Federal Court  Cour fédérale

**Date: 20130411**

**Docket: T-577-12**

**Citation: 2013 FC 363**

**Ottawa, Ontario, April 11, 2013**

**PRESENT: The Honourable Mr. Justice Rennie**

**BETWEEN:**

**REPRESENTATIVE PROCEEDING**

**GRAEME MALCOLM ON HIS OWN BEHALF AND ON BEHALF OF ALL COMMERCIAL HALIBUT LICENCE HOLDERS IN BRITISH COLUMBIA**

**Applicant**

**and**

**THE MINISTER OF FISHERIES AND OCEANS AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and BC WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant, and those that he represents, are commercial fishermen. They make their living fishing halibut off the coast of British Columbia. They seek judicial review to set aside a decision of the Minister of Fisheries and Oceans made on February 17, 2012 changing their allocation of the total allowance catch (TAC), an annual maximum harvest in pounds, for the Pacific halibut fishery. In that decision, the Minister reduced the applicant's share of the TAC from 88% to 85%. This resulted in a corresponding reduction of the applicant's individual transferable quota (ITQ), injuriously affecting his ability to earn a livelihood from the fishery. For the reasons that follow, this application is dismissed.

***Background***

[2] The Pacific halibut fishery is of substantial importance to commercial and recreational fishers. There are approximately 435 commercial halibut licences extant, worked by about 180 active fishermen and licence holders. Many of those represented by the applicant fish full time, and halibut comprises a substantial portion of their catch. The applicant is a third-generation fisherman and has been fishing full time for 11 years. The reduction in ITQ held by the applicant resulted in fewer pounds of halibut that could be landed and sold by the applicant and other commercial fisherman.

[3] Prior to 1991, the commercial sector operated as a derby-style race to catch halibut until the season was closed. The number of boats entitled to fish was limited but there was no limit on the catch. In 1991, this changed to an ITQ system which allocated a quota to each licence holder, based on their historical participation and investment in the fishery. This new system eliminated the race to catch halibut, allowing for longer fishing seasons and a higher quality catch. The ITQ attached to

inactive licences could be transferred to the active licence holders within the same licence category. ITQs came to have significant market value in their own right, and are sold or leased between commercial fishermen. The respondent Minister approves and facilitates the transfer, sale or lease of ITQs.

[4] The ITQ system of resource management has been very successful. The applicant's evidence was that ITQs have improved conservation and, as counsel notes:

> They have also improved DFO's ability to enhance the economically beneficial exploitation of the resource because fishermen have had less to gain by investing in equipment that harvests larger amounts of fish in a short period of time and instead the system rewards cost-effective fishing that maximizes the value of fish landed. Because quota is transferable, income is maximized by leasing or selling quota to the most profitable harvesters. ITQs create flexibility, certainty, stability and equitable access in the fishery because quota can be transferred between fishermen to suit their particular needs and commercial fishermen, including First Nations, can invest in quota as a valuable fishing opportunity that will not be changed from year to year.

[5] Halibut, of course, do not respect international boundaries. Their feeding, spawning and migration patterns cross the international waters boundaries between Canada and the United States. Hence, the division of the halibut fishery as a whole is determined by the International Pacific Halibut Commission (the Commission) established under the Canada-U.S. *Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea*. Canada is, as is the United States, obliged by this treaty to manage its fishery within the TAC allocated to it by the Commission.

[6] Historically, the recreational sector played a small role in the halibut fishery, but it has grown substantially since the 1990s. At present, there are approximately 250,000 tidal water licence holders. Within the recreational sector there are both individual anglers and charter business operators who may fish for halibut and other species, although it is understood that only a small percentage of recreational licence holders fish for halibut.

[7] Historically, the recreational sector operated outside of the TAC. This meant that recreational fishers were not constrained by conservation limits. However, as the sector grew, there came a need to subject it to the catch limitations within which the commercial sector had long been operating.

[8] In 2000, the Department of Fisheries and Oceans retained Dr. Edwin Blewett, a former economist at Fisheries and Oceans, to facilitate consultation to establish an initial allocation of the TAC between the commercial and recreational sectors. Dr. Blewett concluded that, assuming their fundamental interests could be satisfied, both sectors agreed that the "transfer of quota between sectors would be based on the market system." Put otherwise, to increase their share of the TAC and to increase their business, the recreational fishers would have to purchase quota from existing quota holders, namely, the commercial fishers.

[9] The fundamental interests, as determined by Dr. Blewett, were two-fold: avoiding in-season closure for the recreational sector and adequate fishing quota to sustain a viable commercial sector. Dr. Blewett also concluded that the initial allocations should be set by a third party as the sectors could not reach an agreement. Indeed, the two parties were far apart. The recreational sector

proposed that it be allocated 20% of the TAC, whereas the commercial sector thought 5% to be more appropriate.

[10] The Minister then sought the advice of Stephen Kelleher, Q.C., a British Columbia lawyer, as to the initial allocation. In 2002, Kelleher recommended that the recreational sector receive 9% of the TAC and that the Department develop a mechanism to facilitate future transfers of quota between the sectors. The recreational sector opposed any market based mechanism. Kelleher was of the view that if the recreational sector did not adhere to the conservation limit of 9%, the Department would have to impose management measures. He recommended:

> The options for Fisheries and Oceans Canada to consider include new management measures such as closing areas to recreational anglers and reducing daily limits or possession limits, imposing annual limits and restricting fishing times and areas.
>
> A further possibility would be the mid-season closure of recreational halibut fishing. That is seen by the Sport Fishing Advisory Board as the least desirable option. I fully agree.

[11] On October 27, 2003, the Minister introduced an allocation framework (the 2003 Framework). The 2003 Framework provided:

(1) There would be a 12% "ceiling" on the recreational sector's portion of the TAC. This higher allocation was to allow the sector to grow.

(2) The allocation would remain in place until both sectors developed an acceptable adjustment mechanism whereby the recreational sector could acquire additional quota from the commercial sector (known as a "market based mechanism").

[12] In a parallel news release, the Minister stated that the Framework commitments would also ensure that there would be no in-season closures of the recreational fishery.

[13] For each year between 2005 and 2011, the recreational sector exceeded the 12% allocation, taking 18% and 17% of the TAC in 2006 and 2008. In 2010 and 2011, the sector caught approximately 15% of the TAC. This occurred despite more restrictive management practices imposed on the recreational sector.

[14] The failure of the recreational sector to adhere to its share of the TAC precipitated twin concerns about conservation and the Department's international obligation to manage the fishery within the TAC. These concerns were compounded by a corresponding dramatic decline in the abundance of Pacific halibut. Canada's TAC in 2004 was 13.8 million pounds, but by 2010 the TAC had been reduced to 7.5 million pounds. The Department closed the recreational fishery early in 2008, 2010 and 2011 and opened the recreational season late in 2008, 2009 and 2011. The Department also implemented more restrictive catch limits.

[15] During this time, successive Ministers of Fisheries and Oceans, and the Department, repeatedly affirmed the commitment in the 2003 Framework to develop a market based mechanism to facilitate growth of the recreational sector's share of the TAC. To give one example, in a letter published in the October 2007 issue of *Fisherman Life* magazine, the Minister wrote that: "[the Department] is committed to implementing the halibut allocation framework fully, including the 88:12 allocation and a market-based mechanism to enable the transfer of halibut quota between the sectors."

[16] In 2004 and 2005, market based mechanisms were used as a vehicle to change the allocation. In 2004 and 2005, the commercial sector paid to lease quota that was unused from the recreational sector in order to increase its share. Commercial fishermen bid on 9,000 and 10,000 pound blocks of quota, and the proceeds were held in a trust account to be used by the recreational sector if, in the future, it exceeded its 12% share. Then, in 2008, 2009 and 2010, the recreational sector acquired quota from the commercial sector using the trust funds.

[17] In 2007, the sectors reached an agreement whereby the Department would provide initial seed funding of $25 million to facilitate the transfer of halibut quota through a third party. The Department rejected this proposal for financial and legal reasons. In particular, the Department was concerned that it would set a precedent for other fisheries across the country, as it had not previously provided funds to reallocate quota between commercial and recreational sectors.

[18] In 2011, the Department implemented an experimental licence whereby the recreational sector could lease quota from the commercial harvesters at market value. Members of the commercial sector supported this market based mechanism but the recreational sector opposed it and largely boycotted the plan. It did so on the basis that as the fishery is a common public resource, the recreational sector should not have to pay to acquire their share of the quota, and pointed to the fact that the commercial sector did not pay for the ITQ originally granted in 1991.

[19] By 2011, the sectors were at an impasse. The Minister directed Randy Kamp, Member of Parliament (Dewdney-Allouette, B.C.) and Parliamentary Secretary to the Minister of Fisheries and

Oceans, to evaluate the available options. The mandate given to Mr. Kamp was to determine options which respected conservation, provided predictable access and established effective transfer mechanisms between the sectors. Mr. Kamp held a number of consultations with the commercial and recreational sectors and provided the Minister with his recommendations.

[20] The situation was highly politicized and significant economic interests, both vested and potential, were at stake. ITQs had significant monetary value, many in excess of $1 million, which would be diminished if the commercial sector's TAC was reduced. Both sectors engaged in letter-writing campaigns, with the commercial sector supporting the 2003 Framework and the recreational sector calling for it to be overturned.

***Content of the 2003 Framework***

[21] There is an issue between the parties as to whether the 2003 Framework has two components or three, specifically, whether the third element, the Department will avoid in-season closure of the halibut fishery for the recreational sector, was a part of the commitment. The respondent places some emphasis on this, contending that because this "essential component" of the 2003 Framework was breached as early as 2008, and repeatedly thereafter, the applicant could have no reasonable expectation that the 88% allocation as provided in the 2003 Framework would continue.

[22] I find that the in-season closure commitment was not part of the 2003 Framework, and do so for three reasons. First, the Minister reiterated his commitment to the Framework up until late 2011. This was despite the fact that the season was opened late and/or closed early every year between

2008 and 2011. In other words, the Minister and the Department continued to rely on the 2003 Framework, notwithstanding the season closures. The argument is, therefore, inconsistent with the respondent's repeated commitment to the Framework.

[23] Second, apart from the News Release accompanying the 2003 Framework, there is no documentary evidence of the Minister or the Department describing the 2003 Framework as having three components.

[24] Third, a finding that the Minister bound himself by a commitment not to close the fishery in-season would again, be inconsistent with the Minister's own legal position. The Minister maintains that he has an over-arching legal duty to manage the fishery and to impose conservation limits through in-season closure, if and when required.

***Decision Under Review***

[25] On February 17, 2012, the Minister decided to allocate 85% of the TAC to the commercial sector and 15% to the recreational sector, without any compensation to the commercial sector, and without a market based mechanism to effect the transfer. The Minister also decided to continue the experimental licence program, even though it was being boycotted by the recreational sector.

[26] In the News Release accompanying the decision, the Minister emphasized his commitment to "greater long-term certainty in the Pacific halibut fishery for First Nations, commercial and recreational harvesters, and, most importantly encouraging jobs and economic growth in British Columbia". The Minister also emphasized the importance of "conservation, stewardship and

careful harvest of Pacific halibut". The Department's website described the change as a "one-time permanent correction to the Pacific Halibut allocation".

[27] Three observations arise from the News Release, one relating to the Minister's mandate, the second to the general legal principles governing fisheries policy, and the third with respect to the economic benefit arising from the allocation.

[28] With respect to the mandate, the applicant observes that the Minister, through the words "most importantly" accorded greater priority to jobs and economic growth than he did to long-term certainty of the fishery. This, it is said by the applicant, is evidence that the Minister misunderstood his mandate. The second observation relates to the statement that this was a "one-time correction" to the 2003 Framework. This statement is, yet again, inconsistent with the Minister's legal position that he is not bound by his own prior policy choices. Third, the applicant notes that while the respondent advised the Court during pre-trial proceedings of its intent to file expert evidence in support of the economic benefits of the decision, no such evidence was filed, and the Court should infer that no such evidence existed. I will return to these points later.

[29] In making this decision, the Minister received advice from the Deputy Minister. This advice came in the form of three memoranda all delivered to the Minister in an eight day period prior to the decision. These memoranda, and the advice they contain, are central to the applicant's argument and require careful dissection.

[30] The February 6, 2012 memorandum from the Deputy Minister to the Minister provided four options:

> The department is presenting four options regarding allocation for your consideration. An option for licensing is included that would formally split the angler and commercial recreational (e.g. charter operator) segments of the recreational sector. All options include the continuation of the experimental licence program as well as a process to engage the recreational sector to address key management measures related to their fishery.
>
> The four options are: an immediate adjustment to 85:15 followed by the Process, an 85:15 sharing arrangement that would be implemented only once the Process has been successfully completed, the creation of a new commercial recreational licence category and maintaining the current 88:12 arrangement plus the announcement of the Process.

[31] The Department recommended Option 4: Maintaining the Current Allocation. The pros and cons of Option 4 were also identified:

> Pros:
>
> - Aligns with current government strategic objectives and priorities regarding stability and predictability
> - Sends strong and consistent message to stakeholders and observers regarding how DFO is moving to modernize fisheries management
> - Provides for continued use and possible further development of the experimental licence into a sustainable market based mechanism.
> - [redacted]
> - Pacific groundfish commercial sector would continue to demonstrate and support changes set out in Fisheries Modernization.
>
> Cons:
>
> - A strong negative reaction could be expected from the recreational sector as it does not address their expectations that change will occur.

- Due to the lower TAC, DFO and the recreational advisors may be pushed to consider significant in-season management measures including a potentially shorter season
- With a perception that there is little to gain, there is a risk that the recreational sector may choose not to accept the incentives and may continue to boycott the experimental licence, the Process and choose instead to continue or accelerate political activities

[32] The Minister did not accept the recommendation. No reasons were given.

[33] Two days later, on February 8, 2012, a revised memorandum was sent to the Minister. The Summary Box on the memorandum read:

- Further to your direction to adjust the Pacific halibut quota allocation to 85:15, an implementation approach has been developed.
- This memorandum outlines key considerations with respect to this approach. Once approved, the department will undertake the necessary actions to implement it.

[34] The memorandum continues:

- In implementing this decision, departmental officials propose the following approach which is structured around three elements:
    1. An immediate, but interim, adjustment to 85:15 for the 2012 fishing season. Maintaining this adjustment beyond 2012 is conditional on the recreational sector successfully addressing key issues in the recreational fishery (noted below).

[35] The key issues in the recreational sector were elaborated upon:

- An agreement on an effective quota transfer mechanism that does not require ongoing government intervention to allow

sectors to adjust to meet their needs in the future [by necessity, this may involve involvement with the commercial sector]
    - The existing experimental licensing program will continue as an interim measure until a permanent solutions can be achieved
- The implementation of improved catch monitoring measures within the recreational fishery;
- The development of viable management measures that could be used to keep the recreational fishery within its allocation while permitting optimum flexibility and season length; and,
- Rules that would determine future management measures if the commercial segment of the recreational sector (e.g. charter operators) continues to grow in relation to other users of the recreational sector

[36] Again, the Minister rejected the recommendation.

[37] On February 14, 2012 a third memorandum was sent to the Minister. The Department maintained both its advice and its recommendation that the *status quo* be maintained. Four options were reduced to two, maintain the status quo or to adjust to 85:15. The pros and cons for adjusting to 85:15 again provided:

Pros:

- The recreational sector will likely view the increase generally positively and as recognition of the importance of the recreational sector
- An increase will enable the season to be managed with possibly less restrictive conditions.

Cons:

- A change in the allocation would be perceived by commercial fishermen in B.C. and across the country as undermining the Minister's core message of stability and predictability in the fisheries modernization agenda
- Many stakeholders and observers will, despite any statement claiming that this is a "one-time" or "final" adjustment, view this as another example where political pressure can achieve desired outcomes, which could increase lobbying pressure on

> the department and Minister in this fishery in the future and in other fisheries across the country
>
> - A transfer that would take effect immediately could cause difficulties for some commercial harvesters who have already entered into sale agreements for the upcoming season
> - First Nations have stated orally and in letters in recent years that consultations held to date, including the most recent meeting on February 10, 2012, between the Parliamentary Secretary and the 5 plaintiffs in the Ahousaht case, have been inadequate if there is to be a change in the allocation
> - No incentive to improve the monitoring and management measures in the recreational fishery

[38] The Department dropped its recommendation that the adjustment be conditional on compliance by the recreational sector with conservation issues.

[39] The Minister signed and stated that he did not agree with the recommendation and wrote: "Please proceed with recommendation # 2".

[40] The applicant correctly notes that the Department never advanced a recommendation #2; rather it was an option. The Department's advice was consistent throughout, namely adherence to the 2003 Framework, identification of a market based mechanism, and a solution to conservation problems in the recreational sector. The Department, in recommending interim re-allocation contingent upon compliance by the recreational sector with conservation issues, was concerned that, if the adjustment was permanent, it could lose leverage over the sector. The briefing note is explicit on this point, noting as a negative consideration, that there would be "no incentive to improve the monitoring and management measures in the recreational sector."

[41] The applicant emphasizes the memoranda. He notes that the Minister's decision is against advice of Departmental officials and that the advantages in favour of maintaining the *status quo* far outweigh the disadvantages. The rationale for increasing the recreational quota is ice-thin. The Department notes that the reallocation will be "viewed positively" by the recreational sector. This comes as no surprise. Secondly, the conservation pressures will disparate, in the short-term, as the over-fishing by the recreational sector will now be sheltered or protected by the greater quota. As noted, the Department's ability to affect behavioural change in the recreational sector is correspondingly diminished. Most importantly, the applicant emphasizes the Department's continued concern about increasing the TAC of the recreational sector in the face of its non-compliance.

[42] The applicant notes that the Deputy Minister specifically identified the importance of developing a market based mechanism to allow sectors to adjust according to their needs. The importance of this was also identified by Mr. Kamp in his advice to the Minister. A November 15, 2011 document from Mr. Kamp entitled "Pacific Halibut Allocation Options: Draft for discussion purpose only" notes:

> All of the options listed below could/should be combined with any or all of the transfer mechanisms outlined in the next section.

[43] No "next section" was produced by the respondent during the course of the proceedings.

[44] On January 10, 2012, Mr. Kamp provided a further memorandum, outlining the pros and cons of three options. "Stability, predictability, transparency and trust" would be ensured by maintaining the 2003 Framework. It would also "send a message that political lobbying is

ineffective", and that if an adjustment is made to 85:15, legal action from commercial interests could be expected.

[45] The applicant points out that the Department itself recognized that the change in allocation was contrary to the commitment made in the 2003 Framework, and militated the stated objective of predictability in the fishing season. The decision of the Minister to change the allocation in light of this advice is evidence of the unreasonableness of the decision.

[46] I will return to these memoranda later, but before doing so, address the standard of review.

***Analysis***

***The Scope of Review***

[47] The applicant and the respondent are *ad idem* that the decision is justiciable and that the standard of review is that of reasonableness. Where they differ is on the outcome when it is applied to the decision. For this reason, it is essential to understand what is meant by "reasonableness" in the context of a decision of this nature.

[48] Section 4 of the *Department of Fisheries and Oceans Act*, RSC, 1985, c F-15 and the *Fisheries Act*, RSC, 1985, c F-14, describes the mandate of the Minister:

| | |
|---|---|
| 4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to | 4. (1) Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés : |
| (a) sea coast and inland fisheries; | a) à la pêche côtière et à la pêche |

| | |
|---|---|
| | dans les eaux internes; |
| (b) fishing and recreational harbours; | b) aux ports de pêche et de plaisance; |
| (c) hydrography and marine sciences; and | c) à l'hydrographie et aux sciences de la mer; |
| (d) the coordination of the policies and programs of the Government of Canada respecting oceans. | d) à la coordination des plans et programmes du gouvernement fédéral touchant aux océans. |

[49] Through section 4, Parliament conferred on the Minister the "widest possible freedom" to exercise his discretion in managing the fisheries: *Carpenter Fishing Corp v Canada*, [1998] 2 FC 548, (FCA) at para 37. In this regard, fisheries policy decisions, affecting as they do the allocation of the fishery as a whole between competing sectors, are of a general, legislative nature. In the ordinary course, they are based on the balancing of competing economic, environmental and policy concerns, aboriginal interests, both constitutional and otherwise, and treaty obligations. The paramount consideration in this balancing is the long-term sustainability of the fisheries.

[50] The allocation decision in question has some of these characteristics. It sets the overall allocation policy affecting the division of a public resource between two sectors of the fishery, involving hundreds of licence holders. This is in contrast with an administrative decision to allocate quota to an individual licence holder.

[51] The standard of review criteria expressed in *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 and *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 are not mutually exclusive or discreet; rather, they fall under the chapeau or rubric of the reasonableness test, which

is to be applied or varied depending on where the decision falls on the spectrum from purely legislative to purely administrative. Ministerial decisions may fall anywhere along a spectrum from a purely administrative decision affecting a single individual, to a policy issue, to a decision which is entirely political and not justiciable. As the Chief Justice of Canada observed in *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5, paras 23-24:

> As discussed above, *Dunsmuir* described reasonableness as a flexible deferential standard that varies with the context and the nature of the impugned administrative act. In doing so, *Dunsmuir* expressly stated that the approaches to review developed in particular contexts in previous cases continue to be relevant (*Dunsmuir*, at paras. 54 and 57). Here the context is the adoption of municipal bylaws. The cases dealing with review of such bylaws relied on by the trial judge and discussed above continue to be relevant and applicable. To put it succinctly, they point the way to what is reasonable in the particular context of bylaws passed by democratically elected municipal councils.
>
> It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.

[52] These principles apply, by analogy, to this case. There are a number of contextual features all of which support a deferential standard of review. These include the nature of the decision and decision maker, the legislative and factual context and the nature and scope of the relevant considerations.

[53] The deferential approach to decisions of this nature is not to say that the decision is above any level of review. The rule of law requires that all exercises of public authority find their source in law. Courts must ensure that governments act within the confines of statutes, the civil and

common law, and the Constitution: *Dunsmuir* at para 28. There is always a role, though it may be limited, for the courts. For example, in *Public Mobile v Canada (Attorney General)*, 2011 FCA 194, the Federal Court of Appeal reviewed a decision of the Governor in Council under the *Telecommunications Act*, SC 1993, c 38 on a standard of reasonableness.

[54] Although decided prior to *Dunsmuir*, the scope for review of sectoral allocations in the fishery was described in *Carpenter Fishing Corp v Canada*, [1998] 2 FC 548 (FCA), another case involving the Pacific halibut fishery:

> The imposition of a quota policy (as opposed to the granting of a specific licence) is a discretionary decision in the nature of policy or legislative action. … These discretionary policy guidelines are not subject to judicial review, save according to the three exceptions set out in *Maple Lodge Farms*: bad faith, non-conformity with the principles of natural justice where the application is required by statute and reliance placed upon considerations that are irrelevant or extraneous to the statutory purpose.
>
> […]
>
> It is only when actions of the Ministry otherwise authorized by the *Fisheries Act* are clearly beyond the broad purposes permitted under the *Act* that courts should intervene.

[55] This approach to the judicial review of fisheries management decisions has been consistently affirmed by the Federal Court of Appeal: *Mainville v Canada (Attorney Genera)*, 2009 FCA 196 and *Canada (Attorney General) v Arsenault*, 2009 FCA 300. In *Mainville* the Federal Court of Appeal confirmed that a court cannot interfere with the Minister's fishing plan except when the Minister acted arbitrarily, in bad faith, or pursuant to irrelevant considerations.

[56] These decisions are also consistent with a standard of review of reasonableness. As a matter of logic, breach of any of the criteria in *Maple Lodge Farms* would render a decision, *per se*, unreasonable. A decision rendered in bad faith, or on the basis of irrelevant considerations, is by its terms, unreasonable.

[57] The Court of Appeal has, again in the context of fisheries policy, assessed ministerial decisions involving competing interests, through the lens of reasonableness. In *Doug Kimoto v Canada (Attorney General)*, 2011 FCA 291, the Court said, a paragraph 13:

> The Minister is charged with the formidable task of managing, developing and conserving the fisheries, which belong to the Canadian people as a whole. Decisions with respect to conservation and management issues must necessarily balance the interests of competing stakeholders. In this case, the Minister informed herself of the available options (of which there were many) by conducting extensive consultations with the various stakeholders. Ultimately, she chose to expend the U.S. Fund, for the most part, on a voluntary and permanent licence retirement program. This was a highly discretionary decision guided by fact and policy. In our view, the basis of the Minister's decision was sufficiently transparent and intelligible, and the decision itself fell within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*see Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190, para. 47).

[58] In sum, reasonableness is a flexible standard, to be applied contextually. Reasonableness is informed by prior jurisprudence governing the scope of review for decision of this nature.

***There Is No Reviewable Error***

[59] The applicant contends that the *Dunsmuir* criteria of justification, transparency and intelligibility have not been satisfied. The Minister provided minimal reasons for his decision; the decision prioritizes growth of the recreational industry, despite the potential for negative outcomes

for the commercial sector and conservation, and the decision was inconsistent with the prior assurances given to the commercial fishermen. The Minister's decision is contrary to both the considered advice of his Department, and the advice received from his Parliamentary Secretary. The Minister and his Department repeatedly affirmed that there would be no change to the allocation without a market based process.

[60] Imbedded in the reasonableness standard, when applied in their context, is a recognition that the Minister has the widest discretion to make policy choices. Policy decisions are not necessarily transparent. The applicant effectively argues that there is much that can be said about the lack of justification in the decision, including the lack of consistency with long standing and recently re-affirmed commitments, and the absence of any evidence in support of the claim that it will support economic growth. Ultimately, however, having regard to its context, the decision is one within the range of possible decisions for the Minister to make.

[61] As noted, the Minister made reference to economic growth and jobs as the most important factor. However, the reasons for the decision, when read as a whole, demonstrate that the Minster emphasized three factors in particular: long-term certainty, economic growth and conservation. All of these are appropriate considerations. When viewed in context of the consultations, the objective was to provide stability for the industry. In-season closures were very detrimental to the sports-fishery. The applicant parries this, noting that the arbitrary reduction in the commercial sector's share introduced great uncertainty into that industry, which is by far the larger industry.

[62] There is no evidence that the decision was made in bad faith or pursuant to an irrelevant purpose. The Minister may have regard to a number of objectives for *Fisheries Act* decisions, including, "to conserve, protect, harvest the reserve or simply to carry out social, cultural or economic goals and policies": *Gulf Trollers Assn v Canada (Minister of Fisheries and Oceans)*, [1987] 2 FC 93 (FCA) at p 106.

[63] There is no question that the Minister departed from a long standing commitment to maintain the 2003 Framework, upon which the applicant and those he represents had, in good faith, built their individual businesses and made their investment decisions. The remedies for this change in position are not judicial. In conclusion, there is nothing preventing the Minister from favouring one group of fishermen over another: *Carpenter* at para 39.

[64] The case law is clear that the Minister cannot be bound by his past policy decisions. In *Arsenault*, the Federal Court of Appeal concluded that the Minister may make changes to fisheries policy at any time. Similar to management plans under consideration in *Arsenault*, the 2003 Framework was an announcement explaining the parameters that the Minister intended to apply in the exercise of his responsibility to manage the fishery. The 2003 Framework did not bind the Minister. Subsequent assurances from the Minister also could not bind him.

[65] In its memoranda to the Minister, the Department cautioned that changing the allocation "would be perceived by commercial fishermen in B.C. and across the country as undermining the Minister's core message of stability and predictability".

[66] This Court cannot re-weight the importance of this factor and find that the Minister should have found it determinative; to do so would overstep the line between the judicial and political spheres. The Minister is entitled to make policy decisions of this nature at his discretion, subject only to the *Maple Lodge Farms* criteria..

[67] The Department also noted that there could be "difficulties for some commercial harvesters who have already entered into sale agreements for the upcoming season." The decision may have immediate and long term negative economic implications for the applicant, but the fact that the decision of the Minister may have negative financial implication for one section over another does not make the decision unreasonable *per se*.

[68] The applicant has presented ample evidence to highlight this point. Commercial fishermen depend on the stability of the industry in order to make informed investment and business decisions. Many have incurred substantial debt, confident that they will have access to a steady allocation of the TAC. Without a doubt, reducing their portion of the TAC without a market based method of compensation will negatively impact the livelihood of many commercial fishermen. That said, it is for the Minister to decide how to balance the interests of the commercial and recreational fisheries.

[69] The applicant also advances concerns about the impact of this decision on conservation. The recreational industry has consistently exceeded its allocation of the TAC, despite the Department's management measures. Unlike the commercial sector, which is much smaller in size and subject to strict monitoring and regulation, the recreational sector is difficult to monitor and control. There are many thousands of recreational fishermen, from casual anglers to sophisticated

tourist operations. There has been no close scrutiny of these many diverse individuals and businesses.

[70] The applicant emphasizes that, given these facts, the decision to encourage growth in the recreational sector undermines, and is inconsistent with, the Department's legal commitment to conservation. He notes that there is little reason to believe the recreational sector will more readily stay within a 15% allocation now, when it has not complied in the past. In 2006, the recreational sector caught 18% of the TAC. In 2008, it caught 17%.

[71] The applicant also emphasises that these concerns were also shared by Mr. Kelleher and by the Department. The Department wanted to delay the shift in allocation until mechanisms could be found to hold the recreational sector to its share of the TAC. In each memorandum, the Deputy Minister identifies the recreational sector's over-fishing as a consideration. A change in allocation would be seen as an example of "where political pressure can achieve desired outcomes and could increase lobbying pressure on the Department." Moreover, the decision would provide "no incentive to improve the monitoring and management in the recreational sector."

[72] The applicant points out that in assessing the reasonableness of the decision, there is not much, if anything, that can be said in support of the decision. On the contrary, there are a great number of considerations that point in the opposite direction. There is no evidence of greater economic benefit and no evidence of increased conservation. Moreover, aboriginal and treaty interests are not at play, as what is at stake is the division of a share between two competing groups.

[73] The role of the Court in the context of decisions of this nature is not to re-weigh the factors and come to its own conclusion. Provided the decision was one that a minister conceivably could make, deference requires that it be respected.

[74] I see no basis to interfere. The commercial and recreational sectors had been at odds for more than a decade. Inevitably, the gains of one sector would come at the expense of the other. Such policy decisions are the Minister's to make. The Minister is not bound by the advice from the Department and his decision not to follow the considered and repeated recommendations of the Department is not a reviewable error.

[75] In concluding, it should be noted that the Minister's discretion to manage the fishery is not unbridled. It is subject to the over-arching responsibility to preserve the resource. The Minister is obliged to ensure that Canada remains within the TAC and to take effective enforcement measures to ensure that limits are respected. In this regard, from the perspective of the halibut fishery, as a resource and the Minister's legal obligations to preserve the fishery, it is irrelevant who catches the fish; what is important is that the TAC is respected.

***Legitimate Expectations Do Not Apply***

[76] The applicant seeks a declaration that the Minister violated legitimate expectations that a market based process would be followed in adjusting the allocation of the TAC.

[77] The test for legitimate expectations is whether the Minister made "clear, unambiguous and unqualified" representations regarding what process would be followed: *Canada (Attorney General)*

*v Mavi*, 2011 SCC 30 at para 68. Additionally, the doctrine of legitimate expectations can only pertain to the process that the Minister would follow, not the outcome of the decision: *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 35.

[78] In this case, the first criteria was met. For close to a decade, the Minister and senior officials in the Department in Ottawa and Vancouver confirmed the 2003 commitment to market based transfers between the sectors. A year before the decision in question, on February 15, 2011, the Minister confirmed in unqualified and unambiguous terms that changes to the allocation would only come through a market based mechanism.

[79] However, any expectations about process would relate to the consultations leading up to the decision. The applicant has not expressed any dissatisfaction with that process. Indeed, the record indicates that the consultations were comprehensive. Here, the applicant seeks a certain outcome. The phrase "market based process" does not refer to the process by which the decision is reached. Rather, it relates to a specific outcome; ultimately compensation for the commercial sector for any increases in the recreational sector's share.

[80] Moreover, legitimate expectations cannot conflict with the Minister's statutory duty: *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at para 131. Requiring the Minister to impose a market based adjustment mechanism would fetter his discretion, contrary to the broad authority conferred on him by Parliament.

[81] Therefore, the doctrine of legitimate expectations has no application to this decision.

***Promissory Estoppel Does Not Apply***

[82] There is no basis upon which public law promissory estoppel can be invoked.

[83] The applicant must show that the Minister has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. The applicant must also establish that he acted in reliance on that representation: *Maracle v Travellers Indemnity Co of Canada,* [1991] 2 SCR 50 at para 13.

[84] I accept that commercial fishermen relied on the Minister's assurances. There is ample evidence in the record, in the form of affidavits from other commercial fishermen, that the Minister knew that fishermen would rely on the 2003 Framework and subsequent assurances. Commitment to the 2003 Framework was repeated by the Assistant Deputy Minister, the Deputy Minister and the Minister. The evidence is also uncontradicted that the commercial sector, in reliance on these commitments, made significant investment decisions, including the acquisition of quota, fishing equipment and vessels, with the expected costs in the hundreds of thousands of dollars. The Minister repeated his commitment to maintain the ratio and to market based mechanisms as late as 2011 and repeated it during the consultations. The Minister has long sought to promote industry stability.

[85] Despite this, *Mount Sinai Hospital* provides that promissory estoppel cannot prevent a minister from exercising a broad statutory mandate to act in the public interest, as the Minister defines it. At paragraph 47, the Supreme Court stated that, "The legislation is paramount.

Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text."

[86] The applicant argues that the statute does not compel the Minister to adjust the allocation and that no conservation objective is served, indeed, resource conservations may be undermined. The applicant does not dispute that were the exercise of the Minister's discretion rooted in this objective, such as it is when the fishery is closed in-season, there could be no objection. Here, however, the Minister has simply decided to prefer the interests of one group of fishermen over another.

[87] The Minister's discretion cannot be so easily compartmentalized. Subject to the *Maple Lodge Farms* reasonableness criteria, the Minister has discretion to change course on policy. The Minister decided to increase the recreational sector's share without compensating the commercial sector. Becoming bound to any one policy choice would be in violation of his duty.

[88] In announcing the change in share on its website, the Department stated that this was a "one-time permanent correction" to the allocation. This statement is inconsistent with the Minister's legal position, and indeed inconsistent with a long line of cases relied upon by the Minister. Those cases confirm that subject to the overarching duty to the conservation of a public resource, the Minister remains free to change the allocation. As noted, his mandate requires that. It is inappropriate for him to represent otherwise, particularly where it conflicts with his position before the Court.

[89] In sum, there is no basis for this Court to interfere with the Minister's decision.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

Submissions on costs may be made within twenty days of the date of this decision.

"Donald J. Rennie"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-577-12 |
| **STYLE OF CAUSE:** | GRAEME MALCOLM ON HIS OWN BEHALF AND ON BEHALF OF ALL COMMERCIAL HALIBUT LICENCE HOLDERS IN BRITISH COLUMBIA v THE MINISTER OF FISHERIES AND OCEANS AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and BC WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE |
| **PLACE OF HEARING:** | Vancouver, BC |
| **DATE OF HEARING:** | October 24, 2012 |
| **REASONS FOR JUDGMENT:** | RENNIE J. |
| **DATED:** | April 11, 2013 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Sean Hern<br>Ms. Alison Latimer | FOR THE APPLICANT |
| Mr. Tim Timberg<br>Mr. Hugh MacAulay | FOR THE RESPONDENT<br>The Minister of Fisheries and Oceans |
| Mr. Christopher Harvey, QC<br>Mr. David K. Georgetti | FOR THE RESPONDENT<br>BC Wildlife Federation and Sport Fishing Institute |

**SOLICITORS OF RECORD:**

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