Federal Court Cour fédérale

Date: 20250425

Docket: T-586-23

Citation: 2025 FC 737

Ottawa, Ontario, April 25, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

PRINCE EDWARD ISLAND FISHERMEN'S ASSOCIATION LTD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, the Prince Edward Island Fishermen's Association (PEIFA or the Association) seeks judicial review of the refusal by the Minister of Fisheries and Oceans and the Coast Guard (the Minister) to reallocate the quota for the fishing of Atlantic Bluefin Tuna (BFT) in order to increase the share allotted to PEI fishers. They say that the current quota allocation is

unfair, and the Minister's refusal to review it is unreasonable because when the quota was originally set the then-Minister promised to review it on a regular basis. No review has been done in the more than 20 years since that promise was made.

[2] The Respondent argues that the PEIFA lacks standing to bring this challenge, and that the Minister's response to their request is not subject to judicial review because it does not affect any rights or interests – it simply maintains the status quo. In the alternative, the Respondent argues that the Minister's decision is reasonable.

[3] For the reasons set out below, this application for judicial review will be dismissed. While I find that PEIFA should be granted public interest standing, I am not persuaded that the Minister's refusal to launch the type of review the Association demanded or to reallocate the BFT quota in its favour is a matter subject to judicial review. I go on to find that if the decision is reviewable, it was reasonable. The Minister has a wide discretion to manage the fishery, and the decision being challenged here was of a policy nature. There is no basis to overturn the Minister's decision.

II. Background

[4] The PEIFA is an association that represents PEI fishers, including those who fish for BFT. The Association has a long involvement in issues relating to the BFT fishery. As with other fisheries on the Atlantic and Pacific coasts, there have been long-standing questions about the approach to managing the BFT quota that is allocated to Canada.

[5] Atlantic BFT are a highly migratory species. The fishery as a whole is managed under the jurisdiction of the International Commission for the Conservation of Atlantic Tunas. Canada is one of 52 contracting parties to this Commission. Harvest limits, referred to as Total Allowable Catch (TAC) were established as early as 1982, and have been adjusted periodically based on information about the health of the fishery. Six national jurisdictions receive quota allocation for the BFT stock: Japan, Canada, the United States, Mexico, the United Kingdom and France (St. Pierre et Miquelon).

[6] The Minister has the authority to allocate Canada's BFT allocation among the various fleets, including "bycatch" for fleets that are not primarily fishing for tuna as well as for scientific research purposes. The annual fleet allocation is set out in the table below

Fleets	**Percentage**	**Quota**
Prince Edward Island	30.02	
Newfoundland	12.84	
Gulf of New Brunswick	7.81	
Quebec	5.09	
Gulf of Nova Scotia	11.27	
Southwest Nova Scotia	21.70	
St. Margaret's Bay	11.27	
Pelagic Long Line [PLL] bycatch in the Central North Atlantic (East of 54 Degrees, 30 minutes)		*15 tonnes

PLL bycatch (west of 54 Degrees, 30 minutes)		**18.76 tonnes
Offshore (bycatch)		**20 tonnes
Science		**10 tonnes

*Amount is allocated to Canada from the entire western Atlantic Bluefin tuna allowable catch (i.e., from the total allowable harvest limit before country allocations are distributed)
**Amounts removed off the top before the 7 inshore fleet allocations are determined.

[7] This fishery is highly lucrative because BFT are highly prized in some markets. Interest in how the TAC is allocated is correspondingly high. For the purposes of this case, the relevant history of discussions about the allocation of the fishery begins in 2003 when the Minister launched a discussion with industry about how the fleet quotas would be allocated. (Note: the references to "the Minister" refer to the Minister in place at the relevant time; there have been several Ministers over this time period).

[8] A BFT Quota Working Group was established and it met to discuss options for a fair and equitable sharing formula. At that time, the position of the PEI fleet was that they should receive 50% of the allocation because they had 50% of the licenses and 50% of the catch history. In November 2003, the then-Minister decided to allocate 30% of the allocation to the PEI fleet for the 2004 fishing season. A press release issued at that time stated that "[t]he Minister has accepted a recommendation by all fleets to periodically review the allocations."

[9] An internal fleet allocation review was conducted in 2007, and in March 2010 the Department of Fisheries and Oceans [DFO] recommended to the Minister the stabilization of fleet shares for several fisheries, including the one for BFT. In November 2013, the PEIFA wrote

to the Minister requesting a periodic review of the BFT allocations. The Minister denied that request. In 2016, DFO recommended to the Minister that the quota allocation for BFT not be reviewed, and the Minister agreed with that recommendation.

[10] On October 4, 2022, PEIFA wrote to the Minister requesting a review of the quota allocation, urging the Minister to distribute the quota in equal shares among the license holders. PEIFA advanced several arguments in this letter, which can be summarized in three main elements. First, they pointed out that it had been 19 years since the original quota allocation decision and no periodic review or adjustment had occurred since then. Second, they argued the current allocation was unfair. They explained this point in the following way:

> The 359 P.E.I. based licensed Atlantic Bluefin tuna fishers are slightly more than half of the total Canadian licensed Atlantic Bluefin fishers. However, the P.E.I. fishers, in total, are allocated only 30% of the Canadian total allowable catch (TAC). By comparison, the four persons holding 24 licenses to fish Bluefin in Saint Margaret's Bay control a quota that is12% of the allocation to Canada. **Is this a fair and reasonable distribution?**
>
> This is a gross imbalance between the P.E.I. and St. Margaret's Bay area fishers. The current allocations are also a gross imbalance, unfair to the licensed Bluefin Tuna fishers in **Gulf Nova Scotia (135), Gulf New Brunswick (102) and Quebec (53).** (emphasis in original)

[11] Finally, PEIFA asserted that the majority of the members of the umbrella consultation mechanism on this fishery, called the Atlantic Large Pelagic Advisory Committee (ALPAC), had voted in favour of a review of the quota allocation in 2014, but this was not accepted because two members of the group had opposed the proposal. The PEIFA argued that it was unfair to give a veto to two members of the group. This point is disputed by the Respondent's evidence.

[12] On November 18, 2022, the Minister wrote to the PEIFA on a variety of subjects. On the BFT allocation question, the Minister stated the following:

> For over a decade, DFO has promoted stable sharing arrangements in the tuna fishery to foster conservation and assist harvesters in gaining access to capital for business planning purposes. The quota is fully subscribed, and the Department currently sees no rationale or broad based support for a shares review in this fishery. My staff remain available to further discuss.

[13] PEIFA replied to the Minister's letter on December 1, 2022, reiterating and elaborating on the main points advanced in their October 2022 letter. Their letter ended with the following statements and request:

> **We appreciate your point that the fishery is fully subscribed.** ***T*****he redistribution we request** does not involve any increase in the overall harvest of Atlantic Bluefin Tuna. We are requesting only an equitable distribution of the resource allowed by the ICCAT quota **for Canada** among the **licensed Bluefin fishers for whom it is intended.**
>
> …
>
> **To reiterate,** we respectfully request that you enact equal quota shares of the Bluefin resource for all fishers licensed to direct for Atlantic Bluefin tuna in Canada.
>
> **Do you agree to our request?** (emphasis in original)

[14] This exchange of correspondence gave rise to the Minister's letter to the PEIFA dated February 24, 2023. This is the "decision" that the PEIFA seeks to challenge in this proceeding.

[15] In her letter, the Minister traced the history of the allocation of BFT quota set out above, noting that "[s]ince 2004, the [BFT] fishery has been managed using fleet quota shares to provide stability and allow fleets to implement management and self-rationalization plans." The

Minister observed that in 2016, DFO did not support any revision to the BFT quota allocation and stated that the Department's "position has not changed since this decision as the Department continues to promote stability in fisheries, and thus supports the existing sharing arrangement in BFT."

[16] The Minister discussed the exception that allowed a single license holder to hold more than one license and indicated that DFO was aware of the concerns regarding the allocation for bycatch by other fisheries and was monitoring the situation. The Minister stated that the results of this review would be presented at a future ALPAC meeting for discussion. In addition, the Minister stated that DFO was making efforts to find solutions to address the evolution of the fishery in St. Margaret's Bay. In light of the recent changes that had been implemented to assist that fishery in capturing its allocation of BFT, the Minister stated that "it would be prudent to assess this initiative over a longer period."

[17] The Minister's letter concludes as follows:

> Thank you for providing me with your thoughts on this matter. If you have further concerns or recommendations that would impact the other fleets, please contact the relevant departmental officials so that these are considered at the ALPAC annual meeting.

[18] The PEIFA seek judicial review of the Minister's refusal to launch a periodic review of the BFT fishery allocation.

III. Issues and Standard of Review

[19] There are four issues in this case:

1. Does the PEIFA have standing to bring this application? If so,

2. Is the Minister's letter a "decision" that can be subject to judicial review? If so,

3. Is the decision reasonable?

4. Is the Minister estopped from refusing to conduct a review?

[20] The first two questions and the last are governed by their applicable legal principles and the standard of review framework has no application. The third question is to be analyzed under the framework set out in *(Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], and confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[21] In summary, under the *Vavilov* framework, a reviewing court is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints (*Vavilov* at para 85). The onus is on the Applicants to demonstrate that "any shortcomings or flaws … are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100). Absent exceptional circumstances, reviewing courts must not interfere with the decision-maker's factual findings and cannot reweigh and reassess evidence considered by the decision-maker (*Vavilov* at para 125).

IV. Analysis

A. *Does the PEIFA have standing?*

(1) Legal Framework

[22] Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 provides that an application for judicial review may be made by the Attorney General of Canada or by "anyone directly affected by the matter in respect of which relief is sought." Therefore, in order to bring judicial review in this Court, a party must either be "directly affected" by the decision or qualify for "public interest" standing.

[23] A party will have direct standing to bring judicial review when a decision affects its legal rights, imposed legal obligations upon it, or prejudicially affected the party in some way: *League for Human Rights of B'nai Brith Canada v Canada*, 2010 FCA 307 at para 58 [*B'nai Brith*]; *Laurentian Pilotage Authority v Corporation des Pilotes de Saint-Laurent Central Inc*, 2019 FCA 83 at para 31; *Kilgour v Canada (Attorney General)*, 2022 FC 472 at para 28 [*Kilgour FC*],aff'd, although not on this point, *sub nom Reisdorf v Canada (Attorney General)*, 2023 FCA 188,leave to appeal to SCC refused, 40998 (16 May 2024).

[24] A commercial interest in the issue is not a sufficient basis for direct standing: *Oceanex Inc v Canada (Transport)*, 2018 FC 250 at paras 259–266 [*Oceanex FC*], aff'd 2019 FCA 250, leave to appeal to SCC refused, 38942 (26 March 2020).

[25] Public interest standing is a wider and more flexible concept. In order to meet the test for public interest standing, a party must show that they raise a serious justiciable issue; they have a real stake or genuine interest in the issue (as opposed to being mere busybodies or meddlesome

interlopers); and that the proposed legal proceeding is a reasonable and effective way to bring the matter before the courts: *Kilgour FC* at para 32, citing *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37 [*Downtown Eastside*].

(2) The Parties' Submissions

[26] The PEIFA submitted in its oral arguments that it qualifies for direct standing because of its long involvement in the issues raised in this application. It says that the Minister's commitment to a periodic review of the fleet allocation was made directly to the PEIFA as well as other organizations, and thus the current Minister's refusal to conduct such a review has a direct impact on the Association and its membership. The PEIFA says that it is not a mere busybody, but rather is a representative organization that is directly concerned with the BFT fishery. Alternatively, the PEIFA argues it qualifies for public interest standing.

[27] The Respondent's main argument on standing is that there is no "decision" to be reviewed, which is discussed below. The Respondent submits that the PEIFA is not directly affected by the Minister's letter, which merely maintains the status quo. Although PEIFA may believe they are prejudiced by not receiving a higher allocation of the BFT quota, the Respondent argues that this is not the sort of prejudice contemplated by s. 18.1 of the *Federal Courts Act*.

[28] In addition, the Respondent relies on *Oceanex FC* for the proposition that a mere commercial interest alone is not sufficient for standing. In light of the fact that the PEIFA

interest in this matter is purely commercial, the Respondent submits that it does not have direct standing.

[29] The Respondent further submits that the PEIFA does not qualify for public interest standing, largely because the allocation of the BFT quota is a purely commercial matter with no over-riding public interest component. Based on its assertion that there is no "decision" that can be reviewed, the Respondent argues that the Court lacks the necessary factual matrix on which to assess the Minister's letter. Therefore, according to the Respondent, the PEIFA should not be granted public interest standing to challenge the Minister's letter.

(3) Discussion

[30] The PEIFA does not satisfy the test for direct standing, because the organization itself is not directly affected by the Minister's letter. The test requires that to be directly affected by a decision, the decision must have affected the legal rights, imposed legal obligations on, or prejudicially affected, the party bringing the application: *B'nai Brith* at para 58. The PEIFA has failed to demonstrate that the Minister's letter had such a direct impact on itself, as an organization.

[31] At its core, the PEIFA complaint in this case is that the Minister did not re-open the 2003 BFT fishery allocation decision. It is evident from its submissions that the PEIFA seeks a review because it believes that the result of such an exercise would be that its membership would receive a greater allocation of the TAC in the BFT fishery. The PEIFA accepts that Canada's allocation of the total TAC is now totally subscribed, but it says that its members should receive

a greater proportion of the total – meaning that others would receive less. In this regard, it seems to me that the PEIFA position is exactly the type of complaint about competitive advantage that has been found not to provide direct standing to a party. As explained in *Oceanex FC* at para 262:

> [A] person should not have the right to interfere with or meddle in official action affecting an existing competitor for the sole purpose of preventing that competitor from obtaining some advantage, particularly where the action complained of is something that the person complaining is free to take advantage of himself. Further, that the motive of the application must be considered, and that the public interest in competition must be borne in mind in exercising judicial discretion as to whether to recognize standing in a competitive relationship.

[32] Although I accept that the Association's membership consists of PEI fishers who themselves may claim to be directly affected by the Minister's refusal to review the BFT allocation, this in itself does not give the PEIFA direct standing in this matter.

[33] Nevertheless, and although the matter is not entirely free from doubt, I am prepared to recognize that the PEIFA has public interest standing to pursue its claim. "Public interest standing is a matter of discretion, to be exercised in a purposive, flexible, and generous manner:" *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250 at para 11, citing *Downtown Eastside* at para 53. In assessing whether to grant public interest standing, an important consideration is the desire to prevent government decisions from being effectively immunized from judicial review. In a constitutional democracy like Canada, individuals and groups must have effective mechanisms to seek review by an independent judiciary of government decisions that are alleged to be contrary to the law: *Oceanex FC* at para 282, citing *Downtown Eastside* at para 23. The

three elements of the test for public interest standing must be applied flexibly with this policy goal in mind.

[34] The first branch of the test is whether the PEIFA has raised a serious justiciable issue. To some extent this overlaps with the second issue (whether the Minister's letter is a decision that is subject to judicial review) and thus I will not discuss this aspect of the test in great detail here. At this point, it is sufficient to state that the PEIFA and its membership clearly have strong interests in the BFT allocation and that questions regarding the allocation are properly subject to judicial supervision. There is a substantial body of case-law dealing with disputes about fishery quota allocations in relation to other fisheries, which indicates the strong interests surrounding these types of decisions. The Minister's decisions about how to allocate quota allocation and the process by which that is done are matters that are justiciable, and give rise to matters of public importance. Because of this, I would not deny the PEIFA public interest standing on this ground at this stage of the analysis.

[35] The second branch of the test is whether PEIFA has a genuine interest in the questions underlying this application. In light of its long-standing and active involvement in matters affecting the interests of PEI fishers, and given its specific interest and involvement in the BFT quota allocation question, I accept that the PEIFA does have genuine interest and satisfies the second branch of the test. In this regard, it is relevant that the Respondent's preferred means of dealing with questions about the fishery allocation is through the ALPAC, rather than discussions with individual and prospective license-holders. The PEIFA has participated in ALPAC meetings, speaking on behalf of its membership. It has written to the Minister on the

specific questions raised in this litigation. I am satisfied that the PEIFA brings experience and expertise to the questions raised in this case.

[36] On the final branch of the test, it seems to me evident that this application is a reasonable and effective way to bring the issue before the Court. Given the PEIFA's role and the history of how the BFT fishery quota was allocated in the past, the Association is in a position to muster the relevant evidence and to present the legal arguments to the Court.

[37] For all of these reasons, I am satisfied that the PEIFA should be granted public interest standing to pursue the questions raised in this application. With this, we turn to the second question: whether the Minister's letter is the type of decision that can be subject to judicial review.

B. *Is the Minister's letter subject to judicial review?*

[38] This question arises because the Respondent submits that the Minister's letter was simply a courtesy response to the PEIFA's previous correspondence. The letter did not contain any "decision" but simply maintained the status quo and suggested that the PEIFA pursue discussions with DFO officials so BFT quota allocation questions could be dealt with at a future ALPAC meeting. The Respondent submits that this is not the sort of thing that is subject to judicial review.

(1) Legal Framework

[39] The principles that apply to the question of whether the Minister's letter can be subject to judicial review were summarized in *Canada (Attorney General) v Democracy Watch*, 2020 FCA 69, leave to appeal to SCC refused, 39202 (15 October 2020):

> [19] As in all judicial review applications, the Court must first decide whether the decision sought to be set aside is subject to judicial review. Not all administrative action gives rise to a right of review. There are many circumstances where an administrative body's conduct will not trigger a right to judicial review. Some decisions are simply not justiciable, crossing the boundary from the legal to the political. Others may be justiciable but there may be an adequate alternative remedy. No right of review arises where the conduct attacked fails to affect rights, impose legal obligations, or cause prejudicial effects [citations omitted].

[40] Inherent in this approach is the basic idea that a "decision" has been made – an action by a public official or authority, affecting someone's rights, obligations or interests. Not all administrative actions will qualify. Sometimes this is because the action taken by a public official or authority is only a preliminary step, and the party seeking review still has the opportunity to try to influence the final outcome. In that situation, judicial review would be inappropriate, the party is required to wait for an actual final and binding decision to be taken before launching their challenge.

[41] In this respect, this test seeks to balance considerations that are similar to the third branch of the standing test: balancing access to justice to ensure government actions can be subject to review by an independent judiciary against the need to preserve scarce judicial resources to address "real" disputes that have an impact on a party's rights or obligations. This test, however,

approaches that question from the perspective of the "matter" under review, rather than focusing on the party bringing the question forward.

(2) The Parties' Submissions

[42] The Respondent contends that the Minister's letter is simply a courtesy response to the PEIFA's two prior letters, and as such is not a reviewable decision. The Minister's letter simply maintained the status quo allocation of the BFT quota, advising the PEIFA that its members' quota allocation would remain as they were. The Minister invited the PEIFA to raise its concerns with departmental officials so that they could be discussed at an upcoming ALPAC meeting.

[43] In the Respondent's view, the Minister's letter did not affect any rights, impose any new obligations or cause prejudicial effects. Therefore, it is not a reviewable decision according to the *Democracy Watch* test.

[44] According to the Respondent, this case is similar to the situation in *Kilgour FC*. In that case, the applicants had asked the Canada Border Services Agency [CBSA] to implement a presumptive determination that all goods imported from the Xinjiang region of China should be prohibited because of the increased likelihood that they were produced using forced labour.

[45] An official from the CBSA replied to the applicants by email, thanking them for their letter but stating that the CBSA does not have the authority to prohibit or regulate goods for production by forced labour solely based on the geographic location where the goods were

produced. The CBSA official described the process that is followed to identify goods produced by forced labour which is focused on producers or importers rather than on regions or countries.

[46] The applicants in *Kilgour* sought judicial review of the CBSA official's email message. The Respondent argued that the CBSA email was not a "matter" that was subject to judicial review under section 18.1(1) of the *Federal Courts Act*. Because the claimants in that case had not imported any goods, the email caused them no prejudice, nor did it affect their rights or obligations. The applicants argued that they were affected because of their interest in the elimination of forced labour. They said that the CBSA decision was based on an error of law, which is itself a ground of judicial review, and that the message constituted a new policy which should be subject to judicial review.

[47] The Court ruled that the CBSA email was not subject to judicial review because it did not affect the claimants' rights or obligations or cause them the type of prejudice that gives rise to judicial review. The claimants' interest in preventing forced labour was not sufficient to transform the email into a matter affecting their rights or obligations. A relevant consideration for the Court was whether the applicants had any legal right to make a request that the CBSA adopt a presumption against the importation of goods from Xinjiang province, and whether the CBSA had any duty to respond. The Court found no element of the statutory framework imposed a duty on CBSA to make a decision such as the one requested by the applicants. The Court noted that "if the Programs Manager had simply chosen not to respond to the initial email from the [a]pplicants, there would have been no grounds for review on the basis that the CBSA failed to exercise a delegated duty:" (*Kilgour FC* at para 19)

[48] It was significant for the Court that each shipment of goods that arrives in Canada is subject to an officer's determination and that such rulings can be appealed through an administrative mechanism and subsequently to the Federal Court of Appeal. In light of this, the email was not a decision that determined any rights or obligations, but rather a courtesy reply to a request that CBSA adopt a general policy. The Court found that it was thus not subject to judicial review.

[49] On appeal, the Federal Court of Appeal found that the CBSA email was not a matter that is amenable to judicial review. The Court of Appeal made three key findings: the email did not affect legal rights, impose legal obligations or cause prejudicial effects (at para 6); the claimants had no legal right to seek this sort of advance ruling (para 7); and finally (para 8):

> Perhaps more importantly, the CBSA email in question does not decide anything at all in respect of the importation of goods from Xinjiang, China. Rather, the email is merely a courtesy reply, thanking the appellants for their inquiry and setting out CBSA's views on how the relevant legislation and investigative processes work.

[50] Based on these findings, the Court of Appeal ruled that the CBSA email cannot be the subject of a judicial review application.

[51] The Respondent in this case argues that *Kilgour FC* is directly applicable here, because the Minister's letter amounted to nothing more than a courtesy letter responding to the PEIFA's letters.

[52] The PEIFA argue that the Minister's letter should not be viewed in isolation. The BFT quota allocation they seek to have reviewed dates back to 2003. In the PEIFA's view, the understanding at that time and subsequent events must be considered in determining whether the Minister's decision not to launch a review of the BFT quota allocation can be subject to judicial review. The PEIFA argue that the key question for determination in this case is whether the former Minister's promise to conduct periodic reviews of the BFT quota allocation is binding or not. This is exactly the kind of "matter" that can be subject to judicial review under s. 18.1(1) of the *Federal Courts Act*.

(3) Discussion

[53] Assessing whether the Minister's letter can be subject to judicial review gives rise to the following questions: it is a "matter" that can be subject to judicial review? Does it affect rights or obligations or cause prejudice?

[54] I agree with the PEIFA that the Minister's letter cannot be viewed in isolation. At a minimum, it is important to consider it in light of the two letters the Association sent to the Minister. The October 4 letter reviewed the history of the allocation decision made by the former Minister in 2003, the promise to conduct periodic reviews, and then expressed the PEIFA's dissatisfaction with the current allocation of the BFT quota. The core argument advanced by the PEIFA was that the allocation was unfair because its members held slightly more than half of the licenses for BFT but are allocated only 30% of the quota, whereas the four St. Margaret's Bay license holders controlled 12% of the quota. The PEIFA also indicated that in 2014, a majority of

ALPAC members had voted in favour of a DFO review of the existing BFT quota allocation but no such review had been done.

[55] The PEIFA set out the findings of the review it had conducted, noting the unequal shares in how the fishery quota was allocated as well as the changes that had occurred in the fishery during the intervening period. Based on this, the PEIFA requested the following action from the Minister: “We respectfully request that you enact equal shares of the [BFT] resource for all fishers licenced to direct for [BFT] in Canada.”

[56] The December 1 letter from the PEIFA responds to the Minister’s November 18 letter, in which the Minister had stated that DFO “currently sees no rationale or broad support for a shares review in this fishery.” The PEIFA disputed this assertion, claiming that the Association’s membership represents just over half of the licensed BFT fishers in Atlantic Canada and therefore its support for a review should be sufficient. The PEIFA also reminded the Minister that a majority of ALPAC members had voted in favour of a review in 2014. The Association drew the Minister’s attention to the rationale for a review set out in their October 4 letter, focusing on the alleged unfairness of the 2003 quota allocation, which the PEIFA claimed had redistributed quota shares at the expense of the great majority of the fishers who were involved in the BFT fishery. They claimed that this allocation hit PEI fishers particularly hard. The Association ended the letter by stating: “[t]o reiterate, we respectfully request that you enact equal quota shares of the [BFT] resource for all fishers licensed to direct for [BFT] in Canada.”

[57] The Minister's February 24 letter must be examined in light of these requests on the part of the PEIFA. I accept that the wider context dating back to the 2003 quota allocation decision is also relevant. The Minister's letter addressed several of the concerns raised by the PEIFA in their previous correspondence, including how BFT licenses were held in St. Margaret's Bay, the issue of byline catch by the pelagic longline swordfish and other tunas fishery, and the evolution in fishing conditions. The latter two issues were being examined by DFO, and the Minister expressed the view that it would be prudent to wait the outcome of those reviews before taking any steps.

[58] It is evident that a significant focus of the PEIFA has been the failure to conduct a periodic review of the quota allocation. On this point, the Minister set out the position taken by previous Ministers who had decided against launching a review. The Minister stated that the DFO position "has not changed… as the Department continues to promote stability in fisheries, and thus supports the existing share arrangement in [BFT]."

[59] Although the PEIFA's legal submissions placed a great deal of emphasis on the Minister's failure to conduct a periodic review, it is important to focus on the Association's specific requests of the Minister in the two prior letters. As cited above, in both letters the Association complained about the lack of a review, but the core of their request was not that the Minister launch one. Instead, the PEIFA was quite specific in requesting that the Minister reallocate the BFT quota so that its members would receive their "fair share" of the total allocation to Canada.

[60] Viewing the Minister's letter in light of the specific requests made by the PEIFA draws two points into sharp contrast. First, the Minister's letter did not decide anything. It simply acknowledged the Association's views, explained the DFO position on some of the issues raised by the PEIFA, and directed the Association to discuss these matters with appropriate DFO officials so that the questions could be taken up at a future ALPAC meeting.

[61] I find that the situation in this case is quite similar to that which was examined in *Kilgour FC*. In both cases, the party seeking review had no legal right to seek relief and the responses to the applicants' correspondences were properly characterized as a "courtesy reply" to an inquiry. In *Kilgour FC* the CBSA official explained the process for examining imports and stated that CBSA did not have the authority to issue a blanket, anticipatory presumption based solely on the region of origin of the goods. In the present case, the Minister explained the rationale for not launching a review, and noted that other concerns raised by the PEIFA were being studied and could be discussed in an appropriate forum once those processes were concluded.

[62] As with *Kilgour FC*, it is worth asking: what if the Minister had chosen not to reply to the two letters from the PEIFA? Would that be subject to judicial review? To ask the question is to answer it: the Minister was under no duty to provide a response or to make a decision on the PEIFA's request. Instead, the Minister acknowledged the concerns and suggested that the Association could discuss its questions with the appropriate DFO officials so that the matter could be considered at a future ALPAC meeting.

[63] The second point that emerges from the Minister's letter is that there is nothing in it which affects the PEIFA or its membership's legal rights, or that imposes new obligations on them. Although the PEIFA is aggrieved by the Minister's refusal to re-allocate the BFT quota in its favour, that is not the sort of prejudice that gives rise to a right to seek judicial review.

[64] Based on the analysis set out above, I find that the Minister's letter is not a "matter" that can be subject to judicial review under s. 18.1(1) of the *Federal Courts Act*.

[65] My finding set out above is sufficient to deal with this application for judicial review. However, out of an abundance of caution in case this decision is appealed and my finding on this point is reversed, I will go on to consider whether the Minister's decision not to re-allocate the BFT quota is reasonable.

C. *Is the Minister's refusal to reallocate the BFT quota reasonable?*

[66] For the purposes of this discussion, I will treat the Minister's letter as a "decision" not to launch a review or to reallocate the BFT quota, as had been requested in the PEIFA letters.

(1) Legal Framework

[67] The Minister of DFO has wide-ranging and multi-faceted powers to regulate the BFT fishery in Canada under the *Fisheries Act*, RSC 1985, c F-14, the *Department of Fisheries and Oceans Act*, RSC 1985, c F-15, and related regulations. Among other things, the Minister may consider the sustainability of a fishery, social, economic and cultural factors, Indigenous and

community knowledge, and the application of a precautionary approach (*Fisheries Act*, s 2.5). In making a decision, the Minister "shall consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982." (*Fisheries Act*, s 2.4). In the jargon, this is polycentric decision-making infused with a wide range of complex and sometimes competing policy considerations.

[68] In light of this, there is a considerable body of case-law that has found that Ministerial decisions about fishery quota allocations are of a legislative or policy nature, rather than administrative decisions: see the discussion in *Shelburne Elver Limited v Canada (Fisheries, Oceans and Coast Guard)*, 2023 FC 1166 [*Shelburne FC*], aff'd 2024 FCA 190. This categorization is significant because it affects the approach to judicial review of these types of decisions: *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras 24–36 [*Entertainment Software*], aff'd but not on this point: 2022 SCC 30.

[69] The following summary by Justice Walker (then of this Court) in *Shelburne FC* provides useful guidance on this question:

> [30] The jurisprudence of this Court and the Federal Court of Appeal (FCA) has consistently held that the imposition of a quota policy or quota allocation is a legislative/policy decision but the granting of a specific licence is an administrative decision (*Carpenter Fishing Corp. v Canada*, 1997 CanLII 26668 (FCA), [1998] 2 FC 548 (CA) at para 28 (*Carpenter Fishing Corp.*); *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 at paras 32, 34 (*Malcolm*); *Barry Seafoods* at para 33; *Munroe v Canada (Attorney General)*, 2021 FC 727 at paras 29-31 (*Munroe*); contrast *Mowi v Canada West Inc. v Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 588 at para 153 (*Mowi*)).

> [31] The question in each case that comes before the Courts is whether the decision in issue imposes a "general rule of conduct without reference to a particular case" (*Munroe* at para 37, citing (*R. v Corcoran*, 1999 CanLII 19147 (NL SC), 181 Nfld & PEIR 341 at paras 12-15, 20-21; *Gulf Trollers Assn v Canada (Minister of Fisheries and Oceans)* 1986 CanLII 6787 (FCA), [1987] 2 FC 93 (FCA) at p 743-44).

[70] As explained in *Shelburne FC* at para 27, "a decision maker who exercises a broad policy authority is subject to fewer procedural and substantive constraints than one who makes a highly legal determination (citing Entertainment Software)."

[71] If the decision is properly categorized as administrative in nature, it will be reviewed under the "traditional" approach to reasonableness review under the *Vavilov* framework, which is summarized at para 20 above: Entertainment Software.

(2) The Parties' Submissions

[72] The PEIFA advances several lines of argument in support of its position that the Minister's decision is unreasonable. First, the Association submits that the decision fails to demonstrate justification, transparency and intelligibility because the Minister relied on irrelevant, incorrect or extraneous considerations. In particular, the Minister stated that declining to launch a fleet share review would promote stability and this would foster conservation and assist harvesters in business planning. In the Applicant's view, this reasoning relies on an incorrect consideration, as "stable" fleet shares do not promote or foster conservation.

[73] Moreover, the Association points out that it was not seeking to change the overall TAC allocated to Canada, but rather it wanted a review of the 2003 quota allocation decision. This would have no impact on conservation, as the DFO official acknowledged in cross-examination on his affidavit. In addition, the PEIFA disputes the Minister's reliance on the absence of broad support for a fleet share review. The Association represents nearly half of the BFT license holders and that alone should be sufficient to demonstrate wide support for a review. In addition, the Association observes that in 2014 a majority of members of ALPAC voted in favour of DFO conducting a review of the BFT quota allocation. DFO's refusal to launch a review in effect gave a small minority of license holders a veto.

[74] A second line of argument advanced by the PEIFA relates to the absence of a coherent chain of reasoning to justify the Minister's decision. To some extent, this overlaps with their first point discussed above. The Association submits that the Minister failed to grapple with the evidence they presented about the changes in the fishery since 2003. They argue that simply denying a request for a review because DFO supports stability in the fishery is unreasonable, especially in light of the passage of time since the original quota was allocated. Neither conservation nor stability in the fishery justified the refusal to conduct a periodic review. The Supreme Court in *Vavilov* recognized that circular reasoning and leaps of logic were not characteristics of a reasonable decision. The PEIFA argues that the Minister's decision reflects these sorts of flaws and is therefore unreasonable.

[75] Finally, the PEIFA says that the Minister's decision was not responsive to the key arguments and evidence they put forward. The Association had presented the Minister with

evidence that the fishery had changed considerably in the 19 years since the allocations were first established. This included evidence that the BFT catches in St. Margaret's Bay had declined and t most of that fleet's quota was transferred to other fisheries. In addition, the PEIFA expressed concern about the amount of quota being allocated for bycatch of BFT in the Swordfish Longline fishery. While these concerns were mentioned in the Minister's letter, the PEIFA argues that there is no indication that DFO or the Minister engaged with this evidence. Instead, the Minister relied on decisions by previous Ministers who had refused to conduct a review of fleet shares. By failing to grapple with the PEIFA's evidence and submissions, the Minister simply decided to preserve the status quo. The decision fails to consider DFO's previous commitment to conduct periodic reviews of the fleet share quotas and does not explain why it is abandoning this promise. This does not meet the reasonableness standard set out in *Vavilov.*

[76] For its part, the Respondent argues that the Minister's refusal to launch a review or reallocate the BFT quota is a policy decision. The Minister has a very wide discretion over the management of the fishery and must balance a wide range of factors in deciding on the best approach. The Minister's decision should attract a high degree of deference from a reviewing court.

[77] The Respondent points out that this Court and the Federal Court of Appeal have consistently held that "the imposition of a quota policy or quota allocation is a legislative/policy decision…" which is owed a high degree of deference: *Shelburne FC* at para 30; *Munroe v. Canada (Attorney General)*, 2021 FC 727 at para 30 [*Munroe*]. In this case, the PEIFA has failed

to demonstrate that the Minister acted beyond the scope of the statutory purpose or exercised her discretion in bad faith.

[78] The Minister's decision in this case maintained the status quo of the BFT fishery and it did not affect the PEIFA fleet any more than any of the other fleets. The Minister explained her rationale for refusing to launch a review or reallocate quota based on two stated purposes: (1) to maintain fleet stability as this helped "promote stable fleet shares to foster conservation" and (2) to "assist harvesters in business planning." These are legitimate policy goals that reflect the Minister's wide discretion under the *Fisheries Act*, the *Department of Fisheries and Oceans Act*, and related regulations.

[79] Based on this, the Respondent submits that the Minister's decision is reasonable.

(3) Discussion

[80] The threshold question for this issue is whether the Minister's decision is properly characterized as a policy/legislative decision and thus subject to a less exacting form of review., The alternative is that the Minister's decision is an administrative decision subject to the usual approach to reasonableness review under *Vavilov*. Assessing this calls for an examination of the true substance of the decision in issue, rather than the particular form that it took: *Homex Realty v Wyoming (Village)*, 1980 CanLII 55 (SCC).

[81] As discussed previously, the Minister's letter was a response to previous correspondence from the PEIFA, which specifically requested a reallocation of the BFT quota allocation in

favour of the PEI fishers. The letters also discussed the former Minister's promise to conduct a periodic review, and the Minister's response addresses that question as well. For the purposes of this analysis, therefore, I will treat the Minister's decision as involving two questions: whether to launch a review of the BFT quota allocation, and whether to reallocate BFT fleet shares to give a larger share the license holders represented by the PEIFA.

[82] In my view, the Minister's decision on these points is best characterized as being of a legislative or policy nature, and it is thus subject to a more limited form of judicial review. As discussed above, many decisions of this Court and the Federal Court of Appeal have ruled that quota allocation decisions are policy decisions. In *Shelburne FC* at para 33, Justice Walker noted that the following types of decisions have been found to be policy decisions: a decision to establish a TAC and allocate quota to fishery sectors (*Barry Seafoods NB Inc v Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 725); reallocate TAC between fishery sectors (*Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 [*Malcolm*])' provide a formula for the attribution of quota within a fishery (*Carpenter Fishing Corp v Canada*, 1997 CanLII 26668 (FCA)' or change the method of calculating quota for a defined group of license holders (*Munroe*).

[83] In light of these authorities, there can be no doubt that the Minister's decision in this case is of a policy nature. The decision whether to launch a review of the BFT quota allocation is one that would affect all current and any potential future license holders. Similarly, the decision to reallocate quota to the license holders represented by the PEIFA would affect all other license

holders. The PEIFA has acknowledged that the BFT fishery is fully subscribed, and it has emphasized that it was not seeking an increase the TAC allocated to Canada.

[84] The allocation of the Canadian quota was determined in 2003, and since then several Ministers refused to change it. The PEIFA feels particularly aggrieved by the allocation because it represents a large percentage of BFT license holders but does not receive a proportionate share of the quota allocation. The Association expressed its view to the Minister, and the decision explains the Minister's reasons for not launching a review or reallocating the BFT fleet quota share to PEI fishers. There is no basis to find that the decision was made in bad faith, breached natural justice or that the Minister relied on considerations that are irrelevant or extraneous to the legislative purpose.

[85] Under the *Fisheries Act*, the Minister was required to balance many factors in determining the quota allocation. The material in the record shows that the Minister, like her predecessors, was presented with DFO's policy advice about the advantages and disadvantages of different ways of managing the BFT fishery. In the end, the Minister decided not to launch a comprehensive periodic review of the BFT quota allocation, or to expressly address the PEIFA request to reallocate the quota to give its members a greater share of the TAC. Instead, the Minister acknowledged the PEIFA's concerns, noted that several of them were currently being examined, and directed the PEIFA to raise these issues with appropriate DFO officials so that they could be discussed at an upcoming ALPAC meeting.

[86] Even if I were to find that the Minister's letter may be viewed as somewhat more than a "courtesy response" of the sort that was found in *Kilgour FC*, it remains that the decision not to launch a review or to reallocate quota is of a policy nature rather than an administrative one.

[87] The Minister has very wide discretion in regard to the management of the fishery, and was required to balance an array of factors. The Minister's letter reflects a careful and thoughtful consideration of the PEIFA's requests and explains why the Minister is not immediately acting upon them. The letter is also not a "final" rejection of the PEIFA's demands. If anything, the Minister acknowledged that some of the issues raised by the Association merited examination, noting that processes were underway to consider them and that the issues would be discussed in the appropriate consultative forum (i.e.an upcoming meeting of ALPAC). In addition, there have been regular meetings of ALPAC where this question, among others, has been discussed.

[88] The Minister was not bound to launch a separate consultative process or any sort of formal review. That is a reasonable approach, not tainted by bad faith, procedural unfairness or extraneous considerations. There is therefore no basis to find the Minister's decision to be unreasonable.

D. *Is the Minister estopped from refusing to conduct a review?*

(1) Legal Framework

[89] The doctrine of promissory estoppel gives legal force, in some circumstances, to a simple idea; government should live up to its promises, because people will rely on them and make

decisions expecting that the government will not go back on its word. Promissory estoppel may be available against a Minister but, as noted by the Federal Court of Appeal, its application is narrow and it cannot be invoked to preclude the exercise of a statutory duty (*Malcolm* at para 38, citing *Canada (Minister of Employment & Immigration) v Lidder*, 1992 CanLII 14712 (FCA) at p 625.

(2) The Parties' Submissions

[90] The PEIFA argue that the Minister was estopped from refusing to review the quota allocations due to her predecessor's commitment in 2003 to conduct periodic reviews. When the then-Minister made the quota allocation decision in 2003, he accepted the recommendation by all of the BFT fleets that the quota allocation should be reviewed on a periodic basis.

[91] According to the PEIFA, at that time the Minister acknowledged that periodic review was a requirement of any reasonable quota allocation system. Only a comprehensive review involving all of the affected fleets could take account of changes in the fishery. Since that time, successive Ministers have refused to launch such a review.

[92] The PEIFA submit that where representations were made and relied on by an individual affected, and where such reliance would result in a detriment to that person if the Minister were to backtrack on an earlier representation, there is arguably an estoppel, unless the statute or an overriding public interest dictates a contrary result, citing *Aurchem Exploration Ltd v Canada*, 1992 CanLII 8524 (FC).

[93] The application of the doctrine of promissory estoppel in the context of the management of the fishery was discussed in *Malcolm*. In that case, the Minister had changed the approach to allocating Pacific halibut quota, despite an earlier representation about how that would be done. However, that change in position was only made following lengthy and in-depth consultations. The Federal Court of Appeal ruled at para 42 that "the Minister may modify the approach followed previously if, in the Minister's opinion, public interest considerations reasonably justify such a change of policy." The PEIFA argues that there have been no such "lengthy and in-depth consultations" here, nor are there any overriding public interest considerations that weigh against a review. The Association submits that the Minister is therefore estopped from refusing to launch a review of the BFT fleet allocation decision.

[94] The Respondent argues that while promissory estoppel may be available against the Minister, its application is narrow and the doctrine "cannot be invoked to preclude the exercise of a statutory duty," citing *Malcolm* at para 38. The legislation and regulations grant the Minister wide and unfettered discretion to manage the fishery while taking account of the public interest. The Minister is not bound by the policy decisions of her predecessors and can make new decisions taking account of relevant considerations.

[95] In this case, the Minister was mindful of the current situation in the BFT fishery. According to the Respondent, the Minister's decision to refuse a reallocation of the quota or to launch a consultative review of the fleet share quotas fell squarely within the realm of her discretion. The Respondent contends that because of the wide discretion afforded to the Minister under the law, the doctrine of promissory estoppel has no application to the facts of this case.

(3) Discussion

[96] I am not persuaded that the Minister was bound by the doctrine of promissory estoppel in this case, for two primary reasons. First, the representation by the then-Minister to conduct a review of the allocations was not so clear-cut or definitive as to give rise to any sort of binding obligation on the form or nature of a review. Second, the Minister's decision being challenged here clearly reflects a careful consideration of a variety of policy considerations in exercise of the Minister's wide discretion to manage the fishery.

[97] The representation that the PEIFA relies on as the source of the Minister's obligation to conduct a review is the following statement from a press release announcing the 2003 fleet share quotas: "[t]he Minister has accepted a recommendation by all fleets to periodically review the allocations." No promise was made as to the nature, form or process for such a review.

[98] There is a dispute between the parties about whether any review was ever done. The PEIFA submit that although DFO may have conducted internal examinations of the BFT quota allocation, this does not meet the Minister's commitment to a periodic review because it did not involve the license holders or groups who represent them. The Respondent submits that the evidence shows that the question of fleet share quota allocations has been examined by DFO on several occasions, most particularly in 2007.

[99] I find that the record demonstrates that DFO has, in fact, conducted reviews of the approach to managing the BFT fishery. The PEIFA representative acknowledged that DFO

conducted an internal review when she was cross-examined on her affidavit, and the record confirms that such a review was done. The end result of that process was that DFO officials recommended against re-opening the question of the approach to allocating the BFT quota, and the then-Minister accepted their advice.

[100] When the PEIFA asked for a review, the Minister obviously decided not to launch a separate process. Instead, the Minister simply directed the Association to pursue its concerns with DFO officials so that the matter could be discussed at an upcoming ALPAC meeting. That is a decision that falls within the Minister's discretion to manage the fishery. I can find no binding promise that compelled the Minister to launch another process for reviewing the fleet share quotas. In this regard, the former Minister's promise here was not so clear, unambiguous or unqualified as to create a binding obligation.

[101] For these reasons, I am not persuaded that the Minister was estopped from refusing to launch the type of review demanded by the PEIFA.

V. Conclusion

[102] For the reasons set out above, the application for judicial review is dismissed.

[103] The PEIFA's concerns about the fairness of the allocation of the BFT fleet share quota are not properly the subject of judicial review. As discussed above, however, that does not mean that the Association is foreclosed from pursuing its quest for a reallocation of the quota in favour

of its members. Other avenues exist for the PEIFA, and others involved in the fishery, to raise their concerns and seek to have them addressed.

[104] Following the hearing in this matter, the parties submitted a joint proposal that the successful party would be awarded all-inclusive costs in the amount of $3,000. I am satisfied that this is an appropriate costs award in this case. Therefore, the PEIFA will be ordered to pay the Respondent all-inclusive costs of $3,000.

JUDGMENT in T-586-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The PEIFA shall pay to the Respondent all-inclusive costs in the amount of $3,000.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-586-23
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APPEARANCES:

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