Court File No. T-577-12

FEDERAL COURT

BETWEEN:

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 B.C. WILDLIFE FEDERATION and the SPORTS FISHING INSTITUTE OF B.C. on their own behalf and on behalf of all B.C. tidal waters sport fishing licence holders

RESPONDENTS

REPRESENTATIVE PROCEEDING

RECORD OF THE RESPONDENT
B.C. WILDLIFE FEDERATION and the SPORTS FISHING INSTITUTE OF B.C. on their own behalf and on behalf of all B.C. tidal waters sport fishing licence holders

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INTRODUCTION

1. The Applicant fully sets out the position of the commercial sector in the Pacific halibut fishery. This Memorandum will set out the position of these Respondents (the "Recreational Sector"). It may be summarized as follows:

(a) The fishery is a common property resource that is not owned by either the government of Canada or the commercial quota-holders represented by the Applicant.

(b) The Minister's role and duty is to allocate and manage the fishery as a public resource in the best interests of all Canadians. Whereas it may be advisable and convenient for the Minister to accommodate the wishes and, where they exist, the inter-sectoral agreements of stakeholders, the Minister's role and duty is non-delegable in the sense that he or she remains responsible to Parliament at all times for the proper management of the resource in the public interest. Where private arrangement amongst stakeholders cannot be reached, or are reached in a manner inconsistent with the Minister's constitutional position or duty, the Minister must act in accordance with his or her statutory mandate regardless of the inconvenience to stakeholders or to the DFO. In other words, the Minister cannot abdicate responsibility by downloading the hard decisions on stakeholders.

(c) In the twelve-year period leading up to the Decision, the recreational sector participated in a process facilitated by the Minister the objective of which was to reach agreement on inter-sectoral allocation issues, but the formulations of a potential agreement based on a "market mechanism" foundered when fundamental practical and jurisdictional obstacles could not be overcome. When it foundered the Minister was forced to exercise his statutory mandate, which he did, legally and after a fair process.

(d) The Decision is rational, intelligible and reasonable and is based on socio-economic considerations which the Minister is not only entitled, but required, to take into account.

(e) The arguments of the commercial sector are misconceived insofar as they are based on the principle that the Minister has authority to compel the "market mechanism" transfer of fishing quota from and to persons who do not participate in the harvest of fish. The regulation of the marketing of this form of quota would be *ultra vires* the *Fisheries Act*.

PART 1 – STATEMENT OF FACTS

A. The Introduction of ITQs

2. The Applicant's Memorandum of Fact and Law describes the evolution of the commercial side of the Pacific Halibut fishery. Originally it was a pure public fishery without licence limitation (much as the recreational fishery is today) but as the catching power of modern vessels increased, licence access was, of necessity, limited to a fixed number of licensees (435) in 1979. Later, in 1991, a cost-free transferable quota system was introduced and "ITQ" was given by DFO to the commercial licensees active at that time. All this is described by the Applicant, but what is not said is that no ITQ whatever was given, then or afterwards, to the recreational sector. The Applicant now argues that the Minister should compel recreational anglers to buy the right to use the ITQ that was previously given to the commercial sector. These Respondents say that any such requirement would be unjust and, in any event, is beyond the authority of the Minister. The Minister's power does not extend to regulation of the marketing of quota, particularly when that quota is disconnected from a fishing licence and is converted into a chose in action of the same nature as shares in a company.

3. The Applicant does not explain how an ITQ system would work in a practical sense in the recreational sector. Between 250,000 and 320,000 BC tidal waters recreational fishing licences are issued annually by DFO to anglers resident in Canada and abroad.[1] This is a changing, transient gaggle of unorganized individuals of all ages and from all walks of life. How, as a practical matter, they would purchase individual segments of ITQ or become lessees of the commercial quota-holders has never been explained by the Applicant. It is a concept fraught with practical, jurisdictional and ethical difficulties, and these difficulties defeated those on both sides who made a bona fide attempt for over a decade to find a workable "market mechanism" as contemplated in the 2003 Framework.

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[1] RR 22 (para 39 of affidavit #1 of T. Karim [250,000]); AR, affidavit of C. Sporer, ex 49 [approximately 300,000]); RR 961 (DFO Pacific Halibut Transfer Mechanism Background and Options Paper , April 2012, ex. 35 to affidavit #1 of T. Karim [320,000]).

4. Even the concept of "quota" has proved elusive. In the fisheries context, quota coupled with a licence is a permit to participate up to a fixed quantity in the exploitation of a public resource.[2] Yet, the "ITQ" that is used by Applicant and other members of the PHMA is of an entirely different character. It has become a tradable share of the total allowable annual catch ("TAC") that is bought, sold and leased in private transactions outside any regulated market exchange. It has been transformed from a quota licence to a quota certificate. Instead of cutting bait, quota holders now cut coupons. Qualification for the annual issuance of ITQ does not require any current participation by the quota owner in the catching of halibut. Many of those who were given quota in 1991 are now retired and are referred to as "slipper skippers" by the active commercial fishers who have no option but to lease quota from them.[3] The slipper skippers receive ITQ for the purpose of trade, not for the purpose of fishing, and this rebounds to the financial detriment of those who actively participate in the commercial fishery.[4] The PHMA has urged the Minister to require a "market mechanism" for transferring ITQ to the recreational angler, but the Minister for many good reasons has declined to enter this field.

B. The 2003 Framework has Three Components, not Two

5. The Applicant denies and downplays the idea that the third component of the Minister's statement (about avoiding any in-season closures in the recreational fishery) was and is an essential component of the 2003 Framework or that it is a commitment of the Minster. Whereas this component may have no significance to the PHMA, the SFAB has consistently said that it is vital to the recreational sector and was a pre-condition to the SFAB's participation in the 2003 Framework. Individual anglers intending to fish for halibut on the outer coast necessarily have

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[2] A fixed individual share of the catch was referred to as a "quota licence" by Dr. Pearse in 1982. See *Carpenter Fishing Corp. v. Canada*, 1997 CanLII 6391 (FCA), [1998] 2 FC 548. This definition is consistent with the discussion of quotas and fishing licences by Binnie J. in *Saulnier v. Royal Bank of Canada*, [2008] 3 S.C.R. 166, 2008 SCC 58.

[3] AR, affidavit of Gary Wick, para 15; another expression used by those who lease quota is "armchair fishermen". See RR 2894 (cross-examination of Graeme Malcolm). Graeme Malcolm leases quota from his retired father (cross-examination at RR 2893). The deponent Raymond Phillips is 80 years old and leased his quota out in 2011 (affidavit, para 4). The deponent Bruce Martinelli says that he wants to retire and lease out his quota (affidavit, para 16).

[4] Graeme Malcolm (affidavit, para 15) deposed that in 2011 the landed price of halibut was $7.00/lb. out of which lease costs of $5.30/lb have to be paid before all other expenses and any profit from the venture. Russell Cameron (affidavit, para 20) deposed that the price of leasing is "too high". For an analysis of this at the industry level see para 27 *infra*.

to make plans far in advance. They come from all across Canada and around the world. Not all of them are able to plan holidays in the early part of the fishing season, and most require the ability to plan well in advance. All the various service industries that support recreational anglers have a similar requirement for predictability and a long season.[5] At the time of the 2003 Framework the recreational halibut fishery extended from February 1 to December 31 without any in-season closures. The Minister made a firm commitment not to change this.[6]

6. The Applicant argues at para 17 of his Memorandum of Fact and Law that the Minister could not have promised that there would be no in-season closures because this would conflict with his overriding statutory duty to close the fishery whenever conservation concerns arise. This overlooks the other tools in the Minister's conservation tool-kit (such as reduced catch or retention limits) that could be used to prolong the season in times of low abundance. Also, it overlooks the fact that the Minister could not validly give the promise that the Applicant relies on in these proceedings - to maintain a fixed inter-sectoral allocation for all time regardless of evolving socio-economic considerations. Nor could the Minister validly impose a compulsory "market mechanism" for quota transactions. The legal constraints preventing the Minister from doing so gradually came into focus as the discussions between the two sectors and the DFO advanced year by year.

7. The Applicant refers to the Hugh Gordon Process in 2008 but omits important parts of it, in particular (a) that both sides agreed that the "transfer mechanism approach" was a viable alternative "only if the Government of Canada provides initial funding to pay commercial licensees for purchase or lease of quota", and (b) that the Gordon Report proposed an initial increase in the recreational share to around 20%.[7] (20% was also what the recreational sector

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[5] See RR 1110 (ex. 47 to affidavit of T. Karim #1): 1110: "The percentage approach creates much greater problems for the recreational sector in terms of the flexibility to respond to external factors because the sector has to deal with the individual decisions of more than 90,000 participants in the halibut fishery as compared with 140 vessels and 436 quota holders, many of whom do not fish but simply are commodity brokers. Under the percentage application, the market demand for recreational fishing cannot be met in years of low abundance. The imposition of reduced limits or fishing time drives business elsewhere, especially to Alaska".

[6] Transcript of cross-examination of Tameezan Karim on Aug. 8, 2012 ["Karim Cross"], p. 4:2-4:17.

[7] The 20% was to be accomplished by an initial transfer of 3% followed by five annual transfers of 1%. See Gordon Report, p. 9 (AR, affidavit of C. Sporer, ex 34, p. 9).

said was needed when an allocation framework was under discussion in the 2000-2003 period[8]). The Gordon proposals foundered when the Government of Canada declined advance treasury funds for the purchase of quota to increase the recreational allocation.

> Following the legal analysis as well as internal analysis of the financial viability of seeking $25 M of appropriated funds, DFO communicated its concerns to both sectors. In late 2008/early 2009, the Minister sent a letter to the SFAB and PHMA indicating DFO was not able to proceed with the Committee's recommendations due to financial and legal constraints.[9]

8. Also, in 2008, contrary to the Minister commitment in 2003 Framework that was key to the participation of the SFAB, the Minister imposed an in-season closure. The SFAB characterized this as the "final nail into the coffin of the halibut allocation policy first announced by Fisheries Minister Robert Thibault on October 27, 2003". [10]

9. The legal constraints referred to by the Minister in 2008/2009 apparently refers to the fact that the Minister has no constitutional authority to raise funds through the allocation of fish resources since the fisheries are a public resource not owned by the federal crown. This had been pointed out to the Minister by the Federal Court of Appeal in June, 2006 in the *Larocque* case.[11] The implication of *Larocque* is that a program to generate funds for the purchase of quota through raising the licence fee on recreational licences would be *ultra vires*.

10. Thus, during 2009 and 2010 the concept of a "market mechanism" for the re-allocation of fisheries access as between the commercial and the growing recreational sector was looking increasingly impossible to implement. DFO reps stated that "since the current interpretation is that DFO does not have the authority to collect fees for the purpose of funding a re-allocation of quota between the commercial and recreational sectors...participants in both sectors must look to

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[8] AR, vols 1-2, tab 17, Affidavit of C. Sporer, ex. 11, p. 10 (Kelleher Report). See also affidavit of C. Sporer, ex. 4, p. 6 (Blewett Report, Dec. 2000).
[9] RMR 958 (DFO Pacific Halibut Transfer Mechanism Background and Options Paper , April 2012, ex. 35 to affidavit #1 of T. Karim); the letters to PHMA and SFAB are at RMR 669 and 671 (ex. 21 and 22 to affidavit #1 of T. Karim).
[10] RR 500 (SFAB Halibut Allocation Update, November 14 2008, A report from Gerry Kristiansen, Chairman, SFAB Halibut Allocation Committee).
[11] *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237.

solutions that do not rely on DFO regulatory powers".[12] This proved impossible given the different attributes and expectations of each sector. Whereas the commercial sector has 435 licence-holders who all registered with DFO and consistent year after year (most of whom had sold or were leasing out their ITQ by 2007[13]), the recreational sector is comprised of up to 320,000 licence-holders, all of whom are transient and make individual decisions on when to fish and many of whom travel substantial distances in order to do so.[14] Coming up with a market mechanism to transfer ITQ to them had become an insurmountable challenge.

11. On February 15, 2011 the Minister voiced her disappointment that:

> the most recent round of discussions ... have reached an impasse and stakeholders have been unable to reach a consensus. Because of this, a ministerial decision is required....[15]

12. This initiated a year-long process where both sectors in the allocation controversy consulted their constituents and made representations to Randy Kamp (Parliamentary Secretary) and directly to the Minister. Following this the Minister made the decision on February 17, 2012 that is now under judicial review.[16]

PART II – STATEMENT OF POINTS IN ISSUE

13. The Recreational Sector characterizes the issues as follows:

> A. Did the commercial sector representatives have a legitimate expectation that the inter-sectoral allocation could validly be frozen for all time and that the hard allocation-change decisions of the Minister could be downloaded to industry stakeholders?

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[12] RR 961 (DFO Pacific Halibut Transfer Mechanism Background and Options Paper , April 2012, ex. 35 to affidavit #1 of T. Karim).
[13] AR, vols 1-2, tab 17, Affidavit of C. Sporer, ex. 54; an independent study found that by 2006 79% of the ITQ was leased out instead of being fished by the quota owners: see para 27 *infra*.
[14] AR, vols 1-2, tab 17, Affidavit of C. Sporer, ex. 54.
[15] AR, vols 1-2, tab 17, Affidavit of C. Sporer, ex. 47.
[16] AR, vols 1-2, tab 17, Affidavit of C. Sporer, ex. 65.

B. If promissory estoppel applies, would it not apply also to the Minister's commitment not to impose in-season closures on the recreational sector?

C. Was the Minister's decision unreasonable, unjustifiable or unintelligible as alleged?

PART III – ARGUMENT

14. The Recreational Sector submits that the application should be dismissed.

A. The commercial sector representatives had no legitimate expectation that the inter-sectoral allocation could validly be frozen for all time or that the hard allocation-change decisions of the Minister could be downloaded to industry stakeholders

15. The Applicant accepts that the doctrine of legitimate expectation is procedural only and that it cannot conflict with the public authority's statutory remit. Notwithstanding this concession, the Applicant attempts to use the doctrine to support an application to quash an inter-sectoral allocation by the Minister made after a year-long process in which the representations of each competing sector were heard and considered. This process, as followed by the statutory decision-maker, was fair and in accordance with the rules of natural justice. There is nothing in the record to indicate a legitimate expectation that a more elaborate procedural process would be followed or that the process followed was not procedurally fair.

16. What the Applicant is really trying to do is to characterize the "market mechanism" as a process or procedure in the sense used in the law relating to procedural fairness. This he cannot do, and even if he could it would be contrary to the "statutory remit" of the Minister. It cannot be disputed that the Minister's discretion emanating from s. 7 of the *Fisheries Act* cannot be fettered by any policy statements of a prior Minister. It can only be fettered by regulations, and there are no regulations supporting the fetter that the Applicant asks this Court to impose on the Minister.

17. Furthermore, any expectation that the Minister had promised to freeze for all time the proportionate allocation set in 2003 would not have been reasonable or "legitimate" in the

circumstances. During the lead-up to the 2003 Framework any fully informed representative from the commercial sector would have known that the recreational allocation had increased substantially during the 1990s. Indeed, it was the perception of this growth that had prompted the commercial sector to call on DFO to arrange mediated discussions between the sectors.[17] During these discussions the recreational sector had first given notice that a 20% allocation would be required to meet "anticipated needs" by 2008.[18] Commercial sector representatives would also have been aware of the many studies relied on by the recreational sector showing that the value to the economy of a sports-caught fish is significantly greater than that of a commercial-caught fish. And they would all have been aware that the Minister's authority extends to allocation decisions based on socio-economic considerations. This was made clear by the Federal Court of Appeal in the previous high-profile inter-sectoral dispute between the commercial and sports sectors on the Pacific coast, the *Gulf Trollers* case.[19]

18. Even if the Applicant could establish that the commercial sector representatives were induced into a belief that the Minister would never exercise his or her statutory allocation powers in the absence of an agreed market mechanism, it would not satisfy the doctrine of legitimate expectation since that doctrine is incapable of fettering the statutory remit of a Minister. Whether or not that result is fair does not affect this branch of the law, although it may have political repercussions for the government if a change of allocation policy is widely perceived to be unfair.

B. If promissory estoppel applies, it would apply also to the Minister's commitment not to impose in-season closures on the recreational sector.

19. As with the doctrine of legitimate expectation, the Applicant appears to concede that public law promissory estoppel cannot override the Minister's duty to act in the public interest as expressed in the applicable legislation. As the Attorney General has demonstrated, the near-

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[17] Affidavit of Blair Pearl, para 8.
[18] The Kelleher Report refers to an increase of 0.2% to 8.8% within two decades. See AR, vols 1-2, tab 17, Affidavit of C. Sporer, ex. 11, p. 10 (Kelleher Report).
[19] *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93

absolute discretion of the Minister has been affirmed in case after case dealing with fishery allocation disputes.[20] Not a single case has gone the other way.

20. The Recreational Sector does not deny the record of assurances given by the Minister to the commercial sector. However, as is usual in public law conflicts involving two opposing camps, the Minister also made assurances to the recreational sector. In the same ministerial announcement that the commercial sector relies on, Minister Thibault said "I have also made a commitment that there will be no closure of the sport fishery in-season".[21]

21. It cannot be denied that this is a "promise or assurance" by a Minister made to the recreational sector with the knowledge and intention that the recreational sector participants would rely on it. In fact it is the only time the word "commitment" is used in the 2003 announcement (although the use of the word "also" implies that the assurances given to the commercial sector at the same time may have been intended to have a similar status). But the question is: what were the assurances that the Appellant relies on? What the Minister said was:

> A 12 per cent recreational catch "ceiling" will be allocated to the recreational sector until both parties can develop an acceptable mechanism that will allow for adjustment of the recreational share through acquisition of additional quota from the commercial sector.[22]

22. Notably, the Minister did not promise that both parties would develop "an acceptable mechanism…". He, of course, could not do so since it was largely out of his control. Nor did he promise to forever hold the recreational allocation to 12% no matter what the evolving socio-economic context required. Again, he could not do so – since it would contravene his statutory remit. The fact is that he made no assurances whatever that if no "acceptable mechanism" was developed by the parties he would refuse to change the allocation. He remained silent on this point, no doubt wishing to keep his options open.

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[20] Respondents Memorandum of Fact and Law, paras 63 to 73.
[21] AR, vols 1-2, tab 17, Affidavit of C. Sporer, ex. 14.
[22] *Ibid.*

23. So, when examined carefully (as it would have been by each sector at the time) the conclusion is inescapable that the only unequivocal commitment made by the Minister in 2003 was that "there will be no closure of the sport fishery in-season". It is not surprising, therefore, that when a later minister closed the recreational halibut fishery in mid-season in 2008 the recreational sector was outraged and interpreted this as the "final nail into the coffin of the [2003] halibut allocation policy."[23]

24. It is submitted that if the Applicant succeeds in his Application based on either or both doctrines (legitimate expectation and/or promissory estoppel) the Recreational Sector would similarly be entitled to an order in the nature of mandamus to compel the Minister to honour the commitment made in 2003 about no in-season closures. However, since no cross-application for judicial review is brought, the Court cannot grant relief to the Recreational Sector. It is nevertheless appropriate to consider whether the Court would have done so on the evidence presented here. If the answer is no, the same answer would have to be given to the Applicant since there is a greater degree of ambiguity in the part of the Minister's commitment (if that is what it was) that the Applicant relies on.

C. The Minister's decision was not unreasonable, unjustifiable or unintelligible as alleged

25. The Applicant submits that the Minister's decision was unreasonable, unjustifiable, irrational, perverse and unintelligible. The argument is directed to both the process and the outcome.[24] However, it demonstrates a total failure to hear and understand the other side in the conflict that the Minister was called upon to resolve, and a failure to appreciate the limited scope of the Minister's statutory and constitutional power.

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[23] RR 500 (SFAB Halibut Allocation Update, November 14 2008, A report from Gerry Kristiansen, Chairman, SFAB Halibut Allocation Committee).
[24] Applicant's Memorandum of Fact and Law, para 100.

26. Although no reasons for judgment were given by the Minister, it may be inferred from the record that he took into account and weighed in the balance the following facts and arguments advanced by the SFAB:[25]

(a) The decision to honour one part of Minister Thibault's policy by enforcing the 88/12 allocation while ignoring the minister's parallel promise that the recreational fishery would not be closed in-season would be patently unfair and biassed in favour of the commercial sector.

(b) According to the Report on Plans and Priorities on DFO's national website, the target value for all commercial fisheries in 2011-12 is $5 billion, while the comparable number for recreational fisheries is $7.5 billion. In British Columbia, recreational fishing is the single largest component fishery, accounting for 39% of the GDP contribution of all fisheries, including aquaculture. A provincial survey has shown that halibut drives some 30% of the tidal recreational effort which means that in 2007, recreational halibut fishing contributed $46 million to the provincial economy. Despite the fact that it was based on 88% of the harvest, the comparable number for the commercial halibut fishery was only slightly larger at $48 million. On a per licence basis, in 2010 commercial quota-holders paid DFO an average of 7 cents per pound to DFO for their access to halibut while the equivalent payment by the recreational sector was $1.78 a pound. ($6.5 million in recreational licence fees x 30% = $1.96 million divided by 1.092 million pounds = $1.78 per pound.)

(c) With the benefit of hindsight it is clear that the 2003 policy decision made some fundamental mistakes which rendered implementation of that policy unworkable. This policy failed to take into account key differences between the commercial and recreational sectors and especially the fact that each year there are over 300,000 licensed anglers, of whom many choose to fish for halibut. These people make independent choices about when, where and how to fish. Some take advantage of service providers such as lodges and charter operators or rent a boat from a marina while others fish from their own vessels. This complex variety of individual decisions on how to access the halibut resource cannot be satisfactorily accommodated by the 2003 policy.

(d) It is relevant to compare the Canadian situation with the allocation rules in adjacent American jurisdictions. To the south, in 2011 the recreational sector received 44.85% of the available halibut. In Southeast Alaska, the recreational share works out to more than 30% of the TAC. This number is arrived at not by applying a percentage but through the assignment of a fixed number of pounds to

[25] Most of the following points were made in submissions to the Minister in the Randy Kamp process. See RR 1554 (A More Sensible Approach to Canada's Allocation of Pacific Halibut to the Recreational Fishing Sector: a brief to Randy Kamp from the Sport Fishing Advisory Board , October 11, 2011, ex. 60 to affidavit #1 of T. Karim)

the recreational charter sector through what is called a Guideline Harvest Level plus the harvest by non-guided or "independent" anglers and by "subsistence" fishers. Why does the Canadian government think that a 12% share is adequate for the recreational sector when that view is not shared by the United States?

(e) A fixed amount should be initially allocated to the recreational sector each year from the Canadian TAC. This would fulfil the "economic viability" policy priority of government. By providing more stable and predictable season-long access it would allow individual anglers to make informed decisions and allow service providers to better meet the needs of their clients. Social and economic benefits would flow from the recreational fishery as uncertainty with respect to both season length and possession limits was eliminated. The "fixed number" option would be consistent with principles 3, 5, 6, and 9 of the recreational Vision Policy, to which DFO is a signatory. It would ensure that halibut remain a common property resource managed for the benefit of all Canadians. It would be consistent with the principle that recreational fishing is a socially and economically valuable use of fishery resources and the means by which many Canadians access and experience these resources. It considers the needs of the recreational fishery for stable and predictable access, and amounts to a fostering of the current and future potential of the fishery, and it satisfies the concept of "best use" of the resource after obligations to First Nations are met.

(f) The experimental licence system contravened one of the key differences between recreational and commercial fisheries by allowing anglers to ignore possession limits through the purchase of fish prior to harvest, i.e. by leasing quota.

27. The Minister also likely took into account the ethical and financial implications of the current practice in the commercial sector whereby ITQ is issued year after year to persons who have long since forsaken any connection with the fishery and who use their quota solely as a market instrument to trade for profit. In addition to the obvious ethical objections to forcing the recreational sector to participate in this scheme,[26] it has caused an increasingly significant distortion to the commercial fishing economy. In 2007 the active commercial harvesters had to pay $6.59 million in lease payments to non-fishing quota holders, the single largest element of fishery-specific expenses incurred by the fleet. By comparison, the total net earnings of the

[26] See RR 1115 (ex. 47, Karim affid. #1): "The social implications also are negative in that the recreational fishery would be destabilized to a two tiered society. Those with excess funds vs. those who cannot afford to partake in a new commercial license structure and fishery. This problem would be particularly acute in small coastal communities where local people would be barred access to halibut unless they are able to find available quota and are prepared or able to pay a premium to quota holders. The recreational fishery in B.C. along the US Pacific coast is different than Atlantic Canada in that there is a historical expectation of personal public access."

active harvesters were $13 million. In other words, the "slipper skippers", without doing any work at all, made half as much money as the people who actually went out on the water after halibut.[27] An independent study that is referenced in the Respondent's Record describes the effect of the ITQ system as follows:[28]

> Quota owners who leave the fishery often choose to lease their quota out during their entire lifetime and to will the quota to their children as an investment. By 2006, 79% of the quota was leased out instead of being fished by the quota owners.
>
> The lease price of quota increased from $1.95/lb (in constant 2008$) in 1993 to $3.80/lb in 2008, an increase of nearly double.[29]
>
> Since quota owners retain c. 70% of the catch value, fishing costs must be recovered from the 30% of the catch value that remains for the skipper, crew, and vessel share.
>
> The halibut ITQ system does not meet this measure of social benefit, since the cost of leasing is passed on the crew, who can least afford to bear the cost.
>
> In a major study of ITQs, the US National Research Council recommended: "The capacity of IFQs for transferability, consolidation, and leasing has led to a general concern that independent owner-operators of fishing vessels or crew members will be led into economic dependence on absentee owners as quota shares increase in value and small investors are excluded from the field. Consequently, some programs (e.g. Alaskan halibut and sablefish) have adopted owner-on-board and other provisions intended to prevent absentee ownership.

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[27] RR 1554 (A More Sensible Approach to Canada's Allocation of Pacific Halibut to the Recreational Fishing Sector: a brief to Randy Kamp from the Sport Fishing Advisory Board , October 11, 2011, ex. 60 to affidavit #1 of T. Karim)

[28] Referenced at RR 1107 (a further updated "Evaluation Matrix" prepared by DFO that summarized the evaluation of the four options by each of the representative interests); the study is "The elephant in the room: the hidden costs of leasing individual transferable fishing quotas, Pinkerton and Edwards" published online in Marine Policy at http://ecotrust.ca/sites/all/files/Elephant_in_Room_Report.pdf

[29] By 2012 the lease price had risen to $5.30 (see footnote 4 *supra*); the cost of leasing takes up any increase in the landed price of halibut (RR 2864, cross-examination of Russell Cameron).

28. The nature of the ITQ trade became a major impediment when recreational fishers attempted to lease ITQ from commercial quota-holders in accordance with the 2003 policy. One individual angler recounted his experience in a letter to the Minister. He said "my wife and I are recreational anglers who, from time to time, enjoy turning our hand to fishing for the occasional halibut." He notes that having anticipated the possibility of a recreational halibut closure sometime in October "based on information from the Fisheries Department" they had arranged their trip for early September. Having been surprised by the closure announcement they had investigated use of the new "experimental " licence:

> ... but after contacting the department "was completely turned off pursuing this option when I learned I would need to pay the commercial fishing sector $5.00 per pound for the 'single season' lease". He describes the experimental licence as "absolutely outrageous" and urges that it be "trashed" since "Halibut is a PUBLIC resource and the thought of being required to pay the commercial sector for the right to catch one or two small halibut is abhorrent...when...the government asks the commercial sector to pay an annual licence fee of $.10 per pound then commercial fishers charge an exorbitant toll of $5.00 per pound to candidates for an "experimental" halibut licence". ... He notes that other jurisdictions enforce owner-operator provisions and require commercial harvesters to "use the quota or run the risk of losing it" and suggests "there may be merit in some version of this approach in the management of commercial halibut quotas" since "the halibut fishery is a PUBLIC resource and if there are windfall gains to be made these must accrue to the public purse."[30]

29. As highlighted by the writer of the letter, this situation cries out for change. One obvious way to free up more fish for recreational anglers as well as for active commercial harvesters, is through the repatriation of our public resource from Canada's new class of absentee landlords, the non-fishing quota-holders. Repatriation of access to fish from inactive licence and quota holders and the redistribution of this access to both the recreational and commercial sectors would benefit everyone except, of course, the "slipper skippers".

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[30] *Supra* note 27 at RR 1553-4

30. The annual grant of quota by the Minister to inactive quota-holders in the knowledge that it will be used solely for the purpose of trade highlights also a jurisdictional constraint on the Minister that is highly relevant to this case. The Applicant is trying to force the Minister to compel, *inter alia*, recreational lodge operators to lease commercial ITQ from, *inter alia*, inactive commercial ITQ "owners". This would result in the transfer of a market instrument in the nature of property from one person to another, neither of whom engage in fishing. Regulation of such market transactions is so far disconnected from "fisheries" (within the meaning of s. 91(12) of the *Constitution Act, 1867*) that it would be *ultra vires* the Minister's authority.[31] The Applicant is therefore asking this Court to order the Minister to do something the Minister has no legislative or constitutional authority to do. And if the Minister cannot do it by the front door (by compelling the purchase and sale of ITQ in private sector transactions) he cannot do it by the back door by threatening to continue an outdated allocation split if ITQ is not purchased "voluntarily" by recreational interests.

31. In order to retain its legitimacy within the *Fisheries Act*, the Minister must take steps to return quota to its original character as an adjunct of a licence issued for the purpose of fishing, i.e. the "quota licence" that Dr. Peter Pearse talked about in 1982.[32] In this sense it would restrict the licensee's authority to the harvesting of fish in a public fishery to a set quantity and the quota-licence could, therefore, be grounded in the Minister's licensing power under s. 7 of the *Fisheries Act*. However, when quota is structured by the Minister as an instrument that is separated from the activity of fishing, as a requirement, and is transformed into a tradable market instrument as an industry practice it loses its connection with s. 91(12) and takes on the character of a class of assets (that includes shares in corporations, interests in partnerships, bonds and financial derivatives) that are regulated pursuant to exclusive provincial authority.[33]

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[31] Trade processes by which fish when caught are converted into a marketable commodity fall within provincial authority over property and civil rights and cannot come within the scope of the words "sea coast and inland fisheries". See *AG Canada v. AGBC*, [1930] A.C. 111. Similarly, the regulation of market transactions in tradable instruments is within exclusive provincial authority. See *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

[32] See *Carpenter Fishing Corp. v. Canada*, 1997 CanLII 6391 (FCA), [1998] 2 FC 548.

[33] *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

32. A quota share that is traded between "slipper skippers" and lodge operators could only be regulated by provincial legislation notwithstanding the fact that the private transaction pertains to a share in a possible harvest of fish. This result flows from a long line of well-established jurisprudence that has restricted the s. 91(12) power to the regulation and management of fisheries as a public resource. The regulation of the activity of fishing is included in the scope of s. 91(12), but not the regulation of trade transactions in fish once caught or labour relations or any other contractual transactions falling within the subject head, property and civil rights.

> It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it.
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> *Attorney General for Canada v. Attorneys General for the Provinces of Ontario, Quebec, and Nova Scotia*, [1898] A.C. 700 at p. 709.
>
> [I]t has been unquestioned law that since *Magna Charta* no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation.
>
> *Attorney General for British Columbia v. Attorney General for Canada*, [1914] A.C. 153, at p. 170 (cited in *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 67).
>
> In other words, the capacity conferred by s. 91 extended to regulation only, however far regulation might proceed. It included the capacity to impose taxes for licences to fish. But the Dominion had no power to pass legislation purporting directly to grant a lease of an exclusive right to fish in property that did not belong to it, however much it might in other forms impose conditions on the exercise of the right to make such a grant.
>
> *Attorney General for Canada v. Attorney General for Quebec*, [1921] 1 A.C. 413, tab 4 at p. 420.
>
> It is also true that the power of the Dominion does not extend to enabling it to create what are really proprietary rights where it possesses none itself. But it is

obvious that the control of the Dominion must be extensive. It is not practicable to define abstractly its limits in terms going beyond those their Lordships have just employed.

> *Ibid.* at p. 428 (emphasis added).

In their Lordships' judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "Sea Coast and Inland Fisheries".

> *AG Canada v. AGBC,* [1930] A.C. 111 at 121.

The point of Paterson's definition is the natural resource and the right to exploit it, and the place where the resource is found, and the right is exercised. Using that definition there is nothing in it to suggest that head of legislative authority is directed to the regulation or control of the rights and obligations as between themselves of the employers and employees who engage in the business of exploiting the resource.

> *Mark Fishing Co. v. United Fishermen & Allied Workers' Union* (1972), 24 D.L.R. (3d) 585 (BCCA) at 592 (cited by McLachlin CJ in *Ward v. Canada* [2002] 1 S.C.R. 569 at para 35).

I fully agree that in the light of prior decisions s. 91, head 12 of the *British North America Act, 1867*, "Sea Coast and Inland Fisheries", is not broad enough to authorize Parliament to enact legislation in relation to the business of fishing, in so far as that business is concerned with labour relations or with the sale of fish after they have been caught.

> *Re United Fishermen & Allied Workers Union and British Columbia Packers Ltd. et al.* (1975), 64 D.L.R. (3d) 522 at 530-1 (FCA).

Canada's fisheries are a 'common property resource', belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest.

> *Comeau's Sea Foods Ltd. v. Canada (Fisheries and Oceans)*, [1997] 1 SCR 12 at pp. 25-26.

> Although broad, the fisheries power is not unlimited. The same cases that establish its broad parameters also hold that the fisheries power must be construed to respect the provinces' power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. This too is a broad, multi-faceted power, difficult to summarize concisely. For our purposes, it suffices to note that the regulation of trade and industry within the province generally (with certain exceptions) falls within the province's jurisdiction over property and civil rights: see *Citizens Insurance*, *supra*; see also *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 (P.C.).
>
> *Ward v. Canada*, [2002] 1 S.C.R. 569 at para 42

33. The undeniable legal fact that tidal fisheries are a common property resource means that the Crown has no ownership right to the fishery or to any funds derived from a sale or other disposition of the fishery. Apart from a limited right to recover its administration costs from licence fees the Minister has no right to convert the public fishery resource to money for the Canadian treasury for use in purchasing ITQ. The federal regulatory power derived from s. 91(12) does not extend to appropriation of the fishery resource or to the creation of property rights to shares in the fishery resource; nor does it extend to the regulation of the trade in such shares. Hence, there is a fundamental constitutional impediment to the Order that the Applicant seeks.

> See Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans), [1997] 1 S.C.R. 12; Saulnier v. Royal Bank of Canada, [2008] 3 S.C.R. 166, 2008 SCC 58; Larocque v. Canada (Minister of Fisheries and Oceans), 2006 FCA 237; G. V. La Forest, Natural Resources and Public Property under the Canadian Constitution, pp. 75-83.

34. The inability of the Minister to compel one sector to acquire ITQ from another, or to raise funds from the fishery resource to facilitate this, appears not to have been fully appreciated when the "market mechanism" concept was developed in 2003. However, it must have become abundantly clear in June 2006 when the *Larocque* case was decided by the Federal Court of Appeal.

35. Accordingly, far from being unreasonable, arbitrary or unintelligible, the decision under review was fully consistent with the Minister's statutory remit. After years of toying with the

concept of a property-based fisheries regime that would be managed through private sector transactions, the Minister, on February 17, 2012 stepped back into his proper constitutional role of managing a common property fishery in the interests of all Canadians.

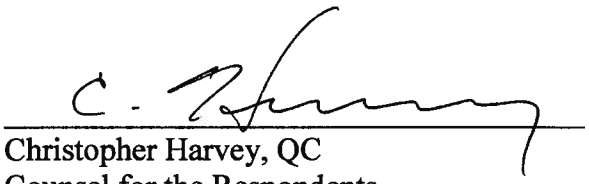
36. Canada's Pacific halibut fishery is a resource belonging to all the people of Canada. It cannot be converted to the private property of those who received the gift of ITQ in 1991. The Applicant urges this Court to direct the Minister "to use a market mechanism to reallocate quota as between the Sectors" – in other words, to force recreational fishers to purchase access to the halibut fishery from the ITQ "owners" represented by the Applicant. That wrongly presupposes that the Minister has converted a public resource into shares of private property and that he has the power to regulate the purchase and sale of those shares. The Order sought would be unconstitutional as well as unreasonable. The Applicant's case should, therefore, be dismissed.

PART IV – STATEMENT OF THE ORDER SOUGHT

37. The Recreational Sector respectfully requests that the Application be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 22nd day of October, 2012



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SPORTS FISHING INSTITUTE OF B.C.
on their own behalf and on behalf of all B.C.
tidal waters sport fishing licence holders

PART V – LIST OF AUTHORITIES

STATUTES

1. *Constitution Act, 1867*, s. 91 (12) (13)
2. *Fisheries Act*, R.S.C., 1985, c. F-14, s. 7

CASES

3. *AG Canada v. AGBC*, [1930] A.C. 111
4. *Attorney General for British Columbia v. Attorney General for Canada*, [1914] A.C. 153
5. *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 (P.C.).
6. *Attorney General for Canada v. Attorney General for Quebec*, [1921] 1 A.C. 413
7. *Attorney General for Canada v. Attorneys General for the Provinces of Ontario, Quebec, and Nova Scotia*, [1898] A.C. 700
8. *Carpenter Fishing Corp. v. Canada*, 1997 CanLII 6391 (FCA), [1998] 2 FC 548
9. *Comeau's Sea Foods Ltd. v. Canada (Fisheries and Oceans)*, [1997] 1 SCR 12
10. *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93
11. *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237
12. *Mark Fishing Co. v. United Fishermen & Allied Workers' Union* (1972), 24 D.L.R. (3d) 585 (BCCA) at 592
13. *Re United Fishermen & Allied Workers Union and British Columbia Packers Ltd. et al.* (1975), 64 D.L.R. (3d) 522 at 530-1 (FCA).
14. *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837
15. *Saulnier v. Royal Bank of Canada*, [2008] 3 S.C.R. 166, 2008 SCC 58
16. *Ward v. Canada*, [2002] 1 S.C.R. 569

TEXTS AND ARTICLES

17. G. V. La Forest, *Natural Resources and Public Property under the Canadian Constitution*, pp. 75-83
18. E. Pinkerton and D. Edwards, *The elephant in the room: the hidden costs of leasing individual transferable fishing quotas*," published online in Marine Policy at http://ecotrust.ca/sites/all/files/Elephant_in_Room_Report.pdf