Federal Court  Cour fédérale

Date: 20171221

Docket: T-1399-14

Citation: 2017 FC 1182

Ottawa, Ontario, December 21, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

THE SQUAMISH INDIAN BAND, AND SYETÁXTN, CHRISTOPHER LEWIS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SQUAMISH INDIAN BAND

Applicants

and

MINISTER OF FISHERIES AND OCEANS

Respondent

JUDGMENT AND REASONS

[1] The Applicants (referred to collectively as Squamish Nation) seek judicial review of the May 8, 2014 decision of the Regional Director General [RDG], Pacific Region of Fisheries and Oceans Canada [DFO] denying a request for an increase to its Food, Social and Ceremonial [FSC] fishing allocation for sockeye salmon in the Fraser River. The Squamish Nation argues that its sockeye salmon allocation is not reasonable, fair, or based upon DFO's policies. It asserts

Aboriginal rights to sockeye salmon and argues that the DFO decision is not consistent with the constitutional duties of the Crown.

[2] For the reasons outlined below, this judicial review is dismissed. The request by the Squamish Nation for an increase in its allocation of sockeye salmon was reasonably considered. DFO took into consideration the relevant legislation and policies, the Squamish Nation's asserted Aboriginal rights, and the competing demands for a limited resource.

I. Relevant Legislation and Policies

[3] The framework for the management of Aboriginal fishing is outlined in legislation and policy documents which DFO and the Minister of Fisheries and Oceans [the Minister] use to manage allocation requests.

[4] The Minister's fishery management powers are outlined in the *Fisheries Act* RSC 1985 c F-14 [the *Act*] and the *Department of Fisheries and Oceans Act*, RSC 1985 c F-15 [the *DFO Act*].

[5] In particular, s.4 of the *DFO Act* provides the Minister with broad powers as follows:

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

(*a*) sea coast and inland fisheries;	*a*) à la pêche côtière et à la pêche dans les eaux internes;
(*b*) fishing and recreational harbours;	*b*) aux ports de pêche et de plaisance;
(*c*) hydrography and marine sciences; and	*c*) à l'hydrographie et aux sciences de la mer;
(*d*) the coordination of the policies and programs of the Government of Canada respecting oceans.	*d*) à la coordination des plans et programmes du gouvernement fédéral touchant aux océans.
Idem	**Idem**
(2) The powers, duties and functions of the Minister also extend to and include such other matters, relating to oceans and over which Parliament has jurisdiction, as are by law assigned to the Minister.	**(2)** Les pouvoirs et fonctions du ministre s'étendent en outre aux domaines de compétence du Parlement liés aux océans et qui lui sont attribués de droit.

[6] Under the authority of section 4 of the *DFO Act* the Minister determines the FSC allocations and the total allowable catch quantities, referred to as "mandates." Mandates set the total allowable catch quantities for each Aboriginal group.

[7] Pursuant to s.43 of the *Act*, the *Aboriginal Communal Fishing Licence Regulations* [*ACFLR*], SOR/93-332 were implemented. The *ACFLR* provides a licencing mechanism for Aboriginal fisheries for FSC purposes through the grant of communal licences. Under s.5 of the *ACFLR*, the Minister can set conditions or restrictions on fishing through the communal licences. The quantity and type of fish caught can be agreed as between the Aboriginal group and DFO through Comprehensive Fishing Agreements [CFA], or unilaterally set by the Minister.

[8] Since the early 1990s, the Squamish Nation has entered into CFAs with DFO.

[9] With respect to the Aboriginal right to fish and its scope, the CFA contains the following language: "…the Parties are not seeking to determine the existence, nature or scope of Aboriginal or treaty rights, but rather are seeking to provide for the orderly management of the fisheries…".

[10] In addition to the *ACFLR*, DFO has a number of policies respecting Aboriginal fisheries.

[11] In 1992 DFO introduced the *Aboriginal Fisheries Strategy* [AFS] which outlines the general approach to licencing taking into consideration the Supreme Court's decision in *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*]. The AFS provides the policy framework for the setting of mandates, which form the basis for the licencing quantities under the CFAs and community licences.

[12] In 1993 the *Policy for the Management of Aboriginal Fishing* [the *Policy*] was introduced. This *Policy* was designed to implement the AFS and to reflect the law on Aboriginal fishing rights set out in *Sparrow*. The *Policy* notes that Aboriginal fishing for FSC purposes will only be restricted to achieve a valid conservation objective, to provide for sufficient food fish for other Aboriginal people, or to obtain some other pressing and substantial objective. The *Policy* also sets out how licences are issued and the allocation process.

[13] In 2006, DFO established the *First Nations Access to Fish for Food, Social and Ceremonial Purposes* [*Access Framework*], designed to formalize the decision making process for allocations beyond the mandate amount. The relevant parts of the *Access Framework* for this application include *Part 2: Pacific Regional Evaluation and Decision Framework (Working Draft)* [Part 2] and *Part 2A: Pacific Region Evaluation and Decision Framework—Request for Allocation Change (Working Draft)* [Part 2A]. Part 2A outlines the criteria which DFO considers when analyzing a claim for an allocation increase.

[14] The *Access Framework* criteria are stated in general terms and it is acknowledged that the information collected ("indicators") under the criteria will vary with each request. Part 2 states:

> …Because the relative important of the indicators will vary with each request, no weighting scheme was developed; teams should identify the indicators that are of greatest importance to the request, and consider how they should influence evaluation of the associated criterion.
>
> The criteria evaluation is not intended to be determined by a mathematical approach (e.g. adding/subtracting the plusses and minuses) – it needs to take into consideration the overall importance of the key indicators of relevance to the request.

[15] The *Access Framework* outlines the DFO process for considering an allocation increase in excess of the mandate limits, as follows:

a. Upon receiving a request from a First Nation, the Area representative engages other Area staff as appropriate and obtains as much information as possible from the First Nation, including supporting rationale, and documentation of current harvest levels. The Area representative provides the RHQ-AFS Manager with a copy of the request and supporting information.

b. The RHQ-AFS Manager contacts the Treaties and Aboriginal Policy Senior Negotiator, who then engages the appropriate Regional Negotiator.

c. The RHQ-AFS Manager provides the Area representative with summary data on current FSC allocations for the requesting First Nation, and neighboring First Nations, for comparison.

d. The Area representative takes the lead in completing the evaluation, and involves other DFO staff.

e. When a draft evaluation has been prepared, the area representative seeks feedback from other DFO staff, who use the criteria in the *Access Framework* to develop a final evaluation and recommendation. A decision note is prepared for the RDG.

f. Once the RDG approves the request, a communal licence is issued.

g. If the decision is for no allocation increase, staff send a letter to the First Nation, outlining the decision rationale.

II. Factual Background

[16] On July 5, 2011 the Squamish Nation requested an increase in its FSC allocation beyond the mandate amounts as follows:

> As you are aware, Canadian case law is very clear that when fishing for food, social and ceremonial purposes First Nations' have top priority over user groups, subject only to conservation purposes. Our membership has expressed serious concern respecting the quantity of fish which has been allocated to our Nation in recent years. We wish to discuss a substantial increase in this allocation, which will come closer to meeting the food, social and ceremonial needs of our membership. Based on our observation that the per capita allotment we have received in the past several years has been substantially less than that provided to

> other First Nations in our area, we anticipate that an increase in our allocation should be readily available.

[17] In December 2011, DFO officials and members of the Squamish Nation met to discuss this request.

[18] Following this meeting, the Squamish Nation limited its request to an increase for sockeye salmon from the allotment of 20,000 sockeye salmon pieces to 70,000 sockeye salmon pieces. On January 27, 2012 it wrote as follows to DFO:

> …the Squamish Nation is receiving substantially less FSC fish, on a per capita allotment, than other First Nations in our area. Our FSC allotment number has not increased since the original allocation in the 1990's. Meanwhile our membership population numbers and necessities for FSC fish have substantially increased. Currently, Squamish Nation members receive approximately five (5) FSC fish per person, which is not meeting our community's needs. Upon further review and analysis, we found that other First Nations in our area are receiving up to 48 FSC fish per person. Many Squamish Nation members rely on FSC fish to sustain them through the year and five fish per person does not meet their needs. You are likely aware that a large proportion of First Nations people in Canada live below the poverty line and Squamish Nation members fall within that category. Therefore, we are requesting that the FSC allocation for the Squamish Nation is increased to 20 fish per person, which based on today's membership numbers would be a total of 70,000 pieces of sockeye for the Squamish Nation under the CFA.

[19] There are a number of varieties of salmon which the Squamish Nation access in the Fraser River including sockeye, pink, coho, chinook, and chum. The Squamish Nation's request for an allotment increase related only to sockeye salmon.

[20] In the ensuing period, various meetings were held and letters were exchanged between the Squamish Nation and DFO officials. In these exchanges, the Squamish Nation reiterated its asserted Aboriginal right to sockeye salmon by noting the historical significance of sockeye salmon to its community.

[21] For its part, DFO outlined the information it required to process the FSC allocation increase request and explained the relevant policies and guidelines. In October 2013, DFO requested reliable catch information on all Squamish Nation fisheries for all species, and requested information on how the Squamish Nation was estimating the FSC requirements for its community.

[22] On December 18, 2013, the Squamish Nation responded with partial catch information and also provided historical information regarding its asserted claim to fish Fraser River sockeye salmon.

[23] On April 7, 2014, DFO notified the Squamish Nation that it was consulting the other Aboriginal groups who also have Fraser River sockeye FSC allocations.

III. Decision Under Review

[24] On May 8, 2014 the RDG, acting on behalf of the Minister, issued its decision in response to the Squamish Nation request for an increase in the sockeye salmon allocation. The decision states that it took into consideration “factors such as community FSC needs, recent harvest levels, your community’s preferences, the availability of species in your fishing area,

including the Squamish and Capilano Rivers and the marine environment, and the implications for other First Nations."

[25] DFO authorized an increase to the allocations for the 2014 licencing period and beyond by increasing the sockeye salmon numbers to 30,000 pieces from the previous 20,000 pieces. As well, increases were approved to the allocations for chum and pink salmon, while the allocations for chinook and coho remained unchanged. Squamish Nation access to crab and prawn remained unchanged.

[26] The decision notes a high demand for sockeye salmon and the fact that over 100 First Nations have licences to fish the Fraser River for sockeye salmon for FSC purposes. DFO also notes that it received numerous requests for increases in salmon allocations, with insufficient sockeye salmon available to fulfill even the current FSC allocations.

[27] The decision states that the goal was to balance "the Squamish interest in Fraser sockeye with FSC allocations of other groups, of which many only have access to Fraser salmon, and with consideration to overall harvest constraints." The increases in other fish opportunities in salmon allocated to the Squamish Nation were designed to contribute to this balance.

IV. Preliminary Issue: Motions to Strike Evidence

[28] In support of their Application, the Squamish Nation filed the following Affidavits:

- Affidavit of Christopher Lewis sworn to [or affirmed] on January 25, 2017;
- Affidavit of Raquel Handel sworn to [or affirmed] on January 25, 2017;

[29] The Respondent filed the following Affidavits:

- Affidavit of Jennifer Nener affirmed on March 30, 2017;
- Affidavit of Rebecca Liang sworn to on March 30, 2017;

[30] Both the Squamish Nation and the Respondent filed motions seeking to strike various paragraphs and related exhibits of the Affidavits of the other party on the grounds that the impugned paragraphs and exhibits contain hearsay or information that was not before the decision-maker.

[31] As the certified tribunal record is sparse, it would seem, at first glance that the request to strike various paragraphs and exhibits is reasonable as much of the information filed by the parties on this judicial review was apparently not before the decision-maker.

[32] The law relevant to these motions is set out in *Association of Universities and Colleges of Canada v Canadian Copyright Licencing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*]. There, the Federal Court of Appeal noted that the evidentiary record before the court on judicial review must be the same as the record that was before the individual decision-maker, subject to certain exceptions.

[33] The exception relevant to both motions here is the "general background" exception: "where the affidavit provides general background information that might assist in understanding the issues relevant to the judicial review" (*Access Copyright*, at para 20).

[34] Notwithstanding the limited record here, I am of the view that this evidence is admissible under the "general background" exception. Considering the relationship between these parties, the complex nature of fisheries management, and the constitutional rights asserted by the Squamish Nation, in my view this information provided by both parties is appropriate to consider within that context.

[35] However, given that much of this information is not directly relevant to the central issues between the parties on this judicial review, it has accordingly been assigned little weight.

V. Issues

[36] The Squamish Nation raises various issues which I have framed as follows:

A. What is the appropriate standard of review?

B. Was the duty to consult breached?

C. Is the decision reasonable?

D. Was there a breach of procedural fairness?

VI. Analysis

A. What is the appropriate standard of review?

[37] The appropriate standard of review needs to be considered in relation to the various issues raised by the Squamish Nation regarding the impugned decision, namely: (i) the duty to consult (ii) the reasonableness of the RDG's exercise of discretion and (iii) the fairness of the process.

(1) The Duty to Consult

[38] In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 61-63 [*Haida*], the Supreme Court of Canada held that the determination of the existence and extent of the duty to consult or accommodate is a question of law generally reviewable on a correctness standard, though, depending upon the circumstances, some deference may be appropriate to the decision-maker's assessment of the facts (see *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 48 [*Beckman*]; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212 at para 34 [*Ahousaht*]).

[39] Whether the duty to consult exists on the facts depends on whether it is triggered. Here whether the duty to consult was triggered is reviewable on a correctness standard (*Ahousaht*, at paras 34-35).

[40] In *Haida* at paras 61-62, the Supreme Court confirmed that if the duty to consult is triggered, whether DFO's consultation process met the duty is reviewed on a reasonableness standard.

(2) Exercise of Discretion

[41] On this issue, the parties agree that in reviewing the decision the standard of review is reasonableness. The parties disagree, however, on what reasonableness requires in this case.

[42] Where precedent adequately settles the standard of review, there is no need to conduct a standard of review analysis (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 57 [*Dunsmuir*]).

[43] Here, the courts have adequately settled on a standard of review for issues of discretion. In *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 at 5-6 [*Maple Lodge*], the Supreme Court held that a court can only interfere with the substance of the discretionary decision if it is made in bad-faith, if it does not conform with the principles of natural justice, or if it relies on considerations which are irrelevant or extraneous.

[44] As a matter of law, the *Maple Lodge* factors are grandfathered into the reasonableness standard defined in *Dunsmuir*, such that any breach of those factors will render a decision unreasonable in this context (*Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 18-24; *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130, at paras 31-35 [*Malcolm FCA*].

[45] The process of issuing licences is distinct from the legislation and policies which provide the Minister the authority to set FSC allocations (*Association des crevettiers acadiens du Golfe inc v Canada (Attorney General)*, 2011 FC 305 at para 29). Together, the policies and licencing process create a specialized and complex field of regulation (*Carpenter Fishing Corp v Canada*, [1998] 2 FC 548 (CA) [*Carpenter*]; *Malcolm v Canada (Fisheries and Oceans)*, 2013 FC 363 at para 49 [*Malcolm FC*] aff'd *Malcolm FCA*. As a result, in *Carpenter*, the Federal Court of Appeal noted:

> The imposition of a quota policy (as opposed to the granting of a specific licence) is a discretionary decision in the nature of policy

> or legislative action. … These discretionary policy guidelines are not subject to judicial review, save according to the three exceptions set out in *Maple Lodge Farms*: bad faith, non-conformity with the principles of natural justice where the application is required by statute and reliance placed upon considerations that are irrelevant or extraneous to the statutory purpose.

[46] Accordingly, courts have applied a high standard of deference to discretionary decisions such as the decision at issue in this case. The decision to increase allocations is a matter of fishing policy, as described in *Carpenter*. Here, DFO must take into account a number of competing factors in determining increases, including: the interests of other Aboriginal groups; the legitimate legislative purpose of conservation; and the community needs of the Squamish Nation.

[47] The decision to increase an allocation, while part of the licencing process, also involves factors which affect other First Nations. This is therefore a policy-based decision based on the broad Ministerial regulatory authority in s.4 of the *DFO Act*, rather than a simple licencing decision.

[48] As such, this Court will apply a highly deferential reasonableness standard to the exercise of the Ministerial discretion in this case (*Malcolm FCA,* at para 35; *Mainville v Canada (Attorney General)*, 2009 FCA 196 [*Mainville*]; *Canada (Attorney General) v Arsenault*, 2009 FCA 300 at paras 38-42).

(3) Procedural Fairness

[49] Courts traditionally apply the correctness standard to matters of procedural fairness (*Mission Institution v Khela*, 2014 SCC 24 at para 79).

[50] The Federal Court of Appeal has recently noted that it is unclear which standard applies to procedural fairness (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 13). In other words, it is not "settled law" that the correctness standard applies to issues of procedural fairness.

[51] However, for the reasons outlined below, I conclude there has been no breach of procedural fairness in this case, whether assessed under a correctness or reasonableness standard of review.

B. Was the duty to consult breached?

(1) Must DFO consider Aboriginal rights?

[52] The Squamish Nation argues that DFO failed to consider its asserted but unproven Aboriginal right to sockeye salmon. Relying on *Haida*, it argues that the nature of their asserted right (to sockeye salmon), is an essential consideration to DFO fulfilling its duty to consult. It argues that DFO was required to conduct a "strength of claim" analysis and accommodate accordingly. The Squamish Nation argues that DFO failed on both its duties to consult and accommodate.

[53] DFO argues that in the context of CFAs, it does not determine the existence or scope of Aboriginal rights. This is reinforced by the language used in the CFAs and communal licences, which expressly state that they do not define the existence of Aboriginal rights. DFO further argues that judicial review proceedings are not the appropriate forum for the consideration of the Squamish Nation's Aboriginal rights claims.

[54] Judicial review proceedings cannot provide a forum for the proof of Aboriginal rights. Such claims requires extensive evidence in order to meet specific legal tests addressed in the context of a full trial: *R v Van Der Peet*, [1996] 2 SCR 507; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 109 and 143; *Mitchell v M.N.R.*, 2001 SCC 33 at para 26; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 26; *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15 at paras 74 and 78 [*Prophet River*].

[55] Notwithstanding this however, *all* administrative decision-makers must act consistently with the law, and must exercise their discretion in accordance with the Constitution and the rule of law (*Roncarelli v Duplessis*, [1959] SCR 121; *Baker v Canada*, [1999] 2 SCR 817 at para 53).

[56] In ensuring compliance with the Constitution in the Aboriginal rights context, judicial review proceedings can take into account "the constitutional dimension of the rights asserted by the First Nation" because "administrative law is flexible enough to give full weight to the constitutional interests" of Aboriginal peoples (*Beckman*, at para 47).

[57] Here therefore DFO, as the administrative decision-maker, must abide by constitutional limits when they are at issue. In the context of Aboriginal rights decision-making, the Supreme Court in *Beckman* confirmed that these limits are imposed by the duty to consult:

> [45]…However, as Lamer C.J. observed in R. v. Van der Peet, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, "aboriginal rights exist within the general legal system of Canada" (para. 49). Administrative decision makers regularly have to confine their decisions within constitutional limits: Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; Little Sisters Book and Art Emporium v. Canada (Minister of Justice), 2000 SCC 69 (CanLII), [2000] 2 S.C.R. 1120; Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3; and Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 (CanLII), [2006] 1 S.C.R. 256. *In this case, the constitutional limits include the honour of the Crown and its supporting doctrine of the duty to consult* (emphasis added).

[58] This was most recently confirmed by the Supreme Court in *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 24 [*Clyde River*], where the Court noted that judicial review can provide a framework for assessing the duty to consult:

> …any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review.

[59] Similarly, in *Prophet River* at para 73, the Federal Court of Appeal confirmed that the duty to consult is the doctrine which imposes limits on administrative decision-makers in the context of considering asserted Aboriginal rights. At the same time, the Court also confirmed that judicial review proceedings cannot provide a forum for the determination of substantive Aboriginal rights.

[60] This follows because the duty to consult deals with unproven assertions of rights. It is a precursor to the full proof of Aboriginal rights, which is left for trial (*Haida*, at paras 31-38).

[61] However, the duty to consult does not arise in every context. Whether the duty to consult actually imposes constitutional limits depends on whether it exists, and is triggered, on the facts (*Ahousaht*, at paras 34-35).

[62] Therefore, in these circumstances, if the duty to consult was triggered, DFO must abide by the constitutional limits imposed by the duty, and the Minister's actions in this respect are reviewable in the context of judicial review proceedings.

[63] However, abiding by constitutional limits does not require a decision-maker to pronounce upon the existence of Aboriginal rights. Nor does the duty to consult require decision-makers to *determine* the existence of claimed rights. Rather, it requires decision-makers to *consider* the asserted rights, pending a fulsome determination of those rights in another forum (*Haida*, at paras 25 and 27).

[64] Accordingly there is a distinction between considering rights and deciding rights. Administrative decision-makers cannot *determine* the existence of Aboriginal rights, but they can *consider* asserted rights if the duty to consult is triggered. Although the Respondent argues that DFO "does not make decisions about rights", as a matter of constitutional law, if the duty to consult is triggered, DFO would be bound by that duty.

[65] In this case, if the duty to consult arises, I am satisfied that DFO had an obligation to consider the good-faith assertion of rights by the Squamish Nation.

(2) Was the duty to consult triggered?

[66] The question of whether the duty to consult is triggered is assessed on the facts. In *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31 [*Rio Tinto*], the Supreme Court outlined the following factors to identify when the duty is triggered:

a. the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right;
b. there is contemplated Crown conduct; and
c. there is potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

[67] Here, the DFO had knowledge of the Squamish Nation's asserted rights, and there was conduct attributable to the Crown in the form of issuing licences. Therefore, I am satisfied that the Squamish Nation can establish the first two *Rio Tinto* factors.

[68] The challenge is with the third factor of the *Rio Tinto* test. In considering the "adverse impact" factor in *Rio Tinto* at para 46, the Supreme Court notes that speculative impacts are not sufficient, and that there must be a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending credible Aboriginal claims or rights.

[69] Further, in considering the issue of adverse impact, courts have concluded that there must be some evidence to support the adverse impact on a "credible claim" (*Brokenhead Ojibway First Nation v Canada (Attorney General),* 2008 FC 735 at para 34).

[70] Applying this law, I am not satisfied that the Squamish Nation has established, with evidence of a credible claim, that the DFO conduct will "adversely affect" the *asserted* right to fish (specifically, for sockeye salmon) in the Fraser River for FSC purposes. In fact, the Squamish Nation exercises this asserted right to fish for sockeye salmon by virtue of the FSC allocation for this species. It is therefore difficult for the Squamish Nation to argue that its asserted right is adversely impacted by the decision under review.

[71] Here, the Squamish Nation has characterized its asserted claim as a right to *fish the Fraser River for sockeye salmon for FSC purposes.* It is not a claim of Aboriginal right respecting 70,000+ sockeye salmon. In fact, in *R. v Sappier;R. v Gray,* 2006 SCC 54 at para 21[*Sappier*], the Supreme Court held that Aboriginal rights are "…not generally founded upon the importance of a particular resource" such as a particular quantity of sockeye salmon in this case.

[72] Accordingly, the Squamish Nation had to present evidence to demonstrate how not being able to fish for 70,000 sockeye salmon pieces versus the 30,000 sockeye salmon pieces (which were allocated) has an adverse impact on its asserted claim to fish for sockeye salmon for FSC purposes.

[73] It failed to do so. Beyond providing evidence which demonstrated the importance of sockeye salmon to their culture, the Squamish Nation did not establish the causal link between the allocation and how that allocation would adversely affect the Squamish Nation's ability to fish sockeye for FSC purposes on the Fraser River.

[74] The Squamish Nation further failed to show, with evidence, how the existing FSC allocation is insufficient for FSC purposes, thereby impacting the asserted right. While the Squamish Nation relies upon a letter which states: "As members receive 5 Sockeye or less, there is not enough Sockeye to be stored for our community's social and ceremonial purposes," no evidence was provided as to why 5 sockeye was not enough for social and ceremonial reasons. Beyond a stated preference for sockeye salmon, the Squamish Nation did not address why other fish cannot satisfy the food needs of the community.

[75] The Squamish Nation had the opportunity to provide evidence on the link between its asserted right and the impact of the allocation on that right. In its letter of October 16, 2013, DFO asked the Squamish Nation for "information pertaining to the method by which the Squamish Nation were estimating the [FSC] requirements for their community for both salmon and non-salmon species." This information would be necessary to demonstrate that the DFO allocations were adversely affecting the general, asserted Aboriginal right of the Squamish Nation to fish the Fraser River for sockeye salmon.

[76] While the duty to consult can be triggered at a low threshold (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34), the authorities mandate

that the asserted claim must be backed by evidence to trigger the duty to consult. Given the lack of evidence of an adverse impact on the Squamish Nation's asserted right with the FSC allocation, I conclude that the duty to consult was not triggered in this case.

[77] Therefore, DFO was not obligated to consider the issue of the asserted Aboriginal rights in the broader duty to consult paradigm and the RDG decision respected constitutional limits on its discretion.

[78] Nonetheless, if the duty to consult was triggered in this case, I am satisfied, based upon the facts of this case, that the duty was at the low end of the spectrum (*Gitxaala Nation v Canada*, 2016 FCA 187 at paras 173-174 [*Gitxaala*]). The extent or content of the duty to consult is fact specific, and the depth of consultation required is proportionate to the strength of the claim asserted and the potential adverse impact (*Clyde River*, at para 20; *Gitxaala*, at para 173). As noted above, the Squamish Nation has failed to offer sufficient evidence of adverse impact on its asserted right. In other words, the Squamish Nation failed to show a strong link between the allocation and its asserted right to fish the Fraser River for sockeye salmon.

[79] I am satisfied on the evidence that any duty to consult was met in the circumstances as the Respondent was required "only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice" (*Gitxaala* at para 174; *Haida*, at para 44). That threshold is satisfied here.

[80] In reaching this conclusion, I rely in particular upon the evidence of Ms. Nener in her Affidavit at paragraphs 30 through 81 where she outlines the consultation which took place between the parties here, summarized as follows:

- A meeting on December 13, 2011, where DFO asked Squamish Nation for information about their allocation request;
- The letters of January 27 and April 18, 2012, in which the Squamish Nation reiterated its requests for expanded FSC fishing opportunities;
- DFO's letter of April 27, 2012, in which it outlined the information and factors it would take into consideration in the allocation request;
- DFO's letter of January 25, 2013, in which it reiterated the competing considerations involved in granting the Squamish Nation's request: the need to consider the various policies involved and the overlapping Aboriginal fisheries claims and issues in the area;
- DFO's letter of May 17, 2013, in which it acknowledged information provided to it by the Squamish Nation in the consultation process;
- DFO's letter of October 16, 2013, in which it made clear that in order to process the Squamish Nation's request, it would require reliable catch information from all Squamish Nation fisheries and species, plans to accommodate any FSC allocation change request, and information pertaining to the method by which the Squamish Nation were estimating the FSC requirements for their community;
- The Squamish Nation's December 18, 2013 letter, in which the Squamish Nation provided partial catch information and set out the historical bases of its claim to fish the Fraser River; and

- DFO's letter of April 7, 2014, in which DFO responded to concerns outlined by Squamish Nation regarding the processing of its allocation increase request, and informed the Squamish Nation that it was beginning its consultation with other First Nations who have Fraser sockeye FSC allocations.

[81] These communications demonstrate that the Squamish Nation was consulted and had various opportunities to provide evidence to substantiate its claim. It also demonstrates that DFO informed the Squamish Nation of the information it required to consider its request. I am also satisfied that DFO kept the Squamish Nation informed as the process unfolded.

[82] Accordingly, I conclude that if the duty to consult was triggered in this case, DFO's consultation and information gathering satisfied their obligation.

[83] I now turn to a consideration of the reasonableness of the decision under review.

C. Is the decision reasonable?

[84] The Squamish Nation raises three principal arguments regarding the reasonableness of the decision.

[85] First, it argues that the RDG failed to consider a relevant factor in the *Access Framework* - namely, parity and comparison with other Aboriginal groups. Throughout the process, the Squamish Nation made repeated references to the comparison of its FSC allocations to other Aboriginal groups. According to the Squamish Nation, the RDG decision fails to explain why

other Aboriginal groups with a smaller population have higher allocations for sockeye salmon. It argues that DFO failed to apply the parity factor referenced in the *Access Framework*.

[86] Second, the Squamish Nation argues that the RDG failed to consider the historical and ceremonial preference of the Squamish Nation for sockeye salmon. This is related to the Squamish Nation's asserted right for sockeye salmon, analyzed above.

[87] Finally, the Squamish Nation argues that based on its population, the FSC allocation of sockeye salmon cannot meet its community's food needs.

[88] The reasonableness of the RDG's decision will be analyzed against these arguments.

(1) Parity and Comparison

[89] In this case, parity and comparison with other Aboriginal groups was considered by the RDG. On the highly deferential reasonableness review mandated by the authorities, there is no basis for the Court to intervene.

[90] The relevant underlying policy is the *Access Framework*, which outlines the Minister's discretion in authorizing an allocation increase. The 2006 version of the worksheets under the *Access Framework* contain, as the Squamish Nation points out, criteria and indicators relating to parity and comparison with other groups in the area on a per capita basis.

[91] During the timeframe when the Squamish Nation's request was being considered, the DFO criteria and indicators were being reconsidered. This is noted in the Affidavit of Jennifer Nener at para 108. Part 2 of the *Access Framework* notes that the information for each relevant criterion will vary with the circumstances and with the particular request being considered.

[92] The criteria involved in the consideration of this decision included:

- First Nations' community needs: food needs, harvest information, current allocations for all species, local species availability;
- Conservation concerns;
- Other valid legislative objectives: health, safety, other First Nations potential or established rights, potential adverse impacts to other First Nations' access; and
- Manageability: fisheries monitoring, management plans, etc.

[93] Here, parity with other Aboriginal groups on a per capita basis was not *expressly* considered in the decision. However, the decision and the record demonstrate that comparison was considered in the analysis. DFO notes that because demand for sockeye is high, and supply was low "DFO has worked to arrive at a decision that balances the Squamish interest in Fraser sockeye with FSC allocations of other groups of which many only have access to Fraser salmon, and with consideration to overall harvest constraints." Accordingly, the expressed community needs of the Squamish Nation, and the needs of other Aboriginal groups, were factored into the decision to grant a 10,000 piece increase in sockeye salmon to the Squamish Nation.

[94] This analysis is reasonable when assessed against the record (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-15). The record and decision demonstrate that sockeye salmon is a sought-after resource, with over 100 Aboriginal groups receiving sockeye allocations. The Squamish Nation's allocation is both higher and lower than some of these other groups. Moreover, the RDG also had to take into account some Aboriginal groups who have limited access to any fish beyond sockeye. Here, the Squamish Nation has access to a number of different fish species.

[95] The Squamish Nation argues that the RDG did not analyze how the competing claims of others impacts its FSC allocation. However, fundamentally the RDG made a policy decision, which must take into account a number of competing factors within the complex nature of fisheries management. In this regard, the RDG exercised her discretion reasonably by properly taking account of the competing factors, including the claims of other Aboriginal groups (*Doug Kimoto v Canada (Attorney General)*, 2011 FCA 291 at para 13).

[96] It is important to note that nowhere in the statutory or policy framework is a per capita, numerical, or comparative analysis mandated, as the Squamish Nation suggests. At most, it is a consideration. But it is not the only consideration, or the most important consideration. The framework which guides the Minister's discretion indicates that the criteria and indicators for each allocation increase decision will be fluid with the circumstances.

[97] This is consistent with the wide scope of the Minister's discretion conferred by the *DFO Act*. The Minister cannot exercise his discretion by only taking account of a per capita analysis,

even if such an analysis was mandated by the relevant policies. The Minister cannot fetter his discretion afforded by the statutory framework in favour of criteria which are designed to guide, but not govern, the Minister's discretion (*Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 at para 62). The Minister must take into account all relevant criteria which arise on the facts of a particular request.

[98] In doing so, the RDG, and by extension, the Minister, is owed a great deal of deference in managing the competing issues in fisheries management. In effect, the Squamish Nation is asking this Court to amend the policy for allocation increases to focus on a per capita analysis, or to "to exercise, but in a different way, the discretion exercised by the Minister in formulating his fishing plan and issuing fishing licences" (*Mainville* at para 4). This is not the Court's role.

[99] It was a reasonable exercise of the Minister's discretion, in relation to the relevant legislation and policies, to consider not just one type of fish on a per capita basis, but all types of fish among all Aboriginal groups, in addition to other factors.

(2) Preferences

[100] The Squamish Nation argues that its right to access other species of fish or shellfish is irrelevant because for ceremonial, food, and historic reasons, sockeye is its preferred species of salmon.

[101] The Squamish Nation relies upon *R v Jack*, [1995] BCJ No 2632 (BCCA) [*Jack*] to support its position that the Minister was bound to give effect to their preferences for a certain

quantity of sockeye salmon. In *Jack*, the claim was that members of certain Aboriginal groups preferred chinook salmon from the Leiner River, and that an opportunity to harvest other species of salmon did not satisfy that preference. However, *Jack* concerned the prohibition of *any fishing* for chinook in a specific place (*Jack*, at para 65). A prohibition against fishing for sockeye salmon is not the issue for the Squamish Nation. The issue it raises is the *quantity* of sockeye salmon it can fish on the Fraser River.

[102] The Squamish Nation has failed to demonstrate how FSC purposes could not be served by the existing allocations. Therefore the Squamish Nation's preference does not impose a mandate on the government to fulfill that preference by allocating a particular quantity of sockeye salmon.

[103] Moreover, DFO reasonably considered the Squamish Nation preference for sockeye salmon. However, DFO also had to consider the fact that "nearly every single First Nation who has access [to] Fraser sockeye has expressed to DFO that they have a preference for Fraser sockeye over other salmon species." This was a concern for DFO and the balance in the decision between the preferences of all Aboriginal groups does not render the decision unreasonable.

(3) Community Needs

[104] The Squamish Nation also claims that there is not enough sockeye salmon available for the food needs of the community.

[105] These arguments are based upon the Squamish Nation's position that there should be a per capita allocation. However, as noted above, a per capita allocation is not mandated by the relevant policy or statutory framework.

[106] DFO states that the Squamish Nation did not provide a "community food needs study." This may have been relevant information to the issue of whether the community food needs were being met by all fishing activities. No evidence was put forward on this issue.

[107] The RDG considered community needs, and whether the Squamish Nation had access to a reasonable number of FSC opportunities. To that end, the DFO increased the Squamish Nation's sockeye allocation to 30,000, and increased other FSC opportunities. This demonstrates that the Respondent took the needs of the Squamish Nation into consideration in reaching its allocation decision.

[108] While the Squamish Nation in this case asked this Court to focus only on the sockeye salmon allocation, that focus is too narrow. DFO in coming to the decision in this matter was balancing the Squamish Nation's asserted rights and the allocation increase request against competing demands from other Aboriginal groups for the same species of fish and shellfish. The Respondent is required to take into account the interests of other groups with FSC rights, and also conservation concerns. It was not unreasonable for the Respondent to do so.

D. Was there a breach of procedural fairness?

[109] The Squamish Nation argues that the decision process breached its procedural fairness rights. It argues that the RDG failed to consider relevant information regarding its asserted rights, and failed to follow its own policy regarding allocation requests. These issues were addressed above where I concluded that the RDG considered the necessary information and rendered a reasonable decision within constitutional limits. No procedural fairness issues arise on these arguments.

[110] The other alleged breach of procedural fairness is the failure of DFO to notify the Squamish Nation of its consultations with other Aboriginal groups.

[111] Procedural fairness arguments must be assessed in the context in which they arise. Here, given the policy-based decision made by DFO, a rigorous standard of natural justice is not applicable (*Jada Fishing Co. Ltd. v Canada (Minister of Fisheries and Oceans)*, 2002 FCA 103 at para 16 [*Jada*]).

[112] Because a lower standard of procedural fairness applies here, the Squamish Nation has the burden to demonstrate prejudice or possibility of prejudice (*Jada*, at paras 16-17).

[113] Here, the Squamish Nation has not provided evidence to demonstrate that it was prejudiced by the consultation process undertaken by DFO. It knew its request could have implications for other Aboriginal groups (*Jada*, at para 17; *Sattar v Canada (Transport)*, 2016

FC 469 at para 32). In fact, the Squamish Nation itself indicated that it would consult other Aboriginal groups directly about its request. While there is no evidence on the record about the Squamish Nation's efforts in that regard, broader consultations regarding competing demands for a limited resource are both reasonable and were expected by the Squamish Nation. The fact that details of this consultation were not disclosed as part of the decision was not a breach of procedural fairness.

[114] Overall, I conclude that there were no breaches of procedural fairness in this process.

VII. Conclusion and Disposition

[115] I dismiss the application for judicial review. The RDG made a reasonable decision in a procedurally fair manner which respected any constitutional limits on her discretion.

[116] The Respondent shall have its costs in accordance with Column III of the Table to Tariff B of the *Federal Courts Rules*.

JUDGMENT in T-1399-14

THIS COURT'S JUDGMENT is that the judicial review application is dismissed with costs to the Respondent in accordance with Column III of the Table to Tariff B of the *Federal Courts Rules*.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1399-14
STYLE OF CAUSE:	THE SQUAMISH INDIAN BAND, AND SYETÁXTN, CHRISTOPHER LEWIS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SQUAMISH INDIAN BAND v MINISTER OF FISHERIES AND OCEANS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 18, 2017, OCTOBER 19, 2017
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	DECEMBER 21, 2017

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