Federal Court  Cour fédérale

Date: 20220427

Docket: T-1156-21

Citation: 2022 FC 621

St. John's, Newfoundland and Labrador, April 27, 2022

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SALTSTREAM ENGINEERING LTD.

Applicant

and

THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD

Respondent

ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY AND WATERSHED WATCH SALON SOCIETY

Interveners

REASONS AND JUDGMENT

I. INTRODUCTION

[1] By a Notice of Application issued on July 22, 2021, amended with leave pursuant to the order of Justice Aylen on September 7, 2021, Saltstream Engineering Ltd. ("Saltstream") seeks

judicial review of the decision (the "Decision") made on June 29, 2021 by the Minister of Fisheries, Oceans and the Canadian Coast Guard (the "Minister").

[2] In that Decision, the Minister refused Saltstream's application for a licence under section 56 of the *Fishery (General) Regulations*, S.O.R./93-53 (the "Regulations"), to transfer 10,000 juvenile Chinook salmon from its hatchery facility to the adjacent salt water pens. Saltstream's subsidiary, 622335 BC Ltd., holds an aquaculture licence for these salt water pens.

[3] Saltstream seeks the following relief:

1. A declaration that the Decision is invalid;
2. An order of *certiorari* quashing and setting aside the Decision;
3. An order of *mandamus* requiring the issuance of a s. 56 transfer licence to Saltstream Engineering within two business days;
4. Costs of the application; and
5. Such further and other relief as counsel may advise and this Court may deem appropriate and just.

[4] By Order dated October 4, 2021, Alexander Morton, David Suzuki Foundation, Georgia Strait Alliance, Living Oceans Society and Watershed Watch Salmon Society (collectively, the "Conservation Coalition") were granted leave to intervene in the application for Judicial Review.

II. BACKGROUND

A. *The Parties*

[5] Saltstream operates a salmon fish farm in the Discovery Islands, which are a group of islands lying between East coast of Vancouver Island and mainland British Columbia.

[6] Saltstream farms Chinook salmon. It has one salmon farming facility and one fish hatchery located in the Discovery Islands, at Doctor Bay and Doctor Bay Farm, respectively.

[7] The Minister is responsible for the management and control of the fisheries in Canada, including the conservation and protection of fish and fish habitat.

B. *Saltstream's Fish Farming Process*

[8] The evidence shows that the Province of British Columbia grants a licence for the area of the fish farms, pursuant to the *Land Act*, R.S.B.C. 1996, c. 245. The Minister grants the licence for operation of the fish farms pursuant to section 3 of the *Pacific Aquaculture Regulations*, S.O.R./2010-270, enacted pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14 (the "Act").

[9] The paragraphs below generally describe the fish farming process followed by Saltstream.

[10] The fish farming process begins with the collection of eggs from “broodstock”, that is salmon selected to breed future generations of fish. The eggs are transferred to hatcheries where they are kept in incubators until they hatch.

[11] Recently hatched eggs are called “fry”. Fry are transferred to freshwater tanks while they grow into small fish. The small fish are called “parr”.

[12] The parr remain in the hatcheries for twelve to fourteen months when the “smoltification” begins. Smoltification is the process by which parr go through the physical and physiological changes required to allow them to transition to salt water. Once the transition is complete, the fish are called “smolts”.

[13] The smolts are transferred from the fresh water hatcheries into salt water pens in the waters of Doctor Bay. This must happen within one week of smoltification. This transfer requires a section 56 transfer licence.

[14] The smolts stay in the salt water pen for eighteen to twenty-four months.

[15] After this eighteen to twenty-four month period, the smolts will have reached optimal market size at which point they are ready for harvest, and transported from the fish farm.

C. *Context*

[16] In a news release issued on December 17, 2020 (the "News Release"), the Minister announced her intention to:

> - phase out existing salmon farming facilities in the Discovery Islands, with the upcoming 18-month period being the last time this area is licensed;
>
> - stipulate that no new fish of any size may be introduced into the Discovery Islands facilities during this time; and
>
> - mandate that all farms be free of fish by June 30, 2022, but that existing fish at the sites can complete their growth-cycle and be harvested.

[17] Saltstream, Mowi Canada West Inc. ("Mowi"), Cermaq Canada Ltd. ("Cermaq") and Grieg Seafood B.C. Ltd. ("Grieg") all have fish farming operations in the Discovery Islands. They applied, through a consolidated proceeding in cause number T-129-21 (the "Consolidated Proceeding"), for Judicial Review of the News Release.

[18] In April 2021, in the course of the above application for Judicial Review, Saltstream sought and obtained injunctive relief enjoining the second component of the News Release that relates to ceasing the transfer of fish into licensed aquaculture facilities in the Discovery Islands; see *Mowi Canada West Inc., Cermaq Canada Ltd., Grieg Seafood B.C. Ltd., and 622335 British Columbia Ltd. v. The Minister of Fisheries, Oceans and the Canadian Coast Guard*, 2021 FC 293 ("*Mowi*").

[19] By letter dated April 27, 2021, the Department of Fisheries and Oceans ("DFO") informed Saltstream of a new process for section 56 transfer licence applications. This new process provides for consultations with First Nations, and a subsequent opportunity for the party seeking the transfer licence to respond to any concerns raised.

[20] Saltstream submitted an application for a section 56 transfer licence on May 3, 2021. DFO consulted with the Homalco First Nation and Tla'amin Nation (the "Sister Nations"). Summaries of the consultations and of Saltstream's response were provided to the Minister in a Memorandum dated June 29, 2021 (the "Memorandum").

[21] The Memorandum concluded with a recommendation that the Minister grant Saltstream's transfer licence application, subject to an amendment to which it had already agreed.

[22] The Minister rejected that recommendation and denied the application, through her Decision.

III. THE CERTIFIED TRIBUNAL RECORD

[23] The Minister's Decision was based upon her review of the documents contained in the Certified Tribunal Record (the "CTR") that was produced pursuant to Rule 318(1)(a) of the *Federal Courts Rules*, S.O.R./98-106 (the "Rules").

[24] The CTR was prepared by Ms. Cindy Scale. The CTR includes the following certificate that was signed on August 5, 2021:

> I, Cindy Scale, of the office of the Deputy Minister of Fisheries and Oceans Canada, Department of Fisheries and Oceans Canada, of Ottawa, in the Province of Ontario, hereby certify that the documents attached to this certificate are true copies of the documents that were before the Honourable Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard when she made her decision in respect of Saltstream Engineering Ltd.'s application dated May 3, 2021 to transfer live fish from their Doctor Bay hatchery to their Doctor Bay facility located in the Discovery Islands region of British Columbia.

[25] The CTR, 50 pages in length, consists of the following documents:

- Memorandum for the Minister – Request to Transfer Live Farmed Salmon into the Discovery Islands from Saltstream Engineering, dated June 29, 2021;
- Saltstream Engineering Ltd.'s Application for Introduction or Transfer of Salmon to Marine Finfish Aquaculture Facilities, dated May 3, 2021;
- BC Aquaculture Regulatory Program, Assessment of the Proposed Transfer of Live Fish into the Marine Environment or Between Marine Sites under the FGR s. 56;
- Memorandum for the Minister – Consultation Approach for Requests to Transfer Marine Finfish into the Discovery Islands, dated April 23, 2021;
- Summary of consultations and other perspectives;
- DFO Analysis of Submissions;
- Draft letter from Hon. Minister Bernadette Jordan to Robert W. Smeal, Saltstream Engineering Ltd. (unsigned); and
- Letter from Hon. Minister Bernadette Jordan to Robert W. Smeal, Saltstream Engineering Ltd. (signed), dated June 29, 2021.

IV. THE EVIDENCE

[26] The facts and details below are taken from the CTR and the affidavits filed by the parties.

A. *The Affidavits*

[27] Saltstream filed three affidavits as follows:

- Mr. Robert Smeal, affirmed on March 15, 2021;
- Mr. Robert Smeal, affirmed on August 11, 2021; and
- Ms. Jamilla Ng, affirmed on August 18, 2021.

[28] The Minister filed two affidavits as follows:

- Ms. Tracey Sandgathe, affirmed on September 9, 2021; and
- Ms. Tracey Sandgathe, affirmed on September 22, 2022.

[29] The Conservation Coalition did not file any affidavits in this proceeding. For the purposes of its motion to intervene, it relied on the following affidavit filed by the Minister in this proceeding:

- Ms. Tracey Sandgathe, affirmed on September 9, 2021.

B. *The Deponents*

[30] Mr. Smeal is the President, Secretary and sole Director of 622335 British Columbia Ltd. In his first affidavit, he set out the history of the establishment of the salmon fish farm at Doctor

Bay, located in the Discovery Islands. He also reviewed the history of his company's relationships with surrounding First Nation communities.

[31] Mr. Smeal gave a detailed description of the company's fish farming operation, which deals only with the production of Chinook salmon. He described the difference between Chinook and Atlantic salmon. He explained that the Doctor Bay site has been disease-free and sea lice free since its inception.

[32] Mr. Smeal also described his experience during the consultation process and expressed his opinion that the process was insufficient. He addressed the impact of the Decision upon his company, as well as upon the fish currently in the production cycle.

[33] In his second affidavit, Mr. Smeal explained that Saltstream holds a licence for the Doctor Bay Farm hatchery, which constitutes the entirety of Saltstream's aquaculture business. Mr. Smeal described how he lives at the Doctor Bay Farm.

[34] Mr. Smeal explained that a delay in hearing the judicial review would be harmful to Saltstream by way of uncertainty for his personal income and housing, as well as financial losses. Mr. Smeal described how the timing of the issuance of the decision in the judicial review will affect the fish farming operation.

[35] Ms. Ng is a legal assistant with the law firm representing Saltstream. Ms. Ng attached exhibits from the affidavits of Ms. Sandgathe and Mr. Foulds that were filed in the Consolidated Proceeding.

[36] Ms. Sandgathe is the Acting Regional Director of Ecosystem Management Branch with the DFO. Ms. Sandgathe was previously the Director of the Aquaculture Management Division with DFO. Ms. Sandgathe is responsible for the regulation of the aquaculture sector in British Columbia.

[37] In her first affidavit, Ms. Sandgathe described the licencing process for transferring live fish from one aquaculture facility to another. She explained that transfer applications are initially reviewed by the BC Introductions and Transfers Committee ("BC ITC"), following which a recommendation is made and sent to the Minister, or her delegate, to decide whether the licence transfer should be issued. Ms. Sandgathe described the factors and considerations that guide the decision making process for transfer licences.

[38] Ms. Sandgathe described the historical and policy context of fish farming, as well as the Minister's December 2020 decision on aquaculture in the Discovery Islands. Ms. Sandgathe also described the transfer applications received after the December 2020 decision.

[39] In her second affidavit, Ms. Sandgathe attached answers to questions submitted by Saltstream. She also attached pages from the Tla'amin Final Agreement. These documents were included as exhibits to her affidavit.

C. *Cross-examinations*

[40] In the present proceeding, the Minister relied upon the transcript of the cross-examination of Mr. Smeal that was conducted in the Consolidated Proceeding.

V. SUBMISSIONS

A. *Saltstream's Submissions*

[41] Saltstream submits that the transfer decision fails to meet the standard set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.). It challenges the adequacy of the reasons.

B. *The Minister's Submissions*

[42] The Minister acknowledges that the Decision is reviewable on the standard of reasonableness. At the same time, she submits that "reasonableness" is to be informed by the factors identified in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2.

[43] The Minister proposes that should the Court find the Decision to be unreasonable, the remedy of *mandamus* is not available since Saltstream cannot meet the test for that remedy.

C. *The Conservation Coalition's Submissions*

[44] The Conservation Coalition's submissions focusses on the role of the precautionary principle in assessing the reasonableness of the Decision.

[45] Similar to the Minister, the Conservation Coalition argues that the remedy of *mandamus* is not appropriate.

VI. DISCUSSION AND DISPOSITION

[46] The subject of this proceeding is the Minister's Decision, refusing Saltstream's application for a transfer licence pursuant to the Regulations. The broad legal context of the Decision is the Act.

[47] Subsection 7(1) of the Act gives the Minister authority with respect to licences and provides as follows:

Fishery leases and licences	**Baux, permis et licences de pêche**
7 (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.	**7 (1)** En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, délivrer des baux et permis de pêche ainsi que des licences d'exploitation de pêches — ou en permettre la délivrance —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.

[48] The broad discretion of the Minister in the matter of licencing was addressed by the Supreme Court of Canada in the decision of *Comeau's Sea Food Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12.

[49] Sections 55 and 56 of the Regulations are relevant to the issuance of transfer licences and provide as follows:

Release or Transfer of Fish	**Libération ou transfert de poissons**
55 (1) Subject to subsection (2), no person shall, unless authorized to do so under a licences,	**55 (1)** Sous réserve du paragraphe (2), il est interdit à quiconque, à moins d'y être autorisé en vertu d'un permis :
(a) release live fish into any fish habitat; or	**(a)** de libérer des poissons vivants dans tout habitat du poisson;
(b) transfer any live fish to any fish rearing facility.	**(b)** de transférer des poissons vivants dans des installations d'élevage.
(2) Subsection (1) does not apply in respect of fish that is immediately returned to the waters in which it was caught.	**(2)** Le paragraphe (1) ne s'applique pas au poisson qui est immédiatement remis dans l'eau où il vient d'être pris.
Licence to Release or Transfer Fish	**Permis pour libérer ou transférer des poissons**
56 The Minister may issue a licence if	**56** Le ministre peut délivrer un permis dans le cas où :
(a) the release or transfer of the fish would be in keeping with the proper management and control of fisheries;	**(a)** la libération ou le transfert des poissons est en accord avec la gestion et la surveillance judicieuses des pêches;
(b) the fish do not have any disease or disease agent that may be harmful to the	**(b)** les poissons sont exempts de maladies et d'agents pathogènes qui

protection and conservation of fish; and	pourraient nuire à la protection et à la conservation des espèces;
(c) the release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.	**(c)** la libération ou le transfert ne risque pas d'avoir un effet néfaste sur la taille du stock de poisson ou sur les caractéristiques génétiques du poisson ou des stocks de poisson.

[50] In *Morton v. Canada (Minister of Fisheries and Oceans)* (2015), 480 F.T.R. 148 at paragraph 97, Justice Rennie commented on the purpose of section 56 of the Regulations as follows:

> In my view, subsection 56(b) of the *FGR*s, properly construed, embodies the precautionary principle. First, subsection 56(b) prohibits the Minister from issuing a transfer licence if disease agents are present that "may be harmful to the protection and conservation of fish." The phrase "may be harmful" does not require scientific certainty, and indeed does not require that harm even be the likely consequence of the transfer. Similarly, the scope of "any disease or disease agent" in subsection 56(b) should not be interpreted as requiring a unanimous scientific consensus that a disease agent (e.g., PRV) is the cause of the disease (e.g., HSMI).

[51] There is dispute between Saltstream and the Minister as to what "is" the Decision. There is also dispute as to the content of the standard of "reasonableness".

[52] Saltstream contends that the letter dated June 29, 2021, denying its application for a transfer licence, is "the" Decision.

[53] The Minister argues that the Decision consists of both the letter and the Memorandum to her that appears in the CTR.

[54] In this case, the Minister provided written reasons, by means of the letter of June 29, 2021. The Memorandum contained in the CTR is part of the material that was presented for her consideration before she made the Decision.

[55] In my opinion, the letter of June 29, 2021 is the Decision, and that Decision must be read in light of the record that was before the Minister. I refer to the decision in *Vavilov, supra* at paragraphs 94 and 95:

> The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. …
>
> …
>
> That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[56] Saltstream submits that the Decision is subject to review upon the standard set out in *Vavilov, supra* at paragraph 99, that is requiring justification, transparency and intelligibility.

[57] The Minister, however, argues that considering the discretionary nature of the Decision, the factors addressed in *Maple Lodge, supra* are engaged. In this regard, she relies upon the decision in *Barry Seafoods NB Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 725 (*"Barry Seafoods 2021"*).

[58] According to the decision in *Maple Lodge, supra*, in order to find a discretionary decision unreasonable, one of the following factors must be present:

1. Bad faith;
2. Non-adherence to statutorily mandated natural justice; and
3. Consideration of factors irrelevant or extraneous to the statutory purpose.

[59] I agree with the submissions of Saltstream, that a reasonableness review is no longer limited to the *Maple Lodge, supra* factors. I refer to the decision in *Portnov v. Canada (Attorney General)* (2021), 461 D.L.R. (4th) 130 where the Federal Court of Appeal said the following at paragraph 25:

> Today, the framework for reviewing the substance of administrative decision-making is *Vavilov*. It is intended to be sweeping and comprehensive – a "holistic revision of the framework for determining the applicable standard of review" (at para. 143). We are to draw upon *Vavilov*, not cases like *Katz*: we must "look to [the] reasons [in *Vavilov*] first in order to determine how [*Vavilov*'s] general framework applies to [a] case" (*ibid*.).

[60] It follows that the Minister's reliance on *Barry Seafoods 2021, supra* is misplaced.

[61] In the language of *Vavilov, supra,* in this case, the Court must look for "justification, transparency and intelligibility."

[62] Saltstream submits that the Decision fails the reasonableness test on several grounds.

[63] Saltstream argues that the Decision refers to submissions that it did not make upon its application for a transfer licence. In particular, it notes the references in the Decision to "consideration" of the perspectives of the Klahoose First Nation, when that First Nation did not make submissions about the licence application.

[64] Saltstream also complains that the Decision refers to its "perspectives" about the teaching of the available science that "the risk to wild fish from concerns like *Piscine orthoreovirus, Tenacibaculum maritium,* and sea lice is low".

[65] Saltstream says that as appears from the summaries attached to the Memorandum to the Minister, it did not comment on the science relating to these parasites and pathogens. Rather, it made the submission that the parasites and pathogens "of concern" were not an issue at Doctor Bay.

[66] Saltstream argues that these mistakes show that the Minister did not appreciate the submissions that it presented with its application for a transfer licence.

[67] The Minister responds that these mistakes are in the nature of “typos”.

[68] I disagree with this position.

[69] I agree with Saltstream that these statements in the Decision are mistakes that invite inquiry as to the attention that the Minister gave to the submissions it made in support of its application for a section 56 transfer licence. I refer to *Vavilov, supra* at paragraph 127 where the Supreme Court of Canada said the following:

> …The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[70] I also refer to paragraph 102 of *Vavilov, supra* where the Supreme Court of Canada said that a reasonable decision:

> …must be based on reasoning that is both rational and logical… [T]he reviewing court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic…

[71] Considering the teachings from *Vavilov, supra,* I conclude that reference to a “submission” from Saltstream, when no such submission was made, is not rational and is a flaw in the decision’s “overarching logic”.

[72] Saltstream also argues that the Minister failed to appreciate and understand the facts about its operations and the importance of the transfer licence to its continued operations.

[73] Saltstream says that the Minister provided a generic response to its transfer licence application, without considering the specific and unique aspects of its operations at Doctor Bay, that differentiate it from the larger operations of other participants in salmon fish farming. According to the evidence, Saltstream is a small family owned business in which Mr. Smeal had invested his whole life and resources.

[74] Saltstream notes that with a couple of exceptions, it received the same decision that was given to Cermaq who had also submitted transfer licence applications on January 6, 2021, February 16, 2021, April 16, 2021 and April 30, 2021.

[75] I agree with these submissions. The Reasons does not show that the Minister "grappled" with these facts, that is the facts about Saltstream's unique operation and the impact the Decision would have on it. I refer to paragraph 128 of *Vavilov, supra* where the Supreme Court of Canada said as follows:

> …[A] decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. …

[76] I also refer to paragraphs 133 to 135 of *Vavilov, supra* where the Supreme Court of Canada said the following:

> It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: Baker , at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the

> reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.
>
> Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. …
>
> Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

[77] Saltstream notes that the Memorandum included a recommendation from DFO that the transfer licence be granted. It submits that where a decision maker departs from a recommended course of action, an explanation is required. I agree.

[78] I refer to the decision *Wilkinson v. Canada* (2014), 460 F.T.R. 175 at paragraphs 20, 44 and 45, where the Court said the following about the departure of a decision maker from the conclusion of a Classification Grievance Committee:

> Classification Grievance Committees are highly specialized and their decisions will also be afforded a high degree of deference (see *Beauchemin* and *McEvoy*, *supra*). In the case at hand, the Deputy Head chose to disagree with the conclusion reached by the Committee. That is certainly his prerogative although it is not often the case as acknowledged by the respondent. Hence it is possible for the decision of the Deputy Head to fall within the range of outcomes which are possible and acceptable because they are defensible in respect of the facts and the law. However, one will expect that such departure will be justified in order to meet the

> standard of reasonableness. This decision under review did not reach the necessary standard.
>
> …
>
> In a case like this one, the reasons given to depart from a well-articulated recommendation must be intelligible, in the sense that they "are able to be understood" (The Canadian Oxford Dictionary, 2001, sub verbo, "intelligible"). With great respect, the decision does not have that measure of intelligibility. It seems to contemplate statements made with respect to degrees 7 and 6 as if they related to degrees 6 and 5. If that is not what the decision actually meant, the respondent has been incapable of enlightening the Court either by providing an alternate meaning. The respondent also seems to rely on "the intention behind ... the position" in order to take the analysis outside of the job description that is at the heart of the grievance adjudication. Finally it faults the Committee for not having considered the organizational context, where it would appear that the Committee considered that context. If the Deputy Head disagreed with the findings on that account, he did not express where his disagreement lies. At the end of the day, this reviewing court is left without understanding "why the tribunal made its decision" (*N.L.N.U., supra*, para 16).
>
> My conclusion on the reasonableness of the decision suffices to dispose of the matter. The application for judicial review is granted, with costs.

[79] I also refer to the decision in *Ross v. Canada (Minister of Justice)* (2014), 453 F.T.R. 56 where the Court said the following at paragraph 56:

> Mr. Pringle was the Minister's delegate to conduct the investigation under s 696.2(3) of the Code. It was open to the Minister not to accept Mr. Pringle's advice and views in making the ultimate decision. However, in light of his departure from Mr. Pringle's advice, to meet the standard of reasonableness the Minister was under a heightened duty to explain the reasons for his disagreement. [citations omitted]

[80] As well, I refer to the decision in *Séguin v. Canada (Attorney General)*, 2021 FC 45 at paragraph 40 where the Court said:

> Finally, reasonableness review is concerned with context: what constitutes a reasonable decision "will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov* at para 90). In instances such as these, where a Deputy Head chooses to depart from the recommendations of the CGC, such a departure must be justified in light of the CGC's expertise (*Wilkinson* 1 at paras 20, 40; see also *Wilkinson v. Canada (Attorney General)*, 2020 FCA 223 (F.C.A.) at paras 19-21)

[81] Saltstream submits that the Minister's reliance on "social acceptability" as a reason for the Decision does not excuse her from analyzing Saltstream's circumstances on an individual basis. It relies on the decision in *Keating v. Canada (Minister of Fisheries & Oceans)* (2002), 224 F.T.R. 98 at paragraph 68 where the Federal Court said the following:

> …[W]hen a government body makes a decision regarding an individual, particularly where the individual has much at stake, the decision-maker does not act fairly when basing its decision, at least to some degree, on the desire to quiet the criticism of others.

[82] I note that the decision in *Keating, supra* involved issues of procedural fairness which are not engaged in this case.

[83] Saltstream submits, as well, that the Decision shows no consideration by the Minister of the intended effect of the injunction granted by Justice Pamel, in *Mowi, supra* to remove the impact of the News Release upon section 56 transfer licence applications. This is not a dispositive argument.

[84] The issue in this application is the reasonableness of the Decision.

[85] The Conservation Coalition made submissions in support of the Decision. I note the objections of Saltstream that many of these arguments were based upon materials that were not contained in the CTR and that did not meet any of the exceptions for consideration of extraneous material, as identified in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency* (2012), 428 N.R. 297 at paragraph 19.

[86] I agree with Saltstream's contentions on this point.

[87] While some of the arguments advanced by Saltstream are not, *per se*, dispositive of the main issue, I am satisfied that the cumulative effect of all of its submissions show that the Decision is unreasonable. It lacks justification, transparency and intelligibility, as required by the decision in *Vavilov, supra*.

VII. REMEDY

[88] As outlined above, if successful upon this application for Judicial Review, Saltstream seeks the following relief:

1. A declaration that the Decision is invalid;

1. An order of *certiorari* quashing and setting aside the Decision;

2. An order of *mandamus* requiring the issuance of a s. 56 transfer licence to Saltstream Engineering within two business days;

3. Costs of the application; and

4. Such further and other relief as counsel may advise and this Court may deem appropriate and just.

[89] Subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 is relevant and provides as follows:

Powers of Federal Court	**Pouvoirs de la Cour fédérale**
18.1 (3) On an application for judicial review, the Federal Court may	**18.1 (3)** Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	**(a)** ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	**(b)** déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[90] It is clear that a remedy upon judicial review lies within the discretion of the Court.

[91] Saltstream seeks a declaration that the Decision is invalid. Declaratory relief may be granted as a remedy pursuant to paragraph 18.1(3)(b) of the Act.

[92] Rule 64 of the Rules describes the circumstances in which declaratory relief is available and provides as follows:

Declaratory relief available	**Jugement déclaratoire**
64 No proceeding is subject to challenge on the ground that only a declaratory order is sought, and the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed.	**64** Il ne peut être fait opposition à une instance au motif qu'elle ne vise que l'obtention d'un jugement déclaratoire, et la Cour peut faire des déclarations de droit qui lient les parties à l'instance, qu'une réparation soit ou puisse être demandée ou non en conséquence.

[93] Declaratory relief is a discretionary remedy whereby a court can issue a declaratory judgment, that is a judicial statement confirming or denying a legal right or existing legal situation. The Court lacks jurisdiction to make declarations of fact; see the decision in *Laurentian Pilotage Authority v. Pilotes du St-Laurent Central Inc.* (1993), 74 F.T.R. 185 (Fed. T.D.) at paragraph 22.

[94] The "usual" remedy upon a successful application for judicial review is an order setting aside the decision under review and remitting the matter back for redetermination. In *Vavilov, supra* at paragraph 142, the Supreme Court of Canada referred to respect "respect [for] the legislature's intention to entrust the matter to the administrative decision maker".

[95] In my opinion, there is no basis to depart from the usual remedy of quashing a decision and sending it back for redetermination, when it fails to meet the applicable standard of review.

[96] In addition to a declaration, Saltstream asks for an order quashing and setting aside the Decision, together with an order of *mandamus* requiring the Minister to issue a transfer licence within two business days, if it is successful in this application for Judicial Review.

[97] Saltstream, in its written and oral submissions, further refines its request for an order of *mandamus* to include directions for a substituted decision.

[98] *Mandamus* is an exceptional remedy and subject to the legal test set out in *Apotex Inc. v. Canada (Attorney General)* (1993), [1994] 1 F.C. 742 (Fed. C.A.). The following requirements must be met for the Court to issue a writ of *mandamus*:

1. There must be a public legal duty to act;
2. The duty must be owed to the Applicant;
3. There is a clear right to performance of that duty, in particular:
    a. the applicant has satisfied all conditions precedent giving rise to that duty;
    b. there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay.
4. Where the duty sought to be enforced is discretionary, the following rules apply:
    a. in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
    b. mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

c. in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

d. *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

e. *mandamus* is only available when the decision-maker's discretion is "spent", i.e., the applicant has a vested right to the performance of the duty.

5. No other adequate remedy is available to the applicant;

6. The order sought will be of some practical value or effect;

7. The Court in the exercise of its discretion finds no equitable bar to the relief sought; and

8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

[citations omitted]

[99] In my opinion, *mandamus* is not available in this case in light of section 7 of the Act.

[100] The Act, in section 7, grants “absolute discretion” to the Minister in the matter of issuing licences. This discretion means that only two choices are now available, that is to grant or deny, the licence sought by Saltstream.

[101] The existence of this “absolute discretion” means that Saltstream cannot satisfy the *Apotex, supra* test for *mandamus*.

[102] However, Saltstream argues that it is not subject to the test in *Apotex, supra* and that the Court should issue directions to the Minister.

[103] Saltstream submits that the Court can give directions as to the course to be followed by the decision maker. It relies on the decision in *Canada (Citizenship and Immigration) v. Tennant* (2019), 436 D.L.R. (4th) 155, involving a matter under the *Citizenship Act*, R.S.C. 1985, c. C-29.

[104] I agree that in rare and exceptional circumstances, the Court can provide a substituted decision.

[105] At paragraph 72 of *Tennant*, *supra*, the Federal Court of Appeal described the limited circumstances where the Court can grant a substituted decision as follows:

> …It is now well-established that this form of relief, a combination of certiorari and mandamus, is available where on the facts and the law there is only one lawful response, or one reasonable conclusion, open to the administrative decision-maker, so that no useful purpose would be served if the decision-maker were to redetermine the matter. [citations omitted]

[106] These conditions do not exist here.

[107] In this case, the facts and the law do not support a substituted decision from the Court, and it will not be granted.

VIII. CONCLUSION

[108] In the result, the application for Judicial Review will be allowed, the Decision of the Minister will be set aside and the matter remitted to the Minister to be re-determined following and in accordance with the law.

[109] In the event of success upon this application, Saltstream asked for the opportunity to make submissions on costs. That opportunity will be provided and a Direction will issue in that regard.

JUDGMENT in T-1156-21

THIS COURT'S JUDGMENT is that the application for Judicial Review is allowed, the Decision of the Minister is set aside and the matter remitted to the Minister to be re-determined following and in accordance with the law. The Applicant will be given the opportunity to make submissions on costs, a Direction will follow in that regard.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1156-21
STYLE OF CAUSE:	SALTSTREAM ENGINEERING LTD. v. THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD v. ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY AND WATERSHED WATCH SALMON SOCIETY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 27 and 28, 2021
REASONS AND JUDGMENT:	HENEGHAN J.
DATED:	APRIL 27, 2022

APPEARANCES:

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