Federal Court of Appeal | Cour d'appel fédérale

Date: 20140520

Docket: A-144-13

Citation: 2014 FCA 130

CORAM: **NOËL J.A.**
MAINVILLE J.A.
WEBB J.A.

BETWEEN:

GRAEME MALCOLM on his own behalf and on behalf of all commercial halibut licence holders in British Columbia

Appellant

and

THE MINISTER OF FISHERIES AND OCEANS as represented by THE ATTORNEY GENERAL OF CANADA and B.C. WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE OF B.C.

Respondents

and

B.C. SEAFOOD ALLIANCE

Intervener

Heard at Vancouver, British Columbia, on February 13, 2014.

Judgment delivered at Ottawa, Ontario, on May 20, 2014.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NOËL J.A.
WEBB J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20140520

Docket: A-144-13

Citation: 2014 FCA 130

CORAM: **NOËL J.A.**
MAINVILLE J.A.
WEBB J.A.

BETWEEN:

GRAEME MALCOLM on his own behalf and on behalf of all commercial halibut licence holders in British Columbia

Appellant

and

THE MINISTER OF FISHERIES AND OCEANS as represented by THE ATTORNEY GENERAL OF CANADA and B.C. WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE OF B.C.

Respondents

and

B.C. SEAFOOD ALLIANCE

Intervener

REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment of Rennie J. of the Federal Court (Federal Court Judge), dated April 11, 2013 and cited as 2013 FC 363, 430 F.T.R. 238, which dismissed the appellant's judicial review application seeking to set aside a decision of the Minister of Fisheries

and Oceans (Minister) made on February 17, 2012 reducing by 3% (from 88% to 85%) the allocation of the Total Allowable Catch (TAC) for Pacific halibut to the commercial fishery sector, and increasing accordingly the allocation of that TAC (from 12% to 15%) to the recreational fishery sector.

[2] The appellant represents Pacific halibut commercial fishers. He essentially submits that

(a) by instituting in the early 1990's an Individual Transferable Quota (ITQ) system in the commercial fishery for Pacific halibut, and

(b) by providing assurances that the reallocation of quotas resulting from the TAC for Pacific halibut would be made under a market-based mechanism,

the Minister was bound to reallocate 3% of the TAC for Pacific halibut to the recreational fishery sector through the use of a market-based mechanism. By deciding otherwise, the Minister would have breached the doctrines of promissory estoppel and legitimate expectations, and would have acted unreasonably.

[3] The Minister has a wide discretion to reallocate portions of a TAC between various sectors of a fishery. In this case, after lengthy and in-depth consultations, the Minister reallocated 3% of the TAC for Pacific halibut from the commercial fishery sector to the recreational fishery sector, essentially with the view that this would encourage jobs and economic growth in British Columbia. In exercising discretion to reallocate part of a TAC from one fishery sector to another, the Minister may take into account social and economic considerations. Moreover, the Minister is under no legal duty to use a market-based mechanism or to provide financial compensation to

the detrimentally affected sector. I would consequently dismiss this appeal. My reasons for doing so are more fully set out below.

Background and context

[4] Pacific halibut migrate across the international boundary between Canada and the United States. In 1923, Canada and the United States established the International Pacific Halibut Commission (Commission) pursuant to the *Convention for the Preservation of the Halibut Fisheries of the Northern Pacific Ocean and Bering Sea* (Convention). Under the Convention, Canada and the United States are obliged to manage their Pacific halibut fisheries within the TAC set by the Commission for each country.

[5] The Minister allocates the Canadian portion of the TAC for Pacific halibut by providing first priority for Aboriginal food, and social and ceremonial purposes. The Minister then allocates the remainder of the TAC between the other participants in the Pacific halibut fishery, principally divided between the commercial fishery sector and the recreational fishery sector.

[6] The commercial fishery for Pacific halibut was historically organized as a derby in which licence holders could catch as much halibut as they could until the season was closed once the TAC was reached. In 1979, in an attempt to control and reduce the size of the Canadian halibut commercial fleet, the Minister created a limited licensing system under which licences conveyed rights to a limited number of people or vessels. This policy eventually resulted in limiting the commercial fishery for Pacific halibut to some 435 licence holders.

[7] In 1982, Dr. Peter Pearce was commissioned by the federal government to review and report on the Pacific fisheries, including the halibut fishery. Dr. Pearce concluded that the Pacific fisheries were at a crisis point and that fundamental policy changes were required to correct the situation. He notably recommended that the limited-licensing system in the commercial fishery for Pacific halibut be replaced by an ITQ system.

[8] The basic principle behind an ITQ system is conceptually simple. It involves the creation of a competitive economic market for access to the fishery. This is accomplished not only by limiting access to the fishery, but also by allowing fishers to buy and sell their right of access. The strategy involves allocating to fishers the privilege of landing a fixed percentage of the TAC. Under an ITQ system, only fishers who possess quota shares are permitted to harvest fish from the fishery. The quota shares are initially assigned by government, but once allocated they can be sold or leased. Therefore, fishers not holding an ITQ may bargain with fishers who hold an ITQ in order to gain entry into the fishery. The ITQ system has many advantages, but it also has many drawbacks. A review of the ITQ system and of its advantages and disadvantages may be found in Neal D. Black, "Balancing the Advantages of Individual Transferable Quotas Against their Redistributive Effects: The case of *Alliance Against IFQs v. Brown*", (1996-1997) 9 Geo. Int'l Envtl. L. Rev. 727.

[9] As a result of the report from Dr. Pearce, the Department of Fisheries and Oceans (DFO) attempted to develop an ITQ system for the Pacific halibut commercial fishery as early as 1983, but met with limited success. After extensive consultations with industry stakeholders, the then Minister decided in 1990 to introduce an ITQ system to the commercial fishery for Pacific

halibut on the basis of a two-year trial program. Starting in 1991, each commercial licence holder for Pacific halibut was allocated, by way of a licence condition, a specific quota of the commercial TAC for that year. The quota allocation was based on a formula that accounted for the historical catch averages and vessel length. At the end of the 1992 fishing season, all 435 halibut licence holders were given the opportunity to vote on the continuation of the program, and they responded positively.

[10] It is useful to note that the commercial Pacific halibut licence holders did not pay for the individual quotas allocated to their licences in 1991. Moreover, the ITQ system introduced into this commercial fishery at that time provided commercial value to the benefit of these licence holders.

[11] As for the recreational fishery for Pacific halibut, it was historically small, and it operated through an individual licensing scheme. However, spurred by the decline of the recreational fishery for Pacific salmon, the amount of halibut caught by the recreational sector had increased substantially by the mid-1990's, causing conservation concerns. As a result, in 1999, the then Minister committed to establishing an equitable and sustainable framework for allocating the TAC for Pacific halibut between the commercial and recreational sectors. Extensive consultations were carried out with stakeholders for this purpose.

[12] In 2000, the DFO retained economist Dr. Edwin Blewett to facilitate discussions between the commercial and recreational Pacific halibut fishery sectors. These discussions revealed deep discrepancies between the views of the sectors; the recreational sector seeking 20% of the TAC

for Pacific halibut, and the commercial sector proposing only 5%. In 2001, the DFO retained Stephen Kelleher, Q.C. to provide advice on an initial allocation of the Pacific halibut TAC between the commercial and recreational sectors. Mr. Kelleher recommended a 9% allocation of the TAC to the recreational sector.

[13] In 2003, the then Minister announced a new policy framework that contained various policy objectives (2003 Framework). First, there would be a 12% ceiling for the recreational sector's portion of the Pacific halibut TAC. Second, the 12% ceiling would remain in place until both the commercial and recreational sectors developed an acceptable mechanism to allow for adjustment through acquisition of additional halibut quotas from the commercial sector. In addition, the DFO would seek to avoid any in-season closure of the recreational fishery for Pacific halibut.

[14] The commercial sector received no compensation for the 12% of the TAC allocated to the recreational sector under the 2003 Framework, and no market-based mechanism was implemented to effect that allocation.

[15] Since 2003, in order to keep the recreational sector within 12% of the TAC, the DFO has imposed restrictive management measures on the Pacific halibut recreational fishery, including early closures of the fishery in many years. Nevertheless, the recreational sector's catch has consistently exceeded the 12% ceiling, causing serious concerns with respect to conservation and to Canada's international obligations under the Convention.

[16] Moreover, there has been little progress achieved with respect to the second policy objective of the 2003 Framework dealing with the development of a mechanism acceptable to both sectors so as to allow for adjustments to the 12% ceiling through acquisition of additional halibut quotas from the commercial sector. In 2007, the DFO retained Mr. Hugh Gordon to try to assist the recreational and commercial sectors to reach a consensus on an acceptable market-based mechanism. That process resulted in a consensus recommendation from both sectors that the DFO provide initial funding of $25 million to facilitate the transfer of the Pacific halibut through a market mechanism, which initial funding would be "paid-back" by the recreational sector through increased licence fees or a stamp. However, the DFO did not agree with using the public purse, and it did not believe it had the authority to levy fees on the recreational sector for that purpose.

[17] In 2010, the DFO retained another facilitator, Mr. Roger Stanyer, to evaluate options for reallocating the TAC between the sectors. However, by the end of that process, the stakeholders had clearly reached an impasse, and any further meetings between them were deemed useless. As a result, representatives of both the commercial sector and the recreational sector undertook extensive letter-writing campaigns in anticipation of a change to the 2003 Framework. The commercial sector supported the continuation of the 2003 Framework, while the recreational sector called for its modification.

[18] On February 15, 2011, the Minister announced that (a) the 2003 Framework allocating 12% of the TAC to the recreational sector would continue for 2011; (b) for the 2011 season, the DFO would create a pilot experimental market-based mechanism that would allow participants in

the recreational sector to voluntarily acquire some of the Pacific halibut quota allocated to the commercial sector; and (c) Randy Kamp, the Parliamentary Secretary to the Minister, would be appointed to evaluate the available options prior to the start of the 2012 season so as to allow for effective conservation, for economic prosperity through predictable access for all users, and for an effective mechanism for transfers between sectors.

[19] Mr. Kamp held extensive meetings with stakeholders. No final document was produced by Mr. Kamp, but drafts were circulated to the Minister proposing various options, including an option to adjust the TAC allocation percentage to the recreational sector from 12% to 15% without compensation or a market adjustment mechanism. As noted in the draft of January 10, 2012 from Mr. Kamp, "[i]f the adjustment is ma[d]e without compensation we can expect legal action from the commercial interests": Appeal Book (AB) at pp. 633-634.

[20] Following the process carried out by Mr. Kamp, the Deputy Minister of the DFO proposed various options to the Minister. On February 17, 2012, the Minister announced an immediate 3% change to the TAC allocation for the Pacific halibut fishery. The Minister allocated 85% of the TAC to the commercial sector (down from 88%) and 15% to the recreational sector (up from 12%). No compensation or market-based mechanism was attached to this reallocation. The Minister also continued the 2011 pilot experimental market-based mechanism for the voluntary acquisition of quotas by the recreational sector. In making this decision, the Minister stated the following: "Our government is making good on a commitment to provide 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": AB at p. 517 .

[21] It is this decision that the appellant challenged in the Federal Court.

The Federal Court Judge's reasons

[22] The Federal Court Judge concluded that the principles of judicial review expressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) and in *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2 (*Maple Lodge Farms*) were not mutually exclusive: reasons at para. 51. Applying by analogy the reasoning of the Chief Justice of Canada in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (*Catalyst Paper*), the Federal Court Judge concluded that reasonableness is a flexible standard to be applied contextually and that it is informed by the prior jurisprudence. Since the jurisprudence had applied a standard of review based on *Maple Lodge Farms* to prior similar decisions of the Minister, the Federal Court Judge concluded that he should follow this approach.

[23] The Federal Court Judge found that "[t]here is no evidence that the decision was made in bad faith or pursuant to an irrelevant purpose": reasons at para. 62. He further concluded that the Minister was facing a policy decision involving the allocation of a fishery resource between competing economic and social interests, and that the Minister chose to make the reallocation with economic growth and jobs in mind: reasons at para. 61.

[24] The Federal Court Judge also concluded, relying on *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548 (CA) (*Carpenter Fishing*) at para. 39, that "there is nothing preventing the Minister from favoring one group of fishermen over another": reasons at para. 63. In addition, he concluded, relying on *Canada (Attorney General) v. Arsenault*, 2009 FCA 300, 395 N.R. 223 (leave to appeal to SCC refused: [2009] S.C.C.A. No. 543 (QL)) (*Arsenault*), that the Minister was not bound by the 2003 Framework since he could make changes to fisheries policy at any time: reasons at para. 64. Finally, the Federal Court Judge noted that there was a long standing dispute between the commercial and recreational sectors, and that the decision to reallocate part of the TAC from one sector to another was a policy decision that properly belonged to the Minister: reasons at paras. 74-75. He therefore ultimately found the Minister's decision to be reasonable.

[25] The Federal Court Judge also rejected the appellant's legitimate expectations submissions. He concluded that the Minister had previously committed to a market based mechanism for effecting quota reallocations between the commercial and recreational sectors: reasons at para. 78. However, he also concluded that the doctrine of legitimate expectations can only pertain to the process that the Minister would follow in reaching a decision, and not to the outcome of that decision: reasons at para. 77. Since no dissatisfaction had been expressed with respect to the extensive consultations leading up to the Minister's decision to reallocate the TAC without compensation, he concluded that the doctrine of legitimate expectations had no application: reasons at paras. 79 to 81.

[26] With respect to the appellant's submissions concerning promissory estoppel, the Federal Court Judge concluded that there was no basis on which this doctrine could be invoked. While the Federal Court Judge recognized that commercial fishers relied on the Minister's assurance of a market-based quota transfer mechanism, he also concluded that "promissory estoppel cannot prevent a minister from exercising a broad statutory mandate to act in the public interest": reasons at para. 85. In the Federal Court Judge's view, "the Minister has discretion to change course on policy": reasons at para. 87.

The issues in appeal

[27] The issues raised in this appeal may be regrouped under the following questions:

(a) What is the applicable standard of review?

(b) Does the doctrine of promissory estoppel apply in the circumstances?

(c) If not, does the doctrine of legitimate expectations apply in the circumstances?

(d) If not, was the Minister's decision nevertheless unreasonable?

Standard of Review

[28] In an appeal of a judgment concerning a judicial review application, the role of this Court is to determine whether the application judge identified and applied the correct standard of review, and in the event he or she has not, to assess the decision under review in light of the correct standard. This means, in effect, that an appellate court's focus is on the administrative decision: *Canada (Attorney General) v. Johnstone et al.*, 2014 FCA 110 at paras. 36 to 38. The

application judge's selection of the appropriate standard of review is itself a question of law subject to review on the standard of correctness: *ibid*.

[29] The Federal Court Judge did not discuss the standard under which he reviewed the application of the doctrines of promissory estoppel and of legitimate expectations. However, it is apparent from his reasons that he used a standard of correctness. The application of these doctrines is akin or analogous to a failure to observe a principle of natural justice, procedural fairness or another procedure that the Minister was required by law to observe, and consequently the Federal Court Judge properly applied a standard of correctness to these matters: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[30] With respect to the substance of the Minister's decision, all parties agree that the applicable standard of review is that of reasonableness, but they disagree as to what that standard requires in the context of this case. The appellant submits that the reasonableness standard set out in *Dunsmuir* applies without qualification, while the respondents submit that the test set out in *Maple Lodge Farms* governs the matter.

[31] Reasonableness is a flexible standard to be applied contextually and it is informed by the prior jurisprudence. In *Catalyst Paper*, the Supreme Court of Canada had to determine what the standard of reasonableness required in the context of the judicial review of municipal bylaws. McLachlin C.J. answered that question as follows at para. 18 of *Catalyst Paper*:

> [18] The answer lies in *Dunsmuir's* recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry (*Dunsmuir*, at para. 64). As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12,

> [2009] 1 S.C.R. 339, at para. 59, *per* Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand. For this reason, it is useful to look at how courts have approached this type of decision in the past (*Dunsmuir*, at paras. 54 and 57). To put it in terms of this case, we should ask how courts reviewing municipal bylaws pre-*Dunsmuir* have proceeded. This approach does not contradict the fact that the ultimate question is whether the decision falls within a range of reasonable outcomes. It simply recognizes that reasonableness depends on the context.

[32] The limited individual quota system put in place in the early 1990's as a result of the new ITQ system introduced at that time was challenged in the Federal courts, leading to the decision of our Court in *Carpenter Fishing*. In upholding that system as a valid policy decision of the Minister, and relying on *Maple Lodge Farms*, Décary J.A. noted in that case that the imposition of an individual quota system is a discretionary ministerial decision in the nature of a policy or legislative action that may only be disturbed on judicial review if it can be established that the decision was made in bad faith, did not conform with the principles of natural justice, or if reliance was placed upon considerations that are irrelevant or extraneous to the legislative purpose: *Carpenter Fishing* at paras. 28 and 37.

[33] That approach to the judicial review of fisheries management decisions had been previously adopted by the Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 (*Comeau's Sea Foods*) at para. 36. It has also been affirmed by our Court post-*Dunsmuir*: *Mainville v. Canada (Attorney General)*, 2009 FCA 196, 398 N.R. 249 at para. 5; and *Arsenault* at paras. 38 to 42.

[34] The decision of the Minister in this case is discretionary and in the nature of a policy action. As a ministerial policy decision made under the *Fisheries Act*, it is amenable to judicial review under a standard of reasonableness discussed in *Dunsmuir*. The issue here is what does the standard of reasonableness require in these circumstances?

[35] A discretionary policy decision that is made in bad faith or for considerations that are irrelevant or extraneous to the legislative purpose is unreasonable by that very fact. Such a decision can also be unreasonable if it is found to be irrational, incomprehensible or otherwise the result of an abuse of discretion. The ultimate question in judicially reviewing the Minister's decision in this case is to determine whether the decision falls within a range of reasonable outcomes having regard for both the context in which the decision was made and the fact that the decision itself involves policy matters in which a reviewing court should not interfere by substituting its own opinion to that of the Minister's. It is with these considerations in mind that the reasonableness of the Minister's decision should be determined.

Promissory estoppel

[36] The appellant submits that (a) by instituting an ITQ system in the commercial fishery for Pacific halibut in the early 1990's, and (b) by providing assurances that the 2003 Framework would be followed with regard to a market-based quota transfer system between the commercial and recreational sectors of that fishery, the Minister cannot now renege on these commitments.

[37] The appellant does not dispute that the Minister may reallocate part of the TAC from the commercial sector to the recreational sector. Rather, he submits that, in light of prior

representations, the Minister was bound to carry out such a reallocation through a market-based mechanism and is now estopped from reallocating the TAC without using such a mechanism.

[38] Though the doctrine of promissory estoppel may be available against a public authority, including a minister, its application in public law is narrow. As noted by Binnie J. in his concurring opinion in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281 (*Mount Sinai*) at para. 47, public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. 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.

[39] This principle has been expressed in various ways. In *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, at p. 220, Rand J. expressed it as follows: "there can be no estoppel in the face of an express provision of a statute". In *Canada (Minister of Employment & Immigration) v. Lidder*, [1992] 2 F.C. 621 at p. 625, Marceau J.A. stated the principle as follows: "[t]he doctrine of estoppel cannot be invoked to preclude the exercise of a statutory duty". In *St. Anthony Seafoods Limited Partnership v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture)*, 2004 NLCA 59, 245 D.L.R. (4^{th}) 597 at paras. 81-82, Mercer J.A. noted that the overriding public interest expressed in legislation precluded the application of the doctrine of promissory estoppel to impede a provincial minister from exercising his discretion so as to respond to current socio-economic concerns in a different manner that that expressed in representations of his predecessor.

[40] The *Fisheries Act*, R.S.C. 1985, c. F-14 grants the Minister wide and unfettered discretion to manage the Canadian fisheries taking into account the public interest. As noted by Major J. in *Comeau's Sea Foods* at pp. 25-26, Canada's fisheries are a "common property resource" belonging to all the people of Canada, and it is the Minister's duty under the *Fisheries Act* to manage, conserve and develop the fisheries on behalf of Canadians in the public interest.

[41] In determining an appropriate management system in a given fishery, the Minister may well exercise his discretion so as to decide to implement an ITQ system with market-based mechanisms for quota transfers from one fishery sector to the other. However, the Minister is not forever bound by such a discretionary decision.

[42] Rather, the Minister may modify the approach followed previously if, in the Minister's opinion, public interest considerations reasonably justify such a change of policy. As noted by this Court in *Arsenault* at para. 43 in the context of modifications to a management plan for a fishery, "[t]he Minister was not bound by his policy and he could, at any time, make changes thereto".

[43] In reallocating the TAC from one fishery sector to another, the Minister may determine (and often has) that the public interest requires that the fishers affected by the reallocation be compensated through a market-based mechanism or through direct government subsidies. However, the Minister may also determine that the public interest does not require such compensation mechanisms. It is therefore for the Minister to determine what weight, if any, is to be given, in the public interest, to providing compensation in the form of market-based

mechanisms or direct subsidies. As aptly noted by my colleague Pelletier J.A. at paragraph 57 of his concurring reasons in *Arsenault*:

> […] Consequently, if there is no vested right to a given quota, there can be no right to compensation arising purely from the fact of loss of quota. As a result, the decision to offer compensation for lost quota is not one which is based on a statute or a regulation. In fact, the crabbers allege in their action that their right to compensation is a matter of contract. The exercise of the minister's discretion to issue fishing licences with reduced quota under section 7 of the Act did not result in a public legal duty to pay compensation for the lost quota. There being no public legal duty, the crabbers are not entitled to an order of *mandamus*.

[44] Another example of this principle may be found in *Kimoto v. Canada (Attorney General)*, 2011 FCA 291, 426 N.R. 69 (*Kimoto*). In that case, a group of commercial salmon trollers on the West coast of Vancouver Island had their TAC curtailed by the Minister by about 50% to satisfy an international treaty commitment made by Canada, in return for which the government of the United States provided compensation of $30 million for a fishery mitigation program to reduce efforts in Canada's commercial salmon troll fishery.

[45] The affected fishers challenged the decision of the Minister to allocate the funds in a manner that was not directly beneficial to them. In *Kimoto*, Layden-Stevenson J.A. dealt with that claim by noting that the concerned fishers had no proprietary right in the fish or the fishery, and no right to compensation for the reduction in the TAC and of their individual quotas that flowed from the treaty commitment. She further noted that the Minister's decision as to how to allocate the compensation was one based on public interest considerations involving the balancing of the preoccupations of a multiplicity of stakeholders. She consequently refused to interfere with the Minister's decision.

[46] In conclusion, in light of the wide discretion provided to the Minister under the *Fisheries Act*, and taking into account the principle that the Minister is not bound by the policy decisions of his predecessors, I agree with the Federal Court Judge that the doctrine of promissory estoppel has no application in this case.

Legitimate expectations

[47] The appellant acknowledges that judicial review on the basis of the doctrine of legitimate expectations is limited to procedural relief. However, the appellant submits that the right to a market-based mechanism for the reallocation of the Pacific halibut TAC does constitute a procedural relief.

[48] The doctrine of legitimate expectations is an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there would otherwise be no such opportunity: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at p. 1204. The use of the doctrine of legitimate expectations to seek substantive relief was considered and rejected by the Supreme Court of Canada in *Mount Sinai*, and that approach has been recently reiterated in *Agraira v. Canada (Public Service and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*) at para. 97.

[49] When applicable, the doctrine can create a right to make representations or to be consulted, but it does not fetter the decision following the representations or consultations: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at pp. 557-558. Further, as

noted by David J. Mullen, *Administrative Law*, 4th ed. (Toronto: Irwin Law, 2001) at p. 184, the courts have taken a broad view of what constitutes a "substantive" as opposed to a "procedural" claim.

[50] I agree with the Federal Court Judge and the respondents in this appeal that the outcome that the appellant seeks in this case – the application of a market-based mechanism – is not a procedural relief. Rather, the appellant is seeking to overturn the Minister's decision on a question of substance, namely the refusal to provide compensation for the reallocation of 3% of the TAC through a market-based mechanism or direct subsidies. Since Canadian jurisprudence does not recognize that the doctrine of legitimate expectations provides substantive relief, and since no dissatisfaction has been expressed with regard to the long and in-depth consultation processes leading to the Minister's decision in this case, the appellant's submissions on the issue of legitimate expectations fail.

Reasonableness of the decision

[51] The appellant does not challenge the decision to reallocate 3% of the TAC to the recreational sector, but rather the decision not to use a market-based mechanism to carry out that reallocation. The appellant essentially submits that the Minister abused his discretion in deciding to reallocate 3% of the TAC without using a market-based mechanism, a decision that constitutes a reversal of a long-standing ministerial policy with respect to the use of such a mechanism. In support of this submission, the appellant points out that the Minister did not follow the recommendations of his officials in discarding market-based mechanisms, and failed to properly articulate the reasons for that decision.

[52] As I have already noted, the Minister has broad authority and discretion under the *Fisheries Act* to manage the fisheries in the public interest. As found by our Court in *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93 at p. 106, and confirmed by the British Columbia Court of Appeal in *R. v. Huovinen*, 2000 BCCA 427, 188 D.L.R. (4th) 28 at para. 24, and by the Supreme Court of Canada in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569 at paras. 39 to 41, the Minister may, among other factors, take into account social and economic factors in managing and allocating a fishery resource.

[53] As further found by our Court in *Arsenault* at para. 43, and as further discussed above, the Minister is not bound by the policy decisions of his predecessors, and he may make new decisions and change existing policies so as to respond, notably, to developing social and economic considerations. Nor is the Minister bound to provide compensation to the affected fishers when reallocating the TAC or reducing a quota: *Arsenault* at para. 57, *Kimoto*.

[54] With respect to a market-based mechanism, the record in this case shows that (a) the 2003 Framework required both the commercial and the recreational sectors to develop an acceptable mechanism to allow for adjustment through acquisition of additional halibut quotas from the commercial sector; (b) both sectors failed to agree to such a mechanism notwithstanding numerous efforts by the DFO to allow them to reach a consensus; (c) the use of public funds to compensate the commercial sector for the reallocation or to foster a market-based mechanism was not deemed appropriate by the DFO; (d) in the current legislative context, the DFO questioned the feasibility of a levy or fee mechanism to collect funds to support a market-

based mechanism involving quota transfers; and (e) the pilot experimental market-based mechanism to reallocate quotas introduced by the Minister in 2011 did not meet with any substantial success.

[55] In light of these facts, of the long series of consultations carried out over many years to develop a market-based mechanism, and of the failures of the numerous attempts to reach an acceptable consensus on such a mechanism, it was not unreasonable for the Minister to decide as he did. The appellant does not question the need for the reallocation, and since a viable market-based mechanism could not be agreed to, the Minister could act in the public interest to ensure that the reallocation actually occurred.

[56] It is moreover readily apparent from his decision that the Minister's primary consideration was to encourage jobs and economic growth in British Columbia. This was an appropriate consideration that the Minister was entitled to take into account. That consideration is substantiated by the fact the recreational sector provides an important contribution to the economy of British Columbia, a matter that is not disputed.

[57] The appellant also submits that the Minister's decision was largely the result of political lobbying by the recreational sector and of electoral calculations on the part of the Minister. However, the record shows that both the commercial and the recreational sector engaged in extensive letter writing campaigns once it became apparent that the 2003 Framework was being reconsidered by the Minister: Federal Court Judge's reasons at para. 20. Moreover, the Federal Court Judge rightfully concluded, at paragraph 62 of his reasons, that there is no evidence

whatsoever in the record that the Minister's decision was made in bad faith or pursuant to irrelevant considerations.

[58] The appellant further submits that the Minister did not follow the recommendations of the officials of the DFO in reaching the decision, and that this emphasizes the unreasonableness of that decision. Officials of the DFO did present the Minister with various options prior to the decision, including the option that the Minister finally approved. While DFO officials favoured another option, this does not mean that the Minister's decision is necessarily unreasonable. The final decision properly belonged to the Minister, and in my view, the very fact the option that was finally approved had been tabled by officials of the DFO as a possible alternative tends to show that the approved option was a possible reasonable outcome of the decision making process.

[59] Finally, the appellant submits that the Minister did not clearly articulate the reasons for which he did not favour a market-based mechanism to reallocate 3% of the TAC to the recreational sector. Taking into account the discretionary and policy nature of the ministerial decision at issue in this case, the Minister would be required at the very most to provide limited reasons. As noted by Rothstein J. in *Alberta (Information and Privacy Commissioner) v. Alberta Teacher's Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 54, "[w]hen there is no duty to give reasons (…) or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review." See also *Agraira* at paras. 57-58.

[60] In the absence of a Parliamentary appropriation of funds to provide compensation or to assist in the establishment of a market-based mechanism, and without any clear legislative authority to impose fees or taxes on the recreational sector for these purposes, and in the absence of any agreement between the recreational and commercial Pacific halibut fishery sectors for the voluntary implementation of a market-based mechanism, the Minister was left with a very limited margin to maneuver if he was to effectively ensure the reallocation of 3% of the TAC to the recreational sector.

[61] The Minister's decision to proceed with the 3% reallocation of the TAC without applying a market-based mechanism or another form of compensation was not irrational or incomprehensible when considering the record as a whole. Moreover, that decision was not an abuse of the Minister's discretion, and it was not made in bad faith or on the basis of considerations that are irrelevant or extraneous to the purposes of the *Fisheries Act*. The Minister's decision fell within a range of reasonable outcomes having regard for both the context in which the decision was made and the discretionary and policy nature of the decision.

Conclusion

[62] For the reasons set out above, I would dismiss this appeal. I would award costs in this appeal to both respondents. There should be no order for costs with respect to the intervener.

"Robert M. Mainville"

J.A.

"I agree,
Marc Noël J.A."

"I agree,
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-144-13
(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE RENNIE DATED APRIL 11, 2013 NO. 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 B.C. WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE OF B.C. and B.C. SEAFOOD ALLIANCE (Intervener)
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 13, 2014
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	(NOËL, WEBB JJ.A.)
DATED:	MAY 20, 2014

APPEARANCES:

Joseph J. Arvay, Q.C. Sean Hern Alison M. Latimer	FOR THE APPELLANT
Tim Timberg Fiona Mendoza	FOR THE RESPONDENT (THE MINISTER OF FISHERIES AND OCEANS as represented by THE ATTORNEY GENERAL OF CANADA
Christopher Harvey, Q.C.	FOR THE RESPONDENT (B.C. WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE OF B.C.)
Catherine Boies Parker	FOR THE INTERVENER

SOLICITORS OF RECORD:

Farris, Vaughan, Wills & Murphy LLP Vancouver, British Columbia	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT (THE MINISTER OF FISHERIES AND OCEANS as represented by THE ATTORNEY GENERAL OF CANADA)
MacKenzie Fujisawa LLP Vancouver, British Columbia	FOR THE RESPONDENT (B.C. WILDLIFE FEDERATION AND SPORT FISHING INSTITUTE OF B.C.)
Farris, Vaughan, Wills & Murphy LLP Vancouver, British Columbia	FOR THE INTERVENER