



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

SEAFOOD NEW ZEALAND LIMITED v ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED AND OTHERS

(SC 99/2023) [2024] NZSC 111

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

What this judgment is about

This appeal concerns the process by which the Minister of Oceans and Fisheries must set fishing quotas that will restore depleted fish stocks to a suitable level within a period appropriate to each stock. The main question is whether the Minister may consider social, cultural and economic factors when setting the period appropriate to the stock, as well as the minimum probability that the Minister's rebuild plan will succeed.

Background

Section 13 of the Fisheries Act 1996 tries to ensure that the level of each stock subject to the quota management system is maintained at or above a level that can produce its maximum sustainable yield (MSY). Theoretically, the MSY is the largest long-term average catch that can be taken from a stock without impairing its renewability. This helps achieve the Act's purpose of providing for the utilisation of fisheries resources while ensuring sustainability.

By 2017, the East Coast tarakihi fishery was depleted to less than half the level that can produce its MSY. The then Minister of Fisheries was required by s 13 of the Fisheries Act to alter the total allowable catch (TAC) to enable the stock to recover to at least MSY within a period appropriate to the stock. In 2018, the Minister reduced the TAC by 17 per cent. That decision was not challenged. In 2019, he reduced the TAC by a further 6.4 per cent and indicated that he would revisit it the following year and make further reductions if the fishing industry did not live up to commitments made in an Industry Rebuild Plan that it had developed.

Royal Forest & Bird Protection Society of New Zealand Inc (RFB) brought judicial review proceedings challenging the Minister's 2019 decision. RFB argued that the Minister ought to have adopted a recovery period having regard only to the scientific (biological and environmental) considerations and based on the best information available to him, and that he was required to consider a 70 per cent probability of a successful rebuild rather than 50 per cent. Fisheries Inshore New Zealand Ltd, since amalgamated into Seafood New Zealand Ltd (Seafood), and Te Ohu Kai Moana Trustee Ltd were joined as respondents.

Procedural history

On 16 June 2021, the High Court upheld four of RFB's causes of action, including those which give rise to the issues in this appeal. On 10 August 2023, a majority of the Court of Appeal upheld the High Court's decision.

On 24 November 2023, the Supreme Court granted Seafood leave to appeal. The approved question was whether the Court of Appeal was correct to dismiss the appeal.

Issues

The appeal presents two issues. The first concerns the Minister's determination of "period appropriate to the stock" in s 13(2)(b)(ii) of the Fisheries Act. The second issue concerns the existence and status in law of a default probability of a successful rebuild of 70 per cent for fish stocks below their "soft limit", such as the East Coast tarakihi fishery. RFB submitted that default probability is contained in two Ministry guidelines documents, the Harvest Strategy Standard (HSS) and Operational Guidelines, and that the default probability of rebuild (and the reasons for that probability) was a mandatory relevant consideration when the Minister set the TAC for East Coast tarakihi in 2019.

Supreme Court decision

The Supreme Court has unanimously allowed the appeal to the extent set out in paragraphs [145] and [146] of the judgment.

Period appropriate to the stock

The Court rejected Seafood's submission that the appropriate recovery period is only one of several mandatory relevant considerations for the Minister. Section 13(2)(b) is divided into two requirements, indicating that each is intended to constrain the TAC by reference to a sustainability requirement. To achieve this, the assessment of the appropriate period must rest on biological characteristics and relevant environmental conditions and exclude social, cultural and economic considerations. Relevant social, cultural and economic factors must be considered when deciding on way and rate because of s 13(3), which does not mention period. This also indicated that the analysis of periods appropriate to the stock must exclude these considerations.

However, the Court determined that there may be a range of recovery periods reasonably available to the Minister. That is because the various tools used to construct a rebuild plan are likely to offer a range of possibilities. Where the stock's biological characteristics and environmental conditions allow for more than one appropriate recovery period, the Minister may consider social, cultural and economic factors when selecting among them.

The Court observed that to the extent the HSS and Operational Guidelines' default outer rebuild limit rests on the premise that socio-economic (and cultural) considerations may influence the assessment of recovery periods appropriate to the stock, they are incorrect. The Minister erred in his 2019 decision by conflating the two requirements in s 13(2)(b) without separately considering whether the period was biologically and environmentally appropriate to the stock.

A default 70 per cent probability of success?

On this issue, the Court first considered whether the HSS and Operational Guidelines are mandatory relevant considerations for the Minister. The Court agreed with Seafood's submission that they are not. The Act lists several planning documents that must be taken into account but not the HSS nor the Operational Guidelines. The HSS and Operational Guidelines also are not preconditions to valid ministerial decision-making; indeed, they were not in existence when the Fisheries Act came into force. The HSS also states that it has no legal effect and that it is intended for the Ministry rather than the Minister. The Operational Guidelines are internal to the Ministry and also were not formulated for the Minister.

The Court held that the legislation requires that a TAC decision must adopt a minimum probability of not less than 50 per cent that the stock will have recovered at the end of the rebuild period. The HSS does not specify a default probability of more than 50 per cent. Rather, the Minister must adopt a probability of success that takes account of what may be considerable uncertainty about future stock levels.

The Court also observed that the Minister may manage risk by revisiting stock and TAC levels during the rebuild period, or by making larger TAC reductions at the beginning of the rebuild period.

The Court held that the HSS and Operational Guidelines may contain "best available information" for the purposes of s 10 of the Fisheries Act, but the relevance of such information to any particular TAC decision depends on its accuracy, as a statistical matter, and the extent to which any underlying assumptions apply to that TAC decision. The default probability of 70 per cent was not the best available information in this case, if only because it assumed the TAC would not be revisited before the rebuild period expired and it was already evident at the time of the 2019 decision that the Minister would not adopt that assumption because he wanted to observe the efficacy of the Industry Rebuild Plan.

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