

SFAB HALIBUT ALLOCATION UPDATE

November 14 2008

A report from Gerry Kristianson, Chairman, SFAB Halibut Allocation Committee

DFO kills Thibault allocation policy

When DFO issued Fisheries Notice FN0806, announcing the in-season closure of the recreational halibut fishery on October 31, 2008, it hammered the final nail into the coffin of the halibut allocation policy first announced by Fisheries Minister Robert Thibault on October 27, 2003.

Thibault's "allocation framework" was aimed at allowing for "future growth of the recreational sector" through a "market-based mechanism for future allocation adjustments." The recreational sector was to be limited to a 12% share of available halibut "until both parties can develop an acceptable mechanism that will allow for adjustment of the recreational share through acquisition of additional quota from the commercial sector." The policy announcement did contemplate that "if abundance levels decline or angling effort increases during this time, DFO will implement alternative measures such as restricting the bag limit to avoid any in-season closures." However, a key part of the announcement was an unequivocal promise from the minister: **"I also have made a commitment that there will be no closure of the sport fishery in-season."**

Although Thibault is long gone from the fisheries portfolio, and lost his House of Commons seat in the recent federal election, his halibut allocation policy was reconfirmed on a number of occasions by his successors. In particular, then Deputy Minister Larry Murray, on July 27, 2007 established a process to finalize development of a market-based allocation transfer process. He promised that the department would "assume a more prominent role in this aspect of the framework". The department formed a working group under the chairmanship of consultant Hugh Gordon which resulted in a unanimous recommendation to government from representatives of the recreational and commercial harvest sectors, First Nations, and the federal and provincial governments. The Gordon Report proposed an initial increase in the recreational share to around 20%, with the cost of compensating commercial quota holders to be underwritten by the federal treasury but with this expenditure recovered by Ottawa through future increases in recreational fishing licence fees or some other means.

Even before the Gordon Report recommendations had been put before then minister Hearn, its terms were rejected by David Bevan, DFO's Assistant Deputy Minister for Fisheries Management and Aquaculture in a memorandum dated February 27, 2008. The lack of any further government response seems to make clear that Mr. Bevan's position has been supported by his superiors and that the consensus proposal for a market-based transfer has been killed.

With this aspect of the Thibault allocation policy placed in its coffin, the department nailed down the lid with Fisheries Notice 0806. By closing the fishery on October 31 it directly contradicted the ministerial commitment "that there will be no closure of the sport fishery in-season." "Although the recreational fishery is generally managed on the basis of a pre-season plan and post season review," said the notice, "there are instances where in-season changes are required."

The notice also seemed to confirm that the region had abandoned hope of finding a market-based mechanism for future allocation adjustments. It made no mention of this possibility, expressing only the hope that, as pre-season plans improve, “the necessity for in-season actions will decrease.” In other words, future in-season closures were made the substitute for an allocation change.

Recreational sector options

Against this background, the recreational sector would seem to have only two options. It could live with the new policy inherent in FN0806 in which recreational access will be artificially restricted to fit within the one remaining element of the Thibault policy – the arbitrary 88/12 allocation - using the bluntest of means including mid-season closures. It could work with government to try and ameliorate the impact of these restrictions. Alternatively, the SFAB could ask the minister to use the power given to her under the Fisheries Act to assign to recreational anglers a larger share of Canada’s halibut.

Option 1 - Permanent restrictions: The consequences of accepting a policy in which the recreational share is limited in perpetuity to 12% are obvious. Given government refusal to facilitate the recreational sector’s attempt to comply with the “market-based” requirement, anglers and the businesses that support them will have to learn to live permanently with such measures as a very much shortened season and changes in daily and total possession limits. Even our attempts this year to improve the situation by leasing quota from the commercial sector has been frustrated by the PHMA’s refusal to release to DFO SFAB money which it presently holds in trust.

Measures like this would result in the removal of millions of dollars from the provincial economy. According to the latest BC Government statistics, the recreational fishery contributed \$288 million dollars a year to the provincial economy in 2007. Halibut probably accounts, conservatively, for at least 10% of this value—or \$29 million. Viewed another way, each of the 1.6 million pounds of halibut harvested by the recreational sector in 2007 contributed \$18.63 to the provincial economy. By contrast, according to the same statistics, commercial halibut accounted for about 13% of the commercial sector’s total GPP value of \$308 million in 2007, or about \$40 million. Based on its 2007 harvest, each pound of commercial halibut contributed around \$3.60 to the provincial economy. Where is the public policy justification for limiting the recreational sector to an arbitrary share of 12% in order to protect the quota held by the commercial sector, more than half of which is not fished by its owners and each pound of which brings much less economic benefit to the province?

Option 2 – Reallocation to 80/20 shares: Alternatively, the recreational sector could return to its pre-Thibault position of seeking access to at least 20% of the available harvest before consideration is given to compensated transfers. This proportion is similar to the current recreational/commercial allocation in Alaska but much less generous than the recreational share to the South.

While many recreational anglers object in principle to the notion that 88% of the halibut available to Canada after FSC requirements have been met is the private property of commercial quota holders, the Sport Fishing Advisory Board attempted to work within the framework of the Thibault allocation policy. It explored a number of options aimed at a compensated transfer and supported the consensus proposal prepared earlier this year by a committee under the chairmanship of Hugh Gordon.

When faced with the likelihood that the sector would exceed the 12% cap during the 2008 season, the SFAB accepted new in-season management measures, called on the department to lease enough quota to cover any difference, and made funds available for this purpose.

The department's refusal to lease enough quota to cover the recreational sector's needs, and to instead close the season prematurely had the effect of reducing both the opportunities available to recreational anglers and the economic benefits that flow from those opportunities. It confirmed the existence of a strong DFO bias in favour of commercial quota holders.

Supreme Court says fish are not property until caught

The continued refusal of the department to allow any reallocation of halibut to the recreational sector unless the sector purchases quota from commercial owners in a "market-based" arrangement appears to fly in the face of a recent fisheries decision by the Supreme Court of Canada after a request by government lawyers that the court not do anything that would fetter the minister's allocation discretion under the Fisheries Act.

In his decision in *Saulnier v. the Royal Bank of Canada*, Justice Binnie said that a commercial fishing licence had to be considered property in bankruptcy proceedings when it had been used to secure financial support from a bank. But the justice also made very clear that such a decision did not reduce the absolute discretion of minister with respect to allocation and that fishermen only had property rights to fish after they were caught. "A holding that a fishing licence is property in the hands of the holder for limited statutory purposes does not fetter the Minister's discretion under the *Fisheries Act* to issue, renew or cancel a fishing licence, according to the exigencies of the management of the fisheries."

The judge noted that Counsel for the Attorney General of Canada "was greatly concerned that a holding that the fishing licence is property in the hands of the holder even for limited statutory purposes might be raised in future litigation to fetter the Minister's discretion." "I do not think this concern is well founded", said the judge. "The licence is a creature of the regulatory system. Section 7(1) of the *Fisheries Act* speaks of the Minister's "absolute discretion". The Minister gives and the Minister (when acting properly within his jurisdiction under s. 9 of the Act) can take away, according to the exigencies of his or her management of the fisheries. The statute defines the nature of the holder's interest, and this interest is not expanded by our decision that a fishing licence qualifies for inclusion as "property" for certain statutory purposes."

Justice Binnie went on to say that "The fishery is a public resource. The fishing licence permits the holder to participate for a limited time in its exploitation. The fish, once caught, become the property of the holder." His stress on the latter point is interesting in the context of halibut quotas. "It is a licence coupled with a proprietary interest in the harvest from the fishing effort contingent, of course, on first catching it," said Justice Binning. "I agree with the observation adopted by Major J. in *Comeau's Sea Foods* that he could not find in the fisheries legislation any legal underpinning for the "vesting" of an interest in a licence "beyond the rights which it gives for the year in which it was issued."

So, if licence (and therefore quota rights), are good only for the year of issue and if the only proprietary interest in the fish comes after they have been caught, what is it that recreational anglers are being asked to pay for in a "market-based" allocation mechanism?

The commercial sector has argued that if the government was to reallocate halibut beyond the current 88/12 division it would be expropriating the property rights of quota holders. This most recent court case seems to make clear that such an argument has no merit. Indeed, the judgment seems to invite a court challenge of the halibut quota system.

By abandoning the Thibault policy and closing the recreational sector mid-season the government has, in effect, confirmed that the protection of commercial quota ownership is more important than either the public right of access to halibut through the recreational fishery or the economic value of the recreational sector. This is not an argument about conservation. It is an argument about access, with DFO taking a position diametrically opposed to that articulated by Justice Binnie. It is saying that halibut are not common property and that the minister has abandoned his discretion in favour of a system that guarantees full property rights to commercial quota holders.

What should the SFAB do next?

Is the recreational sector prepared to accept this outcome? Should we support a situation in which artificial allocation restrictions are being placed on public access to halibut through the recreational fishery by a policy which directly fetters the statutory discretion of the fisheries minister by saying that no reallocation of halibut can take place except through a private “market-based” arrangement between the recreational and commercial sectors? Should we continue to accept a government policy which has given private property rights to quota holders, many of whom acquired these rights for nothing and more than half of whom no longer fish but simply profit from leasing quota to others, while telling recreational anglers that they have to stop fishing, even though every halibut they catch produces five times as much benefit for the provincial economy?



Gerry Kristianson
SFAB Halibut Allocation Committee Chair