage its fisheries, in particular through its own laws. The recognition of an autonomous authority to regulate a fishery runs counter to the statutory powers and obligations of the Minister, according to the Applicants. They say it also contravenes the exclusive federal jurisdiction in relation to the fisheries under paragraph 91(12) of the *Constitution Act, 1867*.

[107] Related to this, the Applicants submit that the question of whether it is permissible to acknowledge and empower Aboriginal self-government in relation to the fishery by agreement rather than by passing a law is an important question that should be left to the judge hearing the judicial review on the merits. They contend that enacting a law would involve public debate and provide an opportunity for input from all interested parties, whereas the negotiations that resulted in the RRA were conducted in private without wider public engagement.

[108] The Applicants argue that the Minister of Fisheries and Oceans had no authority to negotiate the Framework Agreement or the RRA insofar as these address questions of LMG's Aboriginal rights relating to fish, including any self-government rights related thereto, because such powers are the exclusive domain of the Minister of Crown-Indigenous Relations. The Notice of Application for judicial review in this case traces the history of negotiation mandates, policy statements, and briefing materials issued by DFO, and argues that these reflect an unlawful delegation of powers in regard to Indigenous rights. They argue the same flaw appears in various Ministerial mandate letters, which direct the Minister of Fisheries and Oceans to negotiate agreements to implement Aboriginal fishing rights.

[109] Their final argument on this point is that the Minister of Fisheries and Oceans is required to manage the fishery for the interests of all concerned, including the various Aboriginal groups who have Aboriginal or treaty rights to fish for food, cultural, ceremonial or commercial purposes, as well as non-Indigenous fishers: *Gladstone* at paras 65-67; *Marshall II* at paras 40-42.

(ii) Discussion

[110] Having reviewed the parties' submissions and the relevant authorities, I can see no benefit in allowing this claim to proceed to a hearing. It should be struck because there has been no delegation of authorities, and the Minister of Fisheries and Oceans retains the final authority in relation to the issuance of permits and the management of the fishery for the public interest.

[111] I agree with many of the arguments submitted by LMG and the AGC. First, on the face of the RRA and the Framework Agreement, there has been no delegation of Ministerial powers or authorities – either as between the two Respondent Ministers, or between either of them and LMG. The fact that the two Ministers and their respective departmental officials collaborated in the negotiations that resulted in the RRA does not imply any unlawful delegation of authorities. Insofar as these discussions involved Aboriginal and treaty rights issues, it bears repeating that the obligation to seek to negotiate on such matters lies on the Crown, and cannot be the exclusive preserve of a single Minister.

[112] As regards the considerations for decision-making listed in the *Fisheries Act*, the statute contains several relevant provisions. Under section 2.3, the Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35, and section 2.4 requires the Minister to consider any adverse effects on such rights when making a decision under the Act.

[113] Section 2.5 lists a number of factors the Minister "may" consider, including the sustainability of the fisheries (para (b)), Indigenous knowledge (para (d)), community knowledge (para (e)), and social economic and cultural factors (para (g)).On the face of the RRA there is no reason to believe that the Minister has "signed away" any power to consider all of the pertinent factors in making any decision under the *Act*.

[114] As the AGC pointed out, the final authority in regards to issuing permits under the Agreement remains with the Minister, and in exercise of that authority the Minister is obliged by the terms of the Agreement to take into account recommendations made under the collaborative management approach endorsed by its terms, but the Minister has the final word. It is not a tenable argument that by adding to the inputs the Minister will receive or the factors that the Minister must consider, the Minister has somehow abrogated or abandoned any of the Minister's authorities, responsibilities and obligations set out under the *Fisheries Act*.

[115] The Applicants' arguments express two more general concerns relating to the terms of the RRA. First, they are concerned by the creation of a "parallel" governance regime for the fishery, given that it is a limited and shared resource. They object to the recognition of LMG (or Mi'gmaq) laws in relation to fisheries governance. Related to this, the Applicants are concerned about the impact of the Agreement on the overall sustainability of the fishery, as a shared resource. I am not persuaded that either point has any chance of success, in light of the very terms of the Agreement itself.

[116] First, as emphasized by the AGC, the governance authorities recognized by the RRA are limited to the LMG's fisheries. That is to say, under the Agreement Canada has accepted that the LMG, in exercise of a collective or communal right to fish under a communal fisheries license issued by the Minister, can adopt laws that govern the manner in which members of their community can participate in that fishery. There is no doubt that the Aboriginal or treaty right to fish in question here is a collective or communal right: *Sparrow* at 1112; *Marshall II* at paras 13-14. One aspect of collective Aboriginal or treaty rights is the community's right to exercise control over how its members exercise that right: *R v Sundown*, [1999] 1 SCR 393 at para 36; *Bernard v The Queen*, 2017 NBCA 48 at para 58; *Metallic v Listuguj Mi'gmaq Government*, (19 June 2013), Bonaventure No 105-17-000357-120 (QSSC) at paras 9-12; *Canadian National Railway Company v Brant*, 2009 CanLII 32911 at paras 48-51.

[117] Although the Applicants may have concerns about the impact of the RRA on their interests in participating in the fishery, they have demonstrated no legal basis to question the authority of the Ministers to enter into the Agreement, and I find their arguments on this point are doomed to fail. In light of this, this aspect of their claim will be struck out.

(c) *The process claims*

[118] The Applicants' arguments about the process address several different aspects, which boil down to two main points. First, they object to the fact that they were not consulted about - or given an opportunity to be involved in - the negotiations that resulted in the RRA. Second, they say that the Minister of Fisheries and Oceans was required to publish the terms of the RRA in the

Canada Gazette before it was finalized, and then again once it was completed. If this had been done, there would have been an opportunity for public consultation and input.

[119] The first argument is expressed in the Applicants' Notice of Application for judicial review at paragraph 2(c)(vi):

> [TRANSLATION]
>
> DECLARE that, in recognizing the existence of Aboriginal and treaty rights as well as a right to self-government and independent management in relation to the fisheries without having fairly heard and consulted all those involved, the Minister of Fisheries and Oceans and the Minister of Crown–Indigenous Relations have failed to fulfill their duty to act in the public interest, for the benefit of all Canadians, with the goal of achieving and preserving economic and regional fairness, contrary to the principles set out in [*Gladstone* and *Lax Kw'alaams*].

[120] The second argument is based on a claim that various provisions of the *Listuguj Mi'gmaq First Nations Law on the Lobster Fishery and Lobster Fishing Law* No. 2019-01 [*LMG Lobster Law*] duplicate provisions of the *Fisheries Act* or the *Fishery (General) Regulations*, SOR 93-53. The Applicants seek a declaration that the RRA gives the LMG law an effect that is equivalent to these legislative or regulatory provisions. According to the Applicants, several consequences would follow such a declaration: the exclusive authority of the Minister of Fisheries and Oceans would have been usurped and/or limited; and the Minister would have exceeded her authority by failing to publish the terms of the RRA in the *Canada Gazette* both before and after it was concluded, as required by paragraphs 4.1(5) and 4.1(8) of the *Fisheries Act*.

(i) The parties' submissions

[121] LMG advance two main lines of argument against the Applicants' process claims. First, LMG submits that the Applicants are trying to leverage their limited privilege to participate in the fishery to something akin to the duty to consult with First Nations. Second, they argue that the Applicants' arguments about the process are essentially political, and they have previously been rejected by this Court in the Lobster litigation and by the Supreme Court of Canada in *Marshall II*.

[122] The starting point for LMG is to recognize the different nature and status of their rights to participate in the fishery in comparison with the interests asserted by the Applicants. While LMG's participation rests on constitutionally-recognized Aboriginal and treaty rights, the Applicants' interests are subject to the discretion of the Minister. To bolster this point, LMG points to jurisprudence that has recognized exactly this point, including *Potlotek First Nation v Canada (Attorney General)*, 2021 NSSC 283 [*Potlotek*]. In addition, LMG relies on cases that have affirmed that non-Indigenous fishers do not have any proprietary interest in unallocated quota or fish that have not yet been caught (*Canada v 100193 PEI INC*, 2016 FCA 280 at para 15), and that there is no vested right to any particular amount of quota for a particular species because the annual allocation is vested in the Minister who has a very wide discretion (*Anglehart v Canada*, 2018 FCA 115 [*Anglehart CA*] at para 44 (leave to appeal to SCC denied: 2019 CanLII 21181)).

[123] Based on this well-established body of law, LMG asserts that the Applicants' process argument is essentially political in nature and should therefore be rejected. On this point, LMG note that the Applicants' Notice of Application includes an argument that the RRA will cause the

Minister to make decisions contrary to the conservation of the fishery, and that the Applicants should have been heard before the document was finalized. LMG point out that RPPSG and UPM advanced a very similar argument in their motion to intervene in the Lobster litigation, which was rejected as being political rather than legal: *Listuguj Mi'gmaq Government v Canada (Attorney General and Minister of Fisheries, Oceans, and the Canadian Coast Guard)*, unreported, October 4, 2021,Court File No.: T-1722-19 [*Lobster intervention*]. Furthermore, the idea that there is some sort of equivalency between constitutionally-protected Aboriginal and treaty rights and the interests of non-Indigenous commercial fishers was squarely rejected in *Marshall II* at para 45.

[124] LMG submits that the Minister of Fisheries and Oceans is permitted, but not required, to consider the interests of non-Indigenous fishers. On the facts of this case, there is no indication that the Minister failed to do so, and the law clearly recognizes that the Minister can favour one group over another in making decisions regarding licences and quota allocation: *Anglehart v Canada*, 2016 FC 1159 at para 162; aff'd *Anglehart CA* at para 47.

[125] On the *Canada Gazette* argument, LMG asserts that the claim is doomed to fail because the RRA is not an agreement contemplated by sections 4.1 and 4.2 of the *Fisheries Act*, and the Agreement does not provide for any equivalency between LMG Laws and the provisions of the *Fisheries Act* or *Regulations*. Indeed, the RRA explicitly states that "Canada takes no position regarding the contents of LMG Laws" and "[n]othing in this Agreement impacts the application of federal legislation or regulations" (RRA articles 6.3 and 9.7).

[126] For all of these reasons, LMG submits that this aspect of the Notice of Application for judicial review should also be struck out because it has no chance of success at a hearing on the merits.

[127] The AGC took the position that the Minister had the discretion whether to consult with other groups but was not obliged by law or constitutional principle to do so. The Minister did not consult with other Indigenous groups because the RRA's scope is limited to the rights and interests of the LMG.

[128] The AGC underlines the point that rights recognized by section 35 already exist and are affirmed by the *Constitution Act, 1982*, and *Marshall II* confirms that the definition of the scope and meaning of such rights does not depend on the impact on other groups. There is no obligation, constitutional or otherwise, on the Minister to consult with non-Indigenous groups. The AGC states that the Applicants' argument on this point ignores the fact that there is an immense difference between what the constitution requires and what might be desirable from a policy perspective.

[129] The Applicants argue that this aspect of their claim is firmly rooted in existing case-law from the Supreme Court of Canada, which holds that when recognizing or implementing Aboriginal or treaty rights has the effect of impinging on other rights, these other rights must be taken into account in the negotiating process: citing *Marshall II* at paras 40-41; *Gladstone* at paras 73-75; *Lax Kw'alaams* at paras 11-12. The Applicants assert that the Ministers failed to meet their procedural fairness obligations because the negotiations on the RRA were held in

secret, no draft was published in advance, and there was no other consultation with other interested parties, including the individuals represented by the Applicants.

[130] In the context of negotiations that resulted in the recognition by Canada of an open-ended Aboriginal and treaty right in regard to the fishery, the Applicants submit that equity required that they be consulted or given an opportunity for input. The primary obligation of the Minister of Fisheries and Oceans is to conserve the fishery resource, and under section 2.5 of the *Fisheries Act* the Minister was obliged to consider a range of factors, including the sustainability of the fishery, scientific information, and community knowledge. In order to meet this obligation, the Minister was required to provide procedural fairness to the Applicants, but has failed to do so.

[131] On this point, the Applicants underline the history: the negotiations were conducted in secret; there was no wider public consultation or opportunity to make submissions, and the terms of the RRA were not made public for months after it was signed. This gives rise to a procedural fairness concern that should be considered by the judge hearing the merits of the judicial review.

[132] In the alternative, and in the event that the Court finds that the Minister had the power to negotiate and sign the agreements, the Applicants assert that the Minister failed to abide by the requirement in section 4.2 of the *Fisheries Act* to publish the proposed agreement in the *Canada Gazette*. The Applicants say that the purpose of this step is to allow others who have an interest in the matter to provide submissions before the terms of the agreement are finalized. The Applicants argue that the RRA falls within this provision, because it recognizes the laws adopted

by LMG in relation to the fishery and the terms of co-management reflect the Minister's willingness and intention to respect LMG's laws. Despite the "saving" clauses stating that nothing in the RRA can be interpreted as affecting the Minister's authority under the *Fisheries Act*, it is evident that many of the provisions of the *LMG Lobster Law* and the *Law to Make Provision for an Aboriginal Ranger Service for the Listuguj Mi'gmaq First Nation* have effects that are equivalent to the federal statutory and regulatory regime. In the Notice of Application, the Applicants list a series of provisions that they say duplicate or overlap with the provisions of the *Fisheries Act* and *Regulations*.

[133] Based on this, the Applicants assert that the Minister exceeded her authority by not publishing the proposed RRA in the *Canada Gazette* before it was finalized. They say that by failing to publish the draft Agreement, non-Indigenous fishers and the organizations that represent them were denied the opportunity to provide observations regarding the terms of the RRA. The Applicants assert that this violation of the *Fisheries Act* has the effect of making the RRA null and void and without legal effect.

[134] In conclusion on this point, the Applicants submit that their arguments regarding the process and the failure to publish in the *Canada Gazette* raise substantial legal questions that should be determined by the judge hearing the judicial review application. They argue these claims are not doomed to fail and they should not be struck.

(ii) Discussion

[135] I am not persuaded that the Applicants' argument about the process followed in negotiating the RRA is doomed to fail, for the reasons I will explain below. However, there is no merit in the argument about the failure to publish the draft Agreement in the *Canada Gazette* and so that element will be struck.

[136] I agree with LMG that it is vitally important in assessing this claim to begin by acknowledging that their Aboriginal and treaty rights stand on a completely different footing than the interests asserted by the Applicants. However, I am not persuaded that the Applicants' argument on this point rests on any such false equivalency. Rather, as I understand their claim, the Applicants are saying that the RRA has important and far-reaching implications and that the Crown was obliged to provide some opportunity for input from everyone who would be affected by it. In advancing this argument, the Applicants rely on the jurisprudence that recognizes that Aboriginal and treaty rights in Canada do not stand in isolation, but rather must be exercised in the context of the wider society and that in some particular circumstances, the broader public interest may prevail over a particular asserted section 35 right.

[137] The case-law cited by the Applicants provides useful examples. In *Gladstone*, which involved an Aboriginal right to sell herring spawn on kelp, the Supreme Court of Canada recognized the Aboriginal right, found that the relevant Regulations did not specifically accommodate it, but concluded that a new trial was needed to determine whether the regulatory regime was justified. In the course of its decision, the majority discussed the approach to

justification of limitations on Aboriginal rights and the relevance of considerations relating to the wider public interest:

> 73. Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. (emphasis in original)

[138] In *Gladstone*, the Court also recognized that in making decisions about resource allocation the government must demonstrate that it took the existence of Aboriginal rights into account, that is to say, that the regulatory authority was exercised in a manner respectful of the fact that the rights of Aboriginal peoples have priority over the access provided to other users. The Court stated at paragraph 62 that this right has both procedural and substantive dimensions.

[139] In *Marshall II*, the Supreme Court recognized that the paramount regulatory objective is the conservation of the resource, and that this responsibility is placed squarely on the Minister and not on the Aboriginal or non-Aboriginal users of the resource (at para 40). And in a passage that is similar to the one cited from *Gladstone*, above, the Court stated:

> 41. (c) *The Minister's authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups*. The Minister's regulatory authority is not limited to conservation. This was recognized in the submission of the appellant Marshall in opposition to the Coalition's motion. He acknowledges that "it is clear that limits may be imposed to conserve the species/stock being exploited and to protect public safety". Counsel for the appellant Marshall goes on to say: "Likewise, Aboriginal harvesting preferences, <u>together with non-Aboriginal regional/community dependencies</u>, may be taken into account in devising regulatory schemes" (emphasis added). In Sparrow, supra, at p. 1119, the Court said "We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification." It is for the Crown to propose what controls are justified for the management of the resource, and why they are justified. In Gladstone, supra (cited at para. 57 of the September 17, 1999 majority judgment), the Chief Justice commented on the differences between a native food fishery and a native commercial fishery, and stated at para. 75 as follows:
>
> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. <u>In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment</u>. [Emphasis in original.]

[140] From these passages, and other similar findings, one can glean several key organizing principles that apply to the analysis of the Applicants' process claim. First, it is evident that much of the attention in prior cases has been placed on government's obligation to consult with Aboriginal rights-holders or rights-claimants, for the simple reason that this has often not occurred, and it required a series of court orders directing that it happen to clarify the nature of the obligation.

[141] A second important guiding principle is that in the allocation of scarce resources, priority is to be accorded to the constitutionally-protected rights of Aboriginal peoples, whether based on Aboriginal rights or treaties. *Marshall II* and other cases have underlined that rights protected by section 35 are not to be simply treated as equivalent to the interests asserted by users of the resource whose claims are not rooted in constitutionally-protected rights. In some instances, this may involve difficult considerations of overlapping or intersecting rights claims among and between different Aboriginal groups. But the point is that the section 35 rights take priority, and should not be diminished simply because giving effect to them somehow limits the resources available for harvesting by non-Indigenous users of the resource.

[142] Having recognized this priority, however, the case-law confirms that section 35 rights will be exercised in the context of a wider society, and that there will often be competition for access to a limited resource. In such a situation, and given the overall objective of "the reconciliation of [A]boriginal societies with the rest of Canadian society…" (*Gladstone* at para 75), it is legitimate for governments to consider "other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" (per *Marshall II* at para 41).

[143] Turning to the case before me, I find that these principles lead me to find that the Applicants' process claims are not so clearly devoid of any merit that they should be struck at this preliminary stage. On this question, it is important to examine the Applicants' process argument in relation to the context for the negotiation of the RRA. I have already found that the

Applicants' fundamental challenge to the assumptions underlying the government's rights recognition approach should be struck out. However, this does not diminish the force of some aspects of their argument about how that approach was applied in this particular case.

[144] For one thing, it is undeniably true that the scope of the rights recognized by the *Marshall* decisions has been litigated, but not finally determined: see, for example, *R v Marshall; R v Bernard*, 2005 SCC 43; *Potlotek First Nation v Canada (Attorney General*), 2021 NSSC 283 [*Potlotek*]; *Anglehart* (CA). Some of this litigation has involved non-Indigenous users of the fishery challenging steps taken by the federal government to enhance the participation of Aboriginal peoples in the various fisheries. As I noted earlier, in some respects this case is another chapter in that story.

[145] What this demonstrates, at a minimum, is that the federal government was aware of the interests of the people the Applicants' represent in the fishery and in respect of any decisions that might affect the allocation of the resource and/or increase access to the resource for some particular users. In this instance, the government knew from the outset that the Applicant groups had an interest in the fishery. By any measure, they are not mere bystanders or meddlesome gadflies.

[146] A related point is that the courts have recognized that Aboriginal and treaty rights are group and site specific. The specific rights protected by section 35 are rooted in the history of a particular group, often limited to specific locations (whether identified by historical practice or the terms of the treaty), and must be asserted and proven before a court will recognize and

protect them: see, for example, *Lax Kw'alaams* at para 72; *Ktunaxa Nation* at para 84. While I have rejected the assertion that these concepts limit the scope of the government's authority to enter into negotiations with particular Aboriginal groups in an effort to resolve rights claims, I find that these legal doctrines and concepts are relevant considerations in assessing the potential merits of the Applicants' process claims.

[147] One main feature of the Applicants' complaint about the RRA is that the government acknowledged rights that have not yet been formally recognized by any court decision, and in doing so did not put limits on the scope of the rights or the manner of their exercise, as would have been required if the rights were asserted and determined in a court of law. In response, LMG says that the Applicants' arguments are doomed to fail, because they are essentially political in character, ignore the constitutionally protected status of LMG's rights, and run contrary to the authority of the Minister to give priority to certain groups in allocating access to the fishery.

[148] I am not convinced that the Applicants' claim should be struck at this stage on the basis that it is purely political. LMG argues that the RPPSG and UPM (two of the Applicants here) advanced similar arguments in their motion to intervene in the Lobster litigation, but these were rejected as political rather than legal claims. They say that the same result should follow here. I am not persuaded that the *Lobster intervention* decision is so clearly applicable here. For one thing, that case involved a challenge to an actual decision by the Minister in regard to the issuance of specific licenses. The intervention arguments should have been exclusively directed towards that decision-making process, but instead the Court found that the proposed interveners

were raising issues and arguments that went beyond the scope of the actual dispute between the parties.

[149] In this case, by contrast, the Applicants claim that they were unfairly and wrongly excluded from the process by which a more general agreement was reached between the federal Crown and LMG, and which both sides agree is meant to establish and maintain a cooperative relationship in the ongoing management of the LMG fishery. It bears repeating that the Applicants are not challenging any particular decision taken under the RRA. Their claim is about the process by which the Agreement was negotiated and finalized. This is an entirely different claim than the one in issue in the Lobster litigation, and the Applicants' process claims must be examined in light of the essential character of the claim they are advancing.

[150] A related argument by LMG is that the Applicants' process claim should be rejected because their underlying goal in pursuing their judicial review application is to try to maintain the historical situation – a history in which Aboriginal and treaty rights were ignored and Indigenous peoples were excluded from, or only given minimal access to, the fishery. While I can understand why LMG advanced this argument, in light of the way that the Applicants expressed certain of their arguments, I find that LMG's position misreads the essential character of the Applicant's process claim.

[151] I find that the essential nature of the Applicants' process claim is that the law has not yet determined to what extent governments must consult or involve non-Indigenous people with an interest in the subject-matter before they enter into agreements that recognize, acknowledge or

implement section 35 Aboriginal or treaty rights that have not been determined by a court decision. Given that natural resources are limited, and recognizing that non-Indigenous people participate in harvesting of those resources, the Applicants argue that the government must provide a fair process so that their interests – limited though they may be – can be understood and considered.

[152] A similar point was accepted in *Potlotek*, which involved a motion by the Unified Fisheries Conservation Alliance [UFCA] to intervene in an application brought by the Potlotek First Nation against the Minister of Fisheries and Oceans. The case is one chapter in the ongoing disputes related to the implementation of the *Marshall* decisions. The UFCA sought to intervene because it was concerned about the potential impact of a decision recognizing section 35 rights to fish for the Potlotek First Nation on UFCA members' participation in the fishery. In that respect, the factual situation bears some resemblance to the one before the Court in this case.

[153] In granting the intervention motion, the Nova Scotia Supreme Court provided useful insights into the particular interests of the parties and the intervener, as well as a practical perspective on the longer-term implications of rights recognition:

> [53] I am satisfied that the UFCA's intervention will not visit a serious prejudice upon any party to this proceeding. My reasons include:
>
> 1. UFCA's intervention will not be allowed to serve as an echo chamber or bullhorn through which one the Attorney General of Canada's position is unfairly repeated or magnified to the detriment of Potlotek. I note that there is a distinction to be made between the priorities and function of UFCA and the federal government. The UFCA membership is engaged in a commercial enterprise primarily with a view to accessing, protecting and

> monetizing the fishery resource. The Attorney General of Canada's focus is different and wider, involves broader policy concerns and focusses on more things such as enforcement and resource management. The experiences, priorities and perspectives of UFCA are sufficiently different from those of the Attorney General of Canada (and DFO) as to avoid unfair duplication or repetition. Moreover, should there be any signs of such abuse, the Court maintains oversight to ensure procedural fairness; and
>
> 2. It is an inescapable fact that the fishery resource is finite and will be shared between Indigenous groups such as Potlotek and non-indigenous groups. This reality is reinforced in Potlotek's written submissions which confirm that it is "not seeking ownership of commercial licenses held by UFCA members, nor [is Potlotek] seeking to change the legislation or licensure conditions applicable to UFCA members" (page 18). That concession related to the question of whether UFCA could claim a valid economic interest in the proceeding. However, it also affirms the facts that the non-indigenous commercial fishery will remain in place; indigenous fishers and non-indigenous fishers will interact on the water; and sharing of the fishery resource is inevitable. This does *not* mean that the rights which entitle a person access to this resource are the same or equal. Potlotek's treaty rights enjoy constitutional protection. That fact is worthy of recognition and respect. Whatever rights UFCA members have to access the fishery arise primarily as a matter of license or privilege – not the constitution. They are not the same or equal, and any notion of "fairness" must recognize that distinction. I am certainly satisfied that the distinction will be properly recognized without giving rise to a disqualifying, serious prejudice.

[154] While I recognize that *Potlotek* is a decision on an intervention motion, and thus not directly on point, I find that the analysis set out has certain parallels with the considerations that are relevant to the question before me.

[155] As in *Potlotek*, the Applicants here represent fishers engaged in "a commercial enterprise, primarily with a view to accessing, protecting and monetizing the fishery resource." As in *Potlotek*, the Minister's focus here is different and wider, and engages policy concerns relating to

an overarching goal of reconciliation, together with a commitment to fulfilling the statutory responsibilities associated with conservation of the fishery and fish habitat, and responsible enforcement of the regulatory regime in order to achieve those goals. The Applicants bring a different experience and perspective to the table, and the question of whether the Ministers were under any obligation – constitutional or otherwise – to engage, consult or involve them in the process of negotiating and finalizing the RRA is a matter that has not been settled by prior cases.

[156] Finally, as in *Potlotek*, it is important to emphasize two cautionary points:

- If there is any duty on the Ministers to engage or involve the Applicants in the negotiation process, it is not in any meaningful respect equivalent to the constitutional duty to consult Aboriginal peoples. The two stand on a completely different footing, and should not be compared or conflated; and

- While it is inevitable that LMG and non-Indigenous fishers will interact on the water and share a common resource, this does not mean that the rights of the two groups are analogous or equivalent. The section 35 rights asserted by LMG and acknowledged in the RRA are worthy of recognition and respect. The interests advanced by the Applicants arise as a matter of license or privilege – and exist at the discretion of the Minister.

[157] There is another relevant strand of authority that buttresses my conclusion that the process should not be struck at this stage of the proceeding. In *Gladstone*, the Court gave

meaning to the priority that is to be given to Aboriginal rights by imposing two different types of obligations on governments:

> 62. Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. <u>This right is at once both procedural and substantive;</u> at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

(emphasis added)

[158] As noted previously, the focus of the priority discussion in *Gladstone* and subsequent cases has been on the need to ensure that the rights and interests of Aboriginal peoples are respected, while also acknowledging that the resources are used by others. The parties did not refer to any decisions in which the question of whether there are any procedural or substantive requirements imposed on governments in relation to the consideration of the interests of non-Indigenous users of the resource, and I am not aware of any decisions that have determined the question.

[159] I find, therefore, that it is an open question whether there are any procedural aspects to the duty imposed on governments to consider the interests of both Aboriginal rights holders and others who use or rely on the resource in making regulatory allocation decisions. Since the

signature of the RRA establishes a new framework for the exercise of the Minister of Fisheries and Oceans' regulatory obligations and responsibilities, the question of whether there was any obligation on the federal Crown to consult, involve or seek input from non-Aboriginal individuals or groups involved in the fishery remains open, in my view.

[160] Based on these considerations, I am not persuaded that the Applicants' process claim is inevitably doomed to failure. While the legal claim they advance may be somewhat novel, this is not – in itself – a basis to strike the claim: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco*]; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980; *Atlantic Lottery Corp. Inc v Babstock*, 2020 SCC 19 [*Atlantic Lottery*] at para 19. Otherwise, the development of the law would be stunted for no good reason.

(3) Conclusion on the Motion to Strike

[161] For the reasons set out above, I find that the following elements of the Notice of Application should be struck, because they have no reasonable prospect of succeeding:

- The challenge to the rights recognition approach;

- The challenge based on unlawful delegation of authorities;

- The claim that the RRA is invalid because it was not published in the *Canada Gazette*.

[162] I have, however, found that the Applicants' process claim should not be struck at this stage.

[163] With this, we turn to the second motion, brought by the Applicants, seeking further disclosure.

C. *The Applicants' Motion for further Disclosure*

(1) The Disclosure Motion

[164] The second matter before the Court is the Applicants' motion for further disclosure under Rule 318 of the *Federal Court Rules*.

[165] In their Notice of Application for judicial review, the Applicants listed 125 documents they were relying on, and also requested that the Ministers produce eight categories of documents pursuant to Rule 317. Rule 317(1) states that a party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application.

[166] Following the filing of a Notice of Objection under Rule 318(2) [Objection] by the AGC, the Applicants modified their request to four categories of documents, and this request is the subject of the motion before the Court. The four types of documents requested by the Applicants are:

- Annex C to the RRA (which contains certain financial information described below);

- Internal emails and memoranda to the Ministers covering the period January 1, 2017 to April 16, 2021, which make reference to the reconciliation process regarding the fishery in the Gaspé Peninsula, and specifically memoranda or other material produced by the Ministerial representatives and the Director General for the Quebec Region of the Department of Fisheries and Oceans;

- Progress reports and analysis regarding the reconciliation process for the fisheries prepared for the Minister of Fisheries and Oceans and the Minister of Crown-Indigenous Relations for the period from January 1, 2017 to April 16, 2021; and

- Reports regarding the implementation of management measures for the lobster fishery in zone ZPH 21B, and the recognition of Aboriginal or treaty rights regarding lobster fishing, between February 1, 2017 and April 16, 2021.

[167] The AGC's Objection to the original request was based on two arguments: that Rule 317 did not apply, and that the RRA had already been produced but Annex C was not relevant to the Applicant's case and in any event it is confidential and the public interest justified not disclosing it.

(2) The parties' submissions

[168] The Applicants' motion addresses both aspects of the Objection. First, the Applicants acknowledge the case-law that has found that Rule 317 does not apply in the absence of a decision or order (*Alberta Wilderness Association v Canada (Attorney General)*, 2013 FCA 190 [*Alberta Wilderness*] at para 39 and the cases cited therein), but argues that this line of authority is limited to situations where the judicial review application seeks *mandamus*. As stated in *Alberta Wilderness* at paragraph 39: "in the context of mandamus, the legality of the decision is not in issue. Only the failure to make a decision is." By contrast, the Applicants submit that its Notice of Application is seeking declaratory relief and deals directly with the legality of the RRA itself.

[169] The Applicants rely on two decisions of this Court: *Airth v Canada (National Revenue)*, 2007 FC 415 [*Airth*] and *Renova Holdings Ltd v Canadian Wheat Board*, 2006 FC 1505 [*Renova Holdings*]. In *Airth*, which involved a challenge to an ongoing policy or practice of issuing letters of requirement for information to taxpayers, the Court noted (at para 6) that Rule 317 is "clearly more suited to the traditional type of judicial review of an order or decision… [and that] Rule 317 is an inelegant tool in dealing with judicial review of actions, conduct or policies or practices." The Court (at para 7) concurred with the views expressed in *Renova Holdings* that:

> [I]t would be inconsistent with the right to challenge administrative policies and practices… to deny applicants access to the material necessary to establish or, more particularly, to challenge the government's claim as to the underlying legitimacy of its policies, practices or actions. The issue is the manner in which this material is to be produced without authorizing a fishing expedition or a discovery type process.

[170] The Court went on to find that "this is largely an issue of form rather than substance as I have no doubt that the relevant materials for a judicial review must be disclosed one way or another" (at para 8). In the end, the Court did not order further disclosure because the respondent in that case said it had produced all of the relevant material.

[171] On the specific requests in this case, the Applicants assert that Annex C is relevant and not confidential; in the alternative, they argues that even if the Annex is confidential, the public interest in disclosure should prevail. In regard to its other requests, the Applicants simply note that the AGC has not articulated any specific reason to object to the disclosure of these documents, and submit that the material is relevant and necessary for the purposes of the judicial review.

[172] The Applicants argue that their request for disclosure must be understood in the context of the wider purpose of the judicial review in this case, which concerns fundamental interests and the legality of government action. They emphasize the statement in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 that "the evidentiary record… is indispensable to the reviewing court's fulfilment of its responsibility to engage in meaningful review" (at para 71) and, disclosure prevents decision-makers "from being immunized from review" (at para 73).

[173] For all of these reasons, the Applicants submit that their motion for further disclosure should be granted.

[174] The LMG and AGC oppose the request, arguing that Rule 317 does not apply because the Applicants do not challenge a specific decision or order but rather seek to invalidate the RRA. They assert, in the alternative, that the other documents are irrelevant to the Applicants' claim; they also maintain their position that Annex C is confidential, and the public interest favours not ordering disclosure.

[175] LMG argues that the Court should reject the Applicants' attempt to limit the finding in *Alberta Wilderness* that Rule 317 does not apply where no decision has been made to cases involving claims for *mandamus*. LMG notes that other cases have applied this approach to applications seeking declaratory relief (*Gaudes v Canada (Attorney General)*, 2005 FC 351 at para 16), or for writs of prohibition seeking to prevent the application of a government policy or practice (*Patterson v Gascon*, 2004 FC 972 at paras 10-17), or cases seeking an order for contempt of court (*Lill v Canada (Attorney General)*, 2020 FC 551 at para 34).

[176] Based on this case-law, LMG argues that Rule 317 has no application to the case at bar, because the Applicants chose to challenge the legality of the RRA itself, rather than the decision of the Ministers to enter into it. One consequence of the way the Applicants framed their relief is that they did not have to bring their claim within the 30-day deadline set out in section 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7. LMG argues that, having made this choice, the Applicants should not be permitted to make an end-run around the *Rules* by now forcing disclosure of documents.

[177] On the specific requests, LMG argues that the documents are irrelevant to the assessment of the legality of the RRA. LMG points out that a redacted version of Annex C has already been disclosed, except for the specific dollar amounts, which it says are irrelevant to the Applicants' case. As regards the other requests, LMG asserts that they amount to an impermissible fishing expedition that is inconsistent with the limited scope of Rule 317.

[178] The AGC argues that Rule 317 does not apply, noting that the disclosure requirements under Rule 317 are more limited than the discovery rules that apply in an action. The AGC relies on the distinction in the case-law between disclosure requirements in challenges to a decision or order, and other types of judicial reviews. The AGC asserts that the cases cited by the Applicants do not support their position.

[179] In the alternative, the AGC submits that the documents are not relevant in the sense that none of the requested material could influence the way the Court deals with the application: *Maax Bath Inc v Almag Aluminum Inc*, 2009 FCA 204 [*Maax Bath*] at para 9. The AGC contends that none of the requested documents are relevant to the Applicants' challenge to the legality of the RRA. It also claims that the financial details set out in Annex C are confidential and the public interest favours not ordering disclosure.

(3) Discussion

[180] I will dispose of this motion summarily. Rule 317 does not apply, and the Applicants have not demonstrated that any of the requested documents are necessary for the Court to conduct judicial review of their claim. The motion will therefore be dismissed.

[181] The starting point for assessing the Applicants' disclosure motion is the Notice of Application for judicial review itself. The scope of disclosure, and the applicability of Rule 317, flows from the nature of the claim the Applicants have chosen to advance. As all sides acknowledge, in this case the Applicants decided to challenge the legality of the RRA, including the process by which it was negotiated. They have not attacked the decision of the Ministers to sign the RRA, nor any specific decision taken pursuant to it. The Applicants' claim instead seeks a declaratory judgment ruling the RRA invalid.

[182] Applying the relevant case-law to this case, the choice made by the Applicants has the effect of foreclosing the application of Rule 317, because they are not challenging a particular order: see *Alberta Wilderness*, and the discussion in *Patterson* and *Lill*. I agree with the Applicants that the comments in *Airth* and *Renova Holdings* suggest that where a judicial review does not relate to a particular decision, the documents needed to conduct a full and fair judicial review into the legality of the policy, practice or action must be produced "one way or another." However, I do not agree that these decisions in any way enlarge the scope of application of Rule 317.

[183] The next point to note is that the Applicants have filed a substantial amount of material with their Notice of Application for judicial review, and given the nature of their claim (as

discussed earlier), much of the argument focuses on points of law rather than specific facts. I note that LMG has also filed a substantial amount of background material on the motion to strike. The record is not lacking in any way that is evident at this stage of the proceeding. The Applicants have not demonstrated why or how the additional documents they seek are relevant or necessary for the judicial review they have launched. I am not persuaded that the judge hearing the matter on the merits will need any of this information in order to decide the matter.

[184] It is not, therefore, necessary to discuss the detailed submissions advanced on the particular documents requested by the Applicants. I will only add a few observations on certain elements of the requests and the Applicants' submissions on them.

[185] The Applicants contend that the financial details from Annex C are needed because the funding elements of the RRA [TRANSLATION] "have upset the socioeconomic and regional balance" in the fishery as between the non-Indigenous fishers represented by the Applicants and the LMG and other Mi'gmaq communities who may gain greater access to the fishery.

[186] This is not persuasive, or supported by the case-law. As LMG points out, to the extent that the Applicants' argument about the "equilibrium" they seek to defend rested on policies and practices that ignored, or did not give meaningful effect to, the section 35 Aboriginal and treaty rights of LMG or other Mi'gmaq communities, it has been overtaken by the Supreme Court of Canada's recognition of the weight that existing Aboriginal and treaty rights must be afforded in resource allocation decisions: see, for example, *Marshall II* at paras 44-45; *Sparrow* at p. 1119; *Gladstone* at paras 61-62. In light of this, and as discussed earlier on the motion to strike, this

argument is doomed to fail and will not proceed. In light of this, the request for the financial details in Annex C has no purpose.

[187] One final comment on the other documents requested by the Applicants. In light of the nature of the claim the Applicants advance, I find that the requests for background briefing materials and reports lack the specificity appropriate to a Rule 317 request, and instead these requests appear to be an impermissible fishing expedition. The case-law has repeatedly rejected such requests as contrary to the intended purpose of Rule 317: *Maax Bath* at para 15; and see *Access Information Agency Inc v Canada (Attorney General)*, 2007 FCA 224 at para 17; *Athletes 4 Athletes Foundation v Canada (National Revenue)*, 2020 FCA 41 at para 17. None of this material is necessary for the determination of the Applicants' claim, and it goes well beyond the type of material that even a generous reading of their pleadings would suggest is necessary and relevant.

[188] For all of these reasons, the Applicants' motion for further disclosure is dismissed.

V. Conclusion

[189] For the reasons set out above, the motion to strike will be granted, in part. The motion for further disclosure will be dismissed in its entirety.

[190] Motions to strike can involve complex questions which call for a balancing of two sometimes competing factors. The need to allow new or novel claims to proceed to a hearing can be a significant consideration, because otherwise the law's development will be unduly stifled. As the Supreme Court of Canada stated in *Imperial Tobacco* at para 21: "…the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed… The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial."

[191] The novelty of a claim is not, in and of itself, either a reason to strike a claim or to allow it to proceed, but it can be a significant factor in examining a motion to strike: *Hunt v Carey Canada Inc.* at 980; *Atlantic Lottery* at para 19.

[192] On the other side of the coin, "[t]he power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial" (*Imperial Tobacco* at para 19). In addition to serving the parties' interests in fair and effective resolution of their dispute, this also serves wider public interests in ensuring "timely and affordable access to the civil justice system" (*Hryniak v Mauldin*, 2014 SCC 7 at para 2, cited with approval in *Atlantic Lottery* at para 18).

[193] In this case, while the Applicants have attempted to advance a number of novel claims, only one will proceed to a hearing, because, accepting the facts alleged in the Notice of Application for judicial review as true, I have concluded that most of the Applicants' claims are

doomed to fail. This includes their challenge to the “rights recognition” approach and the Crown’s authority to enter into agreements recognizing and acknowledging Aboriginal and/or treaty rights under section 35; their claim that there was an unlawful delegation of authority from the Minister of Crown-Indigenous Relations to the Minister of Fisheries and Oceans, as well as their claim that the latter Minister unlawfully delegated authority to LMG in regard to the governance of its own fishery; as well as their claim that the RRA is invalid because the text was not published in the *Canada Gazette*. Each of these claims is doomed to failure, and will be struck.

[194] However, I have found that the Applicants’ process claim is not plainly doomed to fail, and therefore it will not be struck. It should be emphasized that this is not an indication that I have concluded that the claim is likely to succeed after a full hearing; rather, it is just the opposite – all that I have found is that it is not inevitably doomed to fail.

[195] As regards the motion for further disclosure, it will be dismissed because I have concluded that Rule 317 does not apply, given the way in which the Applicants have framed their claim, and in addition I find that the additional documents they seek are not needed for a full and fair hearing of the merits of the underlying application for judicial review.

[196] Turning to the question of costs, the outcome on the motion to strike is divided, and, considering all of the factors listed in Rule 400, I conclude that each party should bear their own costs in regard to that motion.

[197] On the motion for further disclosure, the Applicants were not successful and I can find no reason to depart from the usual rule that costs follow the outcome. Therefore, the Applicants shall pay reasonable costs to LMG and the AGC. I note that the parties did not devote significant attention to this motion at the hearing, and their written submissions were also limited (other than setting out the background to the dispute, which to some extent duplicated their submissions on the motion to strike). All of which to say, the costs that will be awarded will be relatively modest.

[198] If the parties cannot agree on a reasonable amount, they may make submissions of no more than three (3) pages, within ten (10) days of this Order.

[199] Finally, the Court acknowledges the delay in issuing this Order, and apologizes to the parties for it.

[200] One procedural postscript is required. As discussed above, the Notice of Application for judicial review in this matter is lengthy and complex. In order to ensure that the Court's final Order identified all of the parts of the Notice that must be struck in accordance with the reasons set out above, a confidential version of the Order and Reasons, including the proposed Order, was provided to the parties and they were given an opportunity to comment on the terms of the Order.

[201] The parties were unable to agree on joint submissions regarding the terms of the Order. In my view, both sides' positions go too far. On the one hand, LMG and the AGC submitted that

additional paragraphs should be struck, as well as a list of documents that they say are only pertinent to the portions of the Notice of Application that have been struck.

[202] On the other hand, RPPSG assert that their interpretation of the Reasons leaves the following two questions open for consideration:

> [TRANSLATION]
>
> 1. The issue of the validity of the process through which the Agreement recognized LMG's legislative power over the fisheries, under subsection 91(12) of the *Constitution Act, 1867*;
>
> 2. The issue of whether, in recognizing the existence of undefined Aboriginal and treaty rights as well as a right to self-government and independent management in relation to the fisheries without having fairly heard and consulted all those involved, the Minister of Fisheries and Oceans and the Minister of Crown–Indigenous Relations, in exercising an executive function on behalf of the Crown, have fulfilled their duty to act in the public interest, for the benefit of all Canadians, with the goal of achieving and preserving economic and regional fairness.

[203] I am not persuaded that it is appropriate, in the context of the motion to strike, to also strike materials filed by RPPSG as part of their record. Whether that material is relevant to the matter is best left to the judge hearing the merits. In addition, I do not agree with RPPSG that the first question set out above is still open for debate. The only portions of the RPPSG's original

Notice of Application is their challenge to the process that was followed in negotiating and finalizing the RRA.

[204] The Order that is set out below in the public version of these Reasons and Order reflects the Court's consideration of the parties' comments.

ORDER in T-1608-21

THIS COURT ORDERS that:

1. Public Interest Standing:

   The Applicants are granted public interest standing in this case.

2. The Motion to Strike:

   The motion to strike is granted in part and therefore the following paragraphs are struck from the Notice of Application:

   - Paragraphs 2(b), (c)(i-v), and (d) at pages 11 to 16;
   - The paragraphs challenging the RRA's rights recognition approach, including those found at paras 77-85 and 149-150;
   - The paragraphs challenging the Minsters' unlawful delegation of authorities, including those at paras 87-121, and 124-143;
   - The paragraphs claiming the RRA is invalid because it was not published in the *Canada Gazette*, including those at paras 198-205.
   - Any paragraphs related to the motion for disclosure, including para 210.

The Applicants shall serve and file a fresh amended version of their Notice of Application for judicial review that reflects these changes. That is to say, the new version should not include strikeouts.

3. Motion for further disclosure:

The Applicant's motion for further disclose is dismissed.

4. Costs

The Applicants shall pay to the Respondents LMG and AGC costs only in relation to the Motion for further disclosure. If the parties cannot agree on an amount, they may make submissions to the Court within 10 days of the issuance of the public Order and Reasons. Any such submissions shall not exceed 3 pages.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1608-21
STYLE OF CAUSE:	REGROUPEMENT DES PÊCHEURS PROFESSIONNELS DU SUD DE LA GASPÉSIE INC. UNION DES PÊCHEURS DES MARITIMES INC., PRINCE EDWARD ISLAND FISHERMEN'S ASSOCIATION LTD., GULF NOVA SCOTIA FLEET PLANNING BOARD v LISTUGUJ MI'GMAQ GOVERNMENT and LE PROCUREUR GÉNÉRAL DU CANADA, LE MINISTRE DES PÊCHES ET DES OCÉANS, LE MINISTRE DES RELATIONS COURONNE-AUTOCHTONES
PLACE OF HEARING:	VIDEOCONFERENCE
DATE OF HEARING:	JUNE 22, 2022
REASONS FOR ORDER AND ORDER:	PENTNEY J.
DATED:	OCTOBER 12, 2023

APPEARANCES:

Me Claude Rochon Me David Ferland Me Cassandra Iorio	FOR THE APPLICANTS REGROUPEMENT DES PÊCHEURS PROFESSIONNELS DU SUD DE LA GASPÉSIE INC., UNION DES PÊCHEURS DES MARITIMES INC., PRINCE EDWARD ISLAND FISHERMEN'S ASSOCIATION LTD., GULF NOVA SCOTIA FLEET PLANNING BOARD
Me Zachary Davis Me Riley Weyman	FOR THE RESPONDENTS LISTUGUJ MI'GMAQ GOVERNMENT
Me Ian Demers Me Stéphanie Dépeault Éloïse Eysseric	FOR THE RESPONDENTS LE PROCUREUR GÉNÉRAL DU CANADA, LE MINISTRE DES PÊCHES ET DES OCÉANS, LE

MINISTRE DES RELATIONS COURONNE-AUTOCHTONES

SOLICITORS OF RECORD:

Stein Monast LLP Quebec, Quebec	FOR THE APPLICANTS REGROUPEMENT DES PÊCHEURS PROFESSIONNELS DU SUD DE LA GASPÉSIE INC., UNION DES PÊCHEURS DES MARITIMES INC., PRINCE EDWARD ISLAND FISHERMEN'S ASSOCIATION LTD., GULF NOVA SCOTIA FLEET PLANNING BOARD
Pape Salter Teillet LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENTS LISTUGUJ MI'GMAQ GOVERNMENT
Department of Justice Montreal, Quebec	FOR THE RESPONDENTS LE PROCUREUR GÉNÉRAL DU CANADA, LE MINISTRE DES PÊCHES ET DES OCÉANS, LE MINISTRE DES RELATIONS COURONNE-AUTOCHTONES