Vancouver File No. T-1710-16

FEDERAL COURT

BETWEEN:

ALEXANDRA MORTON

Applicant

AND:

MINISTER OF FISHERIES AND OCEANS

Respondent

MOTION RECORD OF THE PARTY APPLICANT

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Vancouver File No. T-1710-16

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NOTICE OF MOTION

TAKE NOTICE THAT MARINE HARVEST CANADA INC. ("Marine Harvest") will make a motion to the Court in writing under Rule 369 of the *Federal Courts Rules*.

THIS MOTION IS FOR AN ORDER:

(a) that Marine Harvest be added as a party respondent to this judicial review application;

(b) that directions be given to amend the style of cause; and

(c) costs.

THE GROUNDS FOR THE MOTION ARE:

1. Marine Harvest applies for an order that it be granted status as a party respondent pursuant to Rules 104(1)(b) and 303(1)(a) of the *Federal Courts Rules*.

2. Marine Harvest is an aquaculture company with fish farm sites along the west coast of British Columbia. It has fish which have tested positive for piscine reovirus ("PRV") at all but one of its land based hatcheries. These fish must be transferred to marine sites and between

marine sites. Pursuant to its licenses, in order to transfer these fish, Marine Harvest obtains authorization from the BC Introductions and Transfers Committee (the "ITC").

3. The Applicant in this judicial review proceeding seeks an order declaring the ITC's decision or policy of not testing for PRV, and of authorizing the transfer of fish with PRV, to be unlawful. If the relief sought is granted it would severely impact Marine Harvest. If the ITC's decision or policy to allow fish with PRV to be transferred is successfully challenged, Marine Harvest's legal right to transfer fish to its marine sites and between its marine sites will be undermined.

4. Marine Harvest has sought the consent of the parties to this proceeding for it to be added as a party respondent. The Respondent Minister has consented. The Applicant Ms. Morton has not.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

(a) The affidavit of Alexandra Morton sworn November 28, 2016;

(b) The affidavit of Vincent Erenst sworn January 18, 2017;

(c) Such other material as counsel may advise.

DATED this 19th day of January, 2017

Counsel for Marine Harvest Canada Inc.
MacKenzie Fujisawa LLP
Barristers & Solicitors
1600 – 1095 West Pender Street
Vancouver, BC V6E 2M6
Attn. **Chris Watson**

TO: Counsel for the Applicant
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AND TO: Counsel for the Respondent
Minister of Fisheries and Oceans
Steven Postman
Department of Justice
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Vancouver File No. T-1710-16

FEDERAL COURT

BETWEEN:

ALEXANDRA MORTON

Applicant

and

THE MINISTER OF FISHERIES AND OCEANS

Respondent

AFFIDAVIT OF ALEXANDRA MORTON

I, Alexandra Morton, biologist, of the village of Sointula, in the Province of British Columbia, AFFIRM THAT:

1. I have personal knowledge of the facts and matters set out in this affidavit except where those facts and matters are stated to be on information and belief, in which case I believe those facts and matters to be true.

A) My experience and background

2. I have a Bachelor of Science, *magna cum laude* from American University in Washington, D.C.

3. I work as an independent biologist, raising funds for specific research projects that interest me. I am not currently registered as a professional biologist.

4. In 1984, I moved to the Broughton Archipelago between Kingcome and Knight Inlet to study killer whales. From that time until 1999, I conducted research

on the natural history and communication of killer whales and Pacific white-sided dolphins.

5. Salmon farms appeared in my community of Echo Bay in 1987. In about 1993, two of the salmon farm companies began using acoustic deterrent devices to repel seals which were attacking the farm salmon. The potential impact of these acoustic devices on killer whales and other marine mammals was the initial cause of my interest in researching the impacts of salmon aquaculture in British Columbia.

6. During the 1990s, I gradually shifted the focus of my work from killer whales to salmon farms. Today, my research, education, and advocacy work focuses almost exclusively on salmon farms and their impact on the marine environment of coastal British Columbia.

7. It is my understanding that there are now approximately 120 licenced salmon farms off the coast of BC. Most of these farms are open net farms which means that the fish are contained in a net or cage in the ocean, with no barrier to protect or filter the ocean water outside the pen from pathogens which might be generated inside the farm. A Department of Fisheries and Oceans ("DFO") map showing the extent and locations of fish farms along the BC coast in 2014 is available at http://www.pac.dfo-mpo.gc.ca/aquaculture/maps-cartes-eng.html. A copy of this map is attached as **Exhibit A** to my affidavit.

8. Dozens of these salmon farms are located in the Broughton Archipelago, which is a biologically diverse environment rich in marine mammals and fish species including culturally and commercially important species such as salmon. Several of the farms in the Archipelago are also located adjacent to Fraser sockeye salmon migration routes. A copy of a map from the Living Oceans Society showing salmon farm tenures in 2014 in the Broughton Archipelago and wild salmon migration routes is attached as **Exhibit B** to my affidavit.

B) How I found out about Heart and Skeletal Muscle Inflammation and *Piscine Reovirus*

9. I learned of the disease Heart and Skeletal Muscle Inflammation ("HSMI") in the winter of 2010-2011 when I read a diagnostic report by a provincial aquaculture pathologist. The report describes a pattern of inflammation in BC farmed salmon that is referred to as consistent with HSMI found in Atlantic salmon reared in Europe. A copy of this report is attached as **Exhibit C** to my affidavit.

10. After learning that HSMI may occur in BC farm salmon, I read further scientific literature about HSMI that concerned me. For example, I read peer-reviewed papers from 2004 and 2006 that found HSMI is a disease that causes morbidity, including inability to eat and swim, and mortality in fish. These studies report that HSMI does not develop until 5-9 months after fish are transferred to sea water. A copy of the 2004 paper is attached as **Exhibit D** to my affidavit. A copy of the 2006 paper is attached as **Exhibit E** to my affidavit.

11. My concerns were reinforced when I learned that HSMI was first diagnosed in Norway in 1999 and then in Scotland in 2004-2005. I found out about the Scotland diagnosis through the peer-reviewed paper entitled "An outbreak of disease resembling heart and skeletal muscle inflammation in Scottish farmed salmon, *Salmo salar* L., with observations on myocardial regeneration." A copy of this paper is attached as **Exhibit F** to my affidavit.

12. While researching HSMI in 2011, I also read that a newly discovered virus called *Piscine reovirus* ("PRV") was associated with HSMI. I read about this association in a 2010 peer-reviewed paper written by Palacios *et al* titled "Heart and Skeletal Muscle Inflammation of Farmed Salmon Is Associated with Infection with a Novel Reovirus". A copy of this paper is attached as **Exhibit G** to my affidavit.

13. I was immediately concerned about whether PRV was in salmon in BC because the Palacios *et al* paper contained the statement: "... it is urgent that measures be taken to control PRV not only because it threatens domestic salmon production but

also due to the potential for transmission to wild salmon populations." In describing this research in an interview with Wired magazine, Dr. Ian Lipkin, a co-author of the paper, stated: "If the potential hosts [for PRV] are in close proximity, it goes through them like wildfire." The Wired article, dated July 13, 2010, is available at http://www.wired.com/wiredscience/2010/07/salmon-disease-identified/ and a copy is attached as **Exhibit H** to my affidavit.

14. Throughout 2012 and 2013 I continued to review published papers about PRV and HSMI. The bulk of papers about PRV maintained that PRV is most likely the disease agent that causes HSMI. For example, I read one paper by Garseth *et al* from 2013 which states that PRV is "the putative causative agent" of HSMI. A copy of this paper titled "Associations between piscine reovirus infection and life history traits in wild-caught Atlantic salmon *Salmo salar* L. in Norway" is attached as **Exhibit I** to my affidavit.

C) PRV is discovered in British Columbia salmon

15. In October 2011, to get a better understanding of the presence of viruses in farmed and wild salmon in BC, I began sampling wild salmon caught throughout BC and farmed salmon purchased from supermarkets for virus testing.

16. To help me determine whether PRV was in salmon in BC, in 2012 I requested Dr. Are Nylund, University of Bergen, and Dr. Fred Kibenge, Atlantic Veterinary College, University of Prince Edward Island to test samples I had taken from farmed and wild BC salmon.

17. In April 2012, I began getting PRV-positive test results from Dr. Nylund's and Dr. Kibenge's labs for most of the farmed Atlantic salmon samples and in some wild salmon.

18. The discovery of PRV in BC was subsequently published in a peer-reviewed article titled "Whole genome analysis of piscine reovirus (PRV) shows PRV represents a new genus in family *Reoviridae* and its genome segment S1 sequences group it into two separate sub-genotypes". I am listed as a co-author of the paper, as I

provided all of the samples used in the study and assisted with writing and editing. A copy of this paper is attached as **Exhibit J** to my affidavit.

D) My early concern about DFO's failure to test for PRV and HSMI before issuing fish transfer licences

19. I understand that farmed fish are raised in fresh water hatcheries and then the smolts (juvenile salmon) are transferred into open net pens in the ocean, and that fish farm owners can also transfer smolts and fish between their ocean farms.

20. Concerned about the literature suggesting PRV causes HSMI, that HSMI weakens salmon to the point that they cannot swim, and my findings of PRV in BC salmon, I wanted to learn more about the DFO's process for approving fish transfers.

21. So from March to May 2013 I was in communication with the DFO to obtain a better understanding of how transfers of fish from hatcheries to fish farms were approved and whether fish were tested for pathogens prior to releasing fish into open net pens in the ocean.

22. Through this correspondence and my own observations I discovered aquaculture companies were illegally being licenced to approve their own fish transfers with no DFO oversight on disease status of these fish at the time of transfer.

23. On May 7, 2013, I filed a lawsuit in Federal Court challenging the transfer conditions of a fish farm licence issued by the DFO to Marine Harvest Canada Inc. A copy of the Notice of Application for the May 2013 lawsuit is attached as **Exhibit K** to my affidavit.

24. On June 23, 2013, I retained Dr. Are Nylund as an expert witness for the lawsuit to provide an opinion on, among other things, the relationship between PRV and HSMI. A copy of Dr. Nylund's expert report is attached as **Exhibit L** to my affidavit.

25. On January 16, 2014, Dr. Nylund was examined on his expert report. A copy of the transcript of Dr. Nylund's cross-examination is attached as **Exhibit M** to my affidavit.

26. On June 19, 2014, Justice Rennie dismissed the DFO's application to strike Dr. Nylund's affidavit which contained his expert report. Dr. Nylund's expert report was redacted by order of Prothonotary Lafrenière, dated October 10, 2013. A copy of Justice Rennie's decision is attached as **Exhibit N** to my affidavit.

27. On May 6, 2015, Justice Rennie issued his Judgment in *Morton v Canada (Fisheries and Oceans),* 2015 FC 575. Justice Rennie struck out the unlawful parts of the transfer licence, noting that "[t]he causal relationship between PRV and HSMI has not been conclusively established. However, the weight of the expert evidence before this Court supports the view that PRV is the viral precursor to HSMI." A copy of Justice Rennie's judgment is attached as **Exhibit O** to my affidavit.

28. As a result of Justice Rennie's decision and another lawsuit that I brought, the DFO agreed to require all fish farm licence holders to obtain an authorization from the DFO's Introductions and Transfers Committee ("ITC") prior to transferring fish. A copy of a fax sent on November 10, 2015 from counsel for the Minister of Fisheries and Oceans to the Federal Court confirming this change in process is attached as **Exhibit P** to my affidavit.

E) HSMI diagnosed in a fish farm on the BC coast

29. On May 20, 2016, I attended via telephone a press conference held by DFO scientist Dr. Kristi Miller. Dr. Miller is a research scientist and head of the Genetics Lab at the DFO. During the conference, Dr. Miller said she had made a preliminary diagnosis of HSMI in Atlantic salmon collected between 2013 and 2014 from a salmon farm in Johnstone Strait, a major Fraser sockeye migration route. She sampled the fish throughout their grow-out phase in the pens and observed the development of HSMI in PRV infected farm salmon. Attached as **Exhibit Q** is my recording of the conference.

30. After attending the DFO press conference I also read the DFO's news release regarding Dr. Miller's HSMI diagnosis. I printed out this May 20, 2016 news release and attached it as **Exhibit R** to my affidavit.

31. Shortly after learning about the HSMI diagnosis in BC, I read a scientific paper from Godoy *et al* (2016) which reported the diagnosis of HSMI in farmed Atlantic salmon raised in Chile. A copy of this report is attached as **Exhibit S** to my affidavit.

F) DFO's policy of not testing for PRV and HSMI

32. On June 28, 2016, prompted by the concerning HSMI diagnoses in BC and Chile, I sent an email to the ITC regarding testing for PRV and HSMI.

33. In the June 28 email, I asked whether the ITC tests for PRV or HSMI as part of an application for a fish transfer licence. I also asked whether the ITC knows whether fish being released or transferred have PRV or HSMI, and whether the ITC has authorized the release or transfer of PRV infected fish since May 6, 2015, the day Justice Rennie's decision was released. A copy of this email is attached as **Exhibit T** to my affidavit.

34. On July 22, 2016, the ITC responded to my email, stating that the ITC "is not requiring testing for PRV or HSMI as part of applications to transfer salmon. The department does not gather information on the presence of PRV or HSMI in relation to salmon transfers." A copy of this email is attached as **Exhibit U** to my affidavit.

35. The July 22 email also directed me to a DFO webpage setting out the DFO's current scientific understanding of PRV.

36. On July 22, 2016, I reviewed the DFO webpage that I was directed to in the July 22 email. The webpage cites dozens of academic sources for statements regarding PRV and states that "...PRV was found to be correlated with the development of lesions diagnostic of HSMI and spatially located within the affected

tissue, consistent with HSMI etiology from other countries." I printed a copy of this webpage and attached it as **Exhibit** V to my affidavit.

37. On the same day, I reviewed another DFO webpage regarding the ITC. As describe on this webpage, the ITC is responsible for approving fish transfer licences according to all applicable laws, regulations, and policies. I printed a copy of this webpage and attached it as **Exhibit** W to my affidavit.

38. On August 30, 2016, through my counsel, I sent a letter to the Minister of Fisheries and Oceans and the ITC demanding that (1) the Minister require PRV testing for all fish-transfer licence applications; (2) the Minister not issue transfer licenses for any fish infected with PRV. A copy of the August 30 letter is attached as **Exhibit X** to my affidavit.

39. The August 30th letter was sent with the following attachments:

a) June 28, 2016 email from me to the ITC, a copy of which is attached as **Exhibit T** to my affidavit;

b) July 22, 2016 response email from ITC to me, a copy of which is attached as **Exhibit U** to my affidavit;

c) Draft Notice of Application, a copy of which is attached as **Exhibit X, Tab 1** to my affidavit;

d) *Morton v Canada (Fisheries and Oceans),* 2015 FC 575 decision, a copy of which is attached as **Exhibit O** to my affidavit;

e) Garseth *et al, Associations between piscine reovirus infection and life history traits in wild-caught Atlantic salmon Salmo salar L. in Norway*, Prev Vet Med. 2013 Oct 1:112(1-2), a copy of which is attached as **Exhibit I** to my affidavit;

f) Dr. Are Nylund's expert report, a copy of which is attached as **Exhibit L** to my affidavit;

g) Dr. Are Nylund's cross-examination transcript, a copy of which is attached as **Exhibit M** to my affidavit;

h) Copy of a printout of the DFO's webpage on PRV, a copy of which is attached as **Exhibit V** to my affidavit;

i) May 20, 2016 recording of the DFO press conference confirming diagnosis of HSMI in BC, which is attached as **Exhibit Q** to my affidavit; and

j) May 20, 2016 DFO news release regarding an HSMI diagnosis in BC, a copy of which is attached as **Exhibit R** to my affidavit.

40. By letter dated September 29, 2016, Lauren Lavigne, DFO Regional Manager Aquaculture Programs, responded to my August 30th letter. Ms. Lavigne again confirmed that, while the "DFO will continue to monitor the situation and assess whether any changes to the ITC's protocols become necessary", it does not require testing for PRV or HSMI as part of applications to transfer salmon. A copy of the September 29th response letter is included as **Exhibit Y** to my affidavit.

G) Evidence demonstrating my genuine interest in the impacts of salmon farming

41. As stated above, my research, education, and advocacy work is now focused almost entirely on salmon farming and its potential impacts on the marine ecosystem of coastal British Columbia.

42. My research on salmon farming includes:

a) 27 co-authored papers on the impact of salmon farming on fish and whales;

b) 15 years of sea lice research (2001-present). In 2010, I received an honorary Doctorate of Science from Simon Fraser University for my research on farm salmon-origin sea lice; and

c) Sampling wild and farmed salmon throughout British Columbia for various pathogens associated with fish diseases.

43. My research is conducted with the intent of contributing to public discourse and decision making about salmon farming and conservation of the marine environment.

44. The following are some examples of the work I have done to further public debate on the issue of salmon farms and their potential impact on the marine environment:

a) In 2001, I was a founding member of the Coastal Alliance for Aquaculture Reform ("CAAR"), an alliance of organizations working to protect wild salmon, coastal ecosystems, coastal communities, and human health from destructive salmon farming practices and to promote safe farming. CAAR engaged in public outreach with a website called farmedanddangerous.org, held press conferences and ran advertising campaigns;

b) In 2004 and 2008, I was paired with DFO in a sea lice research project conducted for the BC Pacific Salmon Forum, a government funded research program, to do research on sea lice in the Broughton Archipelago;

c) In 2009, I travelled to Norway and presented at the annual general meetings of the two biggest salmon farm companies operating in BC, Marine Harvest and Cermaq, where I told the shareholders that they should move their operations away from large wild Pacific salmon migration routes. I was also invited to a meeting by the CEO of Marine Harvest to discuss issues related to its work in BC;

d) I led a walk down Vancouver Island in 2010 that culminated in an estimated 5000-7000 people on the steps of the BC Legislature asking that salmon farms get out of the ocean;

e) In 2010, I led 100 people in canoes on a 7-day paddle down the lower Fraser River and walked to the opening day of the Cohen Commission of Inquiry into

the Decline of Sockeye Salmon in the Fraser River ("Cohen Commission") hearings;

f) I toured BC during the 2011 federal election to ask candidates from all parties whether they would work towards protecting wild salmon from salmon farms and posting their responses on a website;

g) In 2011, I gave the 2nd Ransome Myer's Lecture at the International Marine Conservation Congress;

h) In 2012-2013, I produced the documentary Salmon Confidential. It has well over 100,000 views on You Tube (https://www.youtube.com/watch?v=fTCQ2IA_Zss&spfreload=5) and over 200,000 views at www.salmonconfidential.ca;

i) In 2013, I produced two documentary shorts specifically about PRV and HSMI which are available at http://vimeo.com/68908525 and http://vimeo.com/70399899#at=0;

j) I have participated in academic think tanks at Simon Fraser University in 2009, 2010, 2011, 2012, and 2013 about the decline of the Fraser sockeye and, after the Cohen Commission, about the Cohen Commission recommendations;

k) In March 2016, I Presented on aquaculture impacts at the University of Washington School of Environmental and Forest Sciences; and

l) On an ongoing basis, I post articles on my blog at www.alexandramorton.typepad.com, where I link to research, articles, and documents.

45. I have participated in the following government proceedings that considered, among other things, the impacts of salmon farming on the marine environment:

a) The Coastal Resource Interest Study (1989), which I believe was a joint project of the provincial Ministry of Environment and the former provincial Ministry of

Agriculture, Fisheries and Food, designed to identify already existing users of the marine environment, including wildlife, tourism, commercial fishing and zone salmon farming opportunity to reduce conflict;

b) The provincial Salmon Aquaculture Review (1995), which included a series of monthly, multi-day meetings at which I presented disease information and was questioned by a salmon farming industry panel, and made written submissions to the Review Board;

c) The BC Legislative Assembly's Special Committee on Sustainable Aquaculture (2006-2007), where I provided testimony as a witness, answered questions from the Committee, made written submissions on my own behalf and that of the Raincoast Research Society, and hosted the Committee at the Salmon Coast Field Station to view sea lice-infected juvenile wild salmon;

d) Appeared as a witness before the Federal Standing Committee on Fisheries and Oceans to testify about aquaculture on February 16, 2000, April 12, 2010, and March 26, 2014.

e) Presented at meeting with BC Minister Letnik March 16, 2015 on disease in farm salmon in Abbotsford, BC.

46. I have participated in the following judicial and quasi-judicial proceedings that considered salmon farming:

a) In 2008, I was one of the petitioners in *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136. The case successfully challenged provincial regulation of salmon farming in British Columbia. The provincial Crown challenged my standing to bring the case. Justice Hinkson concluded that I satisfied the test for public interest standing. A copy of the reasons on standing excerpted from the reasons for judgment of Justice Hinkson is attached as **Exhibit Z** to my affidavit;

b) In 2010, I was granted standing, jointly with the Raincoast Research Society and the Pacific Wild Coast Salmon Society, to be formally involved in the 2010-2011 Cohen Commission hearings as a participant. The Commissioner, Justice Cohen, granted us standing based on his conclusion that we had a substantial and direct interest in the subjects of whether aquaculture was a cause for the decline of the Fraser River sockeye, and DFO policies as they related to aquaculture. An excerpted copy of the Commissioner's ruling on standing is attached as **Exhibit AA** to my affidavit. Additionally, the Cohen Commission called me as a witness; I appeared a witness on a panel addressing "Perspectives on Management, Risks and Finfish Aquaculture";

c) I have also taken steps to enforce laws intended to protect the marine environment, including by initiating two private prosecutions. The most recent private prosecution, which I initiated in 2011 against Marine Harvest for the illegal possession of wild fish, was taken over by federal crown prosecutors and later resulted in a guilty plea. A copy of the transcript of the proceedings at sentencing in this prosecution, dated January 18, 2012, is attached as **Exhibit BB** to my affidavit; and

d) In the *Morton v Canada (Fisheries and Oceans),* 2015 FC 575 case I brought in 2013 the respondents DFO and Marine Harvest Canada Inc. did not challenge my standing. Justice Rennie in his reasons for judgment also accepted that I had brought the case in the public interest. A copy of Justice Rennie's decision is attached as **Exhibit O** my affidavit.

47. I bring this application because I am concerned about the impact of disease in the coastal marine environment in BC. I also believe that it is in everyone's interest that laws protecting the marine environment are properly interpreted, applied and enforced.

48. I provide this affidavit in support of this application and for no improper purpose.

AFFIRMED BEFORE ME at Vancouver, in the Province of British Columbia, on November 22, 2016.	)	
A Commissioner for Taking Affidavits for British Columbia, being a Solicitor	)	Alexandra Morton

Morgan Blakley
Barrister and Solicitor

MORGAN A.S. BLAKLEY
BARRISTER AND SOLICITOR
#214 – 131 Water Street
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This is Exhibit " K " referred to in the affidavit of Alexandra Morton sworn before me at Vancouver, BC this 28th day of November 20 16

A Commissioner for taking Affidavits within British Columbia

MORGAN BLAKLEY

Vancouver File No T-789-13

FEDERAL COURT

ALEXANDRA MORTON

Applicant

and

MINISTER OF FISHERIES AND OCEANS
and MARINE HARVEST CANADA INC.

Respondents

NOTICE OF APPLICATION

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*, RSC 1985, C F-7

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at *Vancouver, British Columbia.*

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: May 7, 2013

Issued by: ORIGINAL SIGNED BY CHRISTIAN PRESBER REGISTRY OFFICER

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MAI MAY 07 2013

CHRISTIAN PRESBER
REGISTRY OFFICER
AGENT DU GREFFE

APPLICATION

This is an application for judicial review of in respect of a License granted under the *Pacific Aquaculture Regulations* (the "Aquaculture License") by the Minister of Fisheries and Oceans or his delegate (the "Minister" or "DFO") to Marine Harvest Canada Inc ("Marine Harvest Canada"). The Aquaculture License contains a License condition that is contrary to law.

Specifically this Application alleges that the Minister lacks the authority or jurisdiction under the *Pacific Aquaculture Regulations*, SOR-2010-270 (the "PARs") to include the impugned License condition in this or any Aquaculture License. The Application further alleges that the impugned License condition is contrary to section 56 of the *Fishery (General) Regulations* SOR-93-53 and is unlawful.

On April 12, 2013, DFO confirmed to the Applicant that DFO had purportedly authorized Marine Harvest Canada to transfer fish infected with a disease agent, under Marine Harvest's Aquaculture License. The Applicant first obtained a copy of the Aquaculture License from DFO on May 3, 2013.

The Applicant makes application for:

1. An order or orders declaring that:

    a. The Minister lacks the authority or jurisdiction to specify any conditions respecting the transfer of fish having diseases or disease agents in a License issued under the PARs.

    b. Section 4 of the PARs and section 22 of the *Fishery (General) Regulations* do not authorize any License conditions that grant permission to transfer fish having diseases or disease agents.

    c. The License condition at clause 3.1 of the Aquaculture License (the "License Condition") is without authority, exceeds the jurisdiction of the Minister and is *ultra vires.*

    d. Any License condition in an aquaculture License that purports to authorize the transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish is *ultra vires.*

2. An order or orders further declaring that:

    a. The License Condition is contrary to law.

b. The License Condition unlawfully allows the transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish, contrary to section 56 of the *Fishery (General) Regulations*.

c. In issuing an Aquaculture License containing the License Condition, the Minister unlawfully and incorrectly applied, or failed or refused to apply, section 56 of the *Fishery (General) Regulations*.

d. The License Condition constitutes an unlawful exception to the legal prohibition, in section 56 of the *Fishery (General) Regulations*, against the transfer of fish having disease or disease agents that may be harmful to the protection and conservation of fish.

e. The Minister's ongoing policy and practice of excluding salmon aquaculture operations in British Columbia from section 56 of the *Fishery (General) Regulations* is unlawful.

3. An order in the nature of *certiorari* severing the impugned License Condition.

4. An order that the Applicant shall not be required to pay costs to the Respondents of the Application, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that the Application is dismissed.

5. Costs.

6. Such further and other relief as this honourable Court deems just.

The grounds for the application are:

The Parties

1. The Minister administers and implements the *Fishery (General) Regulations* and the PARs, which are both enacted under the *Fisheries Act*, RSC 1985, c F-14.

2. On February 28, 2013, the Minister issued the Aquaculture License containing the impugned License Condition to Marine Harvest Canada.

3. Marine Harvest Canada is the holder of the Aquaculture License under the PARs. That Aquaculture License includes the impugned License Condition regarding transfer of fish having disease or disease agents that at issue in this litigation. Marine Harvest Canada operates both the hatchery from which fish infected with Piscine Reovirus were transferred and the aquaculture facility to which these fish were transferred.

4. The Applicant, Alexandra Morton, is a public interest litigant with no personal, proprietary or pecuniary interest in the outcome of this Application. Ms. Morton has a demonstrated record of genuine interest in protecting the marine environment from the impacts of salmon aquaculture in British Columbia. In relation to salmon aquaculture, Ms. Morton has worked to ensure that governments act within their legal powers, to promote compliance with environmental laws, to contribute to scientific studies and to provide information to the Canadian public. She has participated in public interest litigation, private prosecutions and, provincial reviews of salmon aquaculture. Further, she has testified before federal parliamentary and provincial legislative committees, and was a participant and witness in a federal commission of inquiry, all in relation to salmon aquaculture.

5. Ms. Morton believes that this Application is necessary to address the Minister's failure or refusal to correctly apply section 56 of the *Fishery (General) Regulations* to salmon aquaculture operations in British Columbia.

6. The Minister's compliance with the legal preconditions for transferring fish into the ocean is in the public interest.

Transferring fish infected with harmful diseases or harmful disease agents into the ocean is prohibited by the Fishery (General) Regulations

7. Transfer of fish to a fish rearing facility is governed by Part VIII of the *Fishery (General) Regulations.*

8. Under Part VIII, fish may only be lawfully transferred pursuant to a License and in accordance with the requirements set out in section 56; including the requirement in paragraph 56(b) that the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish.

9. Section 56 does not permit the Minister to authorize any transfer of fish having diseases or disease agents that may cause harm to the protection and conservation of fish.

DFO has an ongoing policy of excluding certain salmon aquaculture operations from the fish transfer provisions under Part VIII of the Fishery (General) Regulations

10. As a matter of policy or practice, DFO has developed nine "salmonid transfer zones" covering British Columbia and its coast.

11. Salmonid transfer zones are not prescribed by law.

12. Where a person seeks to transfer salmon from one of DFO's salmonid transfer zones to another zone, DFO requires that person to obtain an Introductions and Transfer License pursuant to Part VIII of the *Fishery (General) Regulations*.

13. DFO requires a person applying for an Introductions and Transfer License under Part VII to apply using a form called "Form B". Form B incorporates information addressing the legal requirements set out in paragraph 56(b) of the *Fishery (General) Regulations*.

14. However, where an aquaculture Licensee seeks to transfer salmon within a salmonid transfer zone, DFO appears to exempt the aquaculture Licensee from obtaining an Introductions and Transfer License pursuant to Part VIII. Rather than requiring an application using Form B, DFO purports to allow aquaculture Licensees to transfer salmon within a salmonid transfer zone pursuant to aquaculture Licenses under the PARs.

15. In effecting this policy or practice of exempting aquaculture Licensees from Part VIII of the *Fishery (General) Regulations*, DFO has adopted a template form for all aquaculture Licenses issued under the PARs (the "Template").

16. Part 3 of the Template includes language identical to the impugned License Condition. The impugned License Condition, and thus also the Template condition, purport to allow a licensee to transfer live salmonids known to have disease agents or diseases that may be harmful to the protection and conservation of fish. The impugned License Condition further purports to allow a licensee to transfer live salmonids known to have had diseases provided that the facility's veterinarian has deemed the transfer to be "low risk."

17. The License Condition states:

> **3.1** The License holder may transfer to this facility live Atlantic or Pacific salmonids from a facility possessing a valid aquaculture License issued pursuant to section 3 of the *Pacific Aquaculture Regulations* between the Fish Health zones described in Appendix VI, provided transfers occur within the same salmonid transfer zone as outlined in Appendix II and provided:
>
> (a) the species of live salmonid fish are the same as those listed on the face of this License;
>
> (b) the license holder has obtained written and signed confirmation, executed by the source facility's veterinarian or fish health staff, that, in their professional judgement:
>
> > (i) mortalities, excluding eggs, in any stock reared at the source facility have not exceeded 1% per day due to any infectious diseases, for any four consecutive day period during the rearing period;
> >
> > (ii) the stock to be moved from the source facility shows no signs of clinical disease requiring treatment; and

(iii) no stock at the source facility is known to have had any diseases listed in Appendix IV; or

(iv) where conditions 3.1 (b)(i) and/or 3(b)(iii) cannot be met transfer may still occur if the facility veterinarian has conducted a risk assessment of facility fish health records, review of diagnostic reports, evaluation of stock compartmentalization, and related biosecurity measures and deemed the transfer to be low risk.

Marine Harvest Canada's Aquaculture License contains the impugned License Condition

18. On February 28, 2013, the Minister or the Minister's delegate granted the Aquaculture License to Marine Harvest Canada.

19. There is no legal requirement to post, release or otherwise make publically available an aquaculture license issued under the PARs. The Aquaculture License was not disclosed to the public or to the Applicant at the time it was issued.

20. On or about March 12, 2013, Ms. Morton learned that Marine Harvest Canada was actively conducting a transfer of Atlantic salmon smolts within DFO's "Salmonid Transfer Zone 7" from its Dalrymple Hatchery to its Shelter Bay aquaculture site.

21. These transferred Atlantic salmon smolts were infected with a disease agent, known as Piscine Reovirus ("PRV") that may be harmful to the protection and conservation of fish.

22. PRV may harm fish, and in particular PRV may be harmful to wild salmon.

23. PRV is waterborne and contagious and can be transmitted from farmed salmon to wild fish.

24. PRV is associated with, and thought, to cause Heart and Skeletal Muscle Inflammation ("HSMI") in salmon.

25. The physical effects of HSMI on salmon reduce salmons' ability to survive and to complete their life-cycle and particularly their ability to swim upstream.

26. In early March 2013, approximately one week prior to Marine Harvest Canada's transfer of infected Atlantic salmon, Ms. Morton wrote to representatives of DFO, Marine Harvest Canada and the Province of British Columbia informing them that 60 percent of the Atlantic salmon smolts at the Dalrymple Hatchery had reportedly tested positive for PRV.

27. Between March 26 and April 4, 2013, Ms. Morton corresponded with Stacee Martin, a DFO official in aquaculture management, attempting to identify the source of the authority for Marine Harvest Canada's transfer of the fish to the Shelter Bay facility. On

April 4, 2013 Ms. Morton specifically sought DFO's reasons for why it perceived the transfer to be lawful.

28. On April 12, 2013, Ms. Martin responded to Ms. Morton's April 4, 2013 email. She advised Ms. Morton that this transfer of fish had been authorized, purportedly, under the Aquaculture License granted to Marine Harvest Canada rather than being authorized under the *Fishery (General) Regulations*.

29. On May 2 and 3, 2013, Ms. Morton requested a copy of the Aquaculture License from DFO. On May 3, 2013, a DFO official provided Ms. Morton with a copy of the Aquaculture License.

30. The Aquaculture License provided to Ms. Morton on May 3, 2013 contains the License Condition.

The License Term is ultra vires the Pacific Aquaculture Regulations

31. Section 43 of the *Fisheries Act* allows the Governor in Council to make regulations for carrying out the purposes and provisions of that legislation. Pursuant to section 43, the Governor in Council enacted the PARs, which came into force on December 18, 2010.

32. Aquaculture off the coast of British Columbia is largely regulated under the *Fisheries Act* scheme through the PARs.

33. Cabinet enacted the PARs in response to the decision of the British Columbia Supreme Court in *Morton v. British Columbia (Agriculture and Lands)*, 2009 BCSC 136.

34. Section 3 of the PARs allows the Minister to issue an aquaculture License authorizing a person to engage in aquaculture.

35. Sections 4 of the PARs and s. 22of the *Fishery (General) Regulations* enumerate the matters that the Minister may specify in License conditions. With the exception of matters addressed under section 22 of the *Fishery (General) Regulations*, section 4 is exhaustive of all matters on which the Minister may lawfully specify License conditions.

36. Section 4 of the PARs allows the Minister to specify conditions in an aquaculture License for the proper management and control of fisheries and the conservation and protection of fish.

37. Section 4 of the PARs does not authorize the Minister to specify any conditions in an aquaculture License that purport to authorize the transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish.

38. There is no authority or jurisdiction to authorize transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish.

39. As with section 4 of the PARs, section 22 of the *Fishery (General) Regulations* authorizes License conditions respecting the matters specifically enumerated within subsection 22(1). None of the enumerated matters address or permit the transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish.

40. Section 22 of the *Fishery (General) Regulations* expressly prohibits License conditions that are inconsistent with any provision of, *inter alia*, the *Fishery (General) Regulations* or the PARs.

41. Section 22 of the *Fishery Act (General) Regulations* does not authorize or permit the Minister to specify any conditions authorizing transfer of fish having diseases or disease agents that may be harmful to the protection and conservation of fish in an aquaculture License.

42. It is unlawful for a License issued under the PARs to specify any conditions related to or authorizing the transfer of Atlantic salmon infected with or carrying a disease or disease agent that may be harmful to the protection and conservation of fish.

43. When including the License Condition in the Aquaculture License granted to Marine Harvest Canada, the Minister acted without authority, exceeded his jurisdiction and acted *ultra vires* the PARs.

44. The Minister's ongoing policy or practice of including conditions allowing the transfer of fish with diseases or disease agents that may be harmful to the protection and conservation of fish into Licenses under the PARs is without authority, lacks jurisdiction and is *ultra vires*.

The License Condition is contrary to section 56 of the Fishery (General) Regulations

45. The impugned License Condition purports to permit Licensees to transfer Atlantic salmon that are known to be infected with harmful disease agents into coastal waters off British Columbia.

46. The License Condition grants Licensees a purported discretion to determine whether to transfer Atlantic salmon that they know contain harmful disease agents into coastal waters off British Columbia.

47. Pursuant to section 56 of the *Fishery (General) Regulations*, the Minister may not issue a License to transfer salmon to a salmon rearing facility where those fish are infected with a disease or disease agent that may cause harm to fish.

48. The License Condition unlawfully allows a Licensee to transfer Atlantic salmon into the marine environment regardless that those Atlantic salmon are known to be infected with a disease agent that may be harmful to the protection and conservation of fish. In this respect, the License Term constitutes an unlawful exception to the legal prohibition in section 56 of the *Fishery (General) Regulations* against the transfer of fish infected with potentially harmful disease or disease agents.

49. In issuing an Aquaculture License containing the impugned License Condition, the Minister unlawfully and incorrectly applied, or failed or refused to apply, section 56 of the *Fishery (General) Regulations*.

50. The License Condition is contrary to law.

51. In creating and implementing a process that permits the transfer of Atlantic salmon infected with potentially harmful diseases or disease agents into aquaculture operations in British Columbia, the Minister is acting unlawfully.

52. The Minister's ongoing policy or practice of excluding salmon aquaculture operations in British Columbia from section 56 of the *Fishery (General) Regulations* is contrary to law.

Additional Grounds

53. The Minister failed to act in a manner consistent with the precautionary principle.

54. In addition, the Applicant relies generally on sections 18, 18.1 and 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the Federal Courts Rules, and such further additional grounds as counsel may identify and this Court may consider.

This Application will be supported by the following material:

1. An affidavit of Alexandra Morton, to be served.
2. The Record of Materials considered by the Minister of Fisheries and Oceans.
3. Such further and additional materials as counsel may advise and the Court may allow.

Rule 317 request:

The Applicant requests that the Minister send a certified copy of the following material not in the Applicant's possession, but in the possession of the Minister, to the Applicant and the Registry:

1. The record of materials considered or relied on by the Minister or his delegate in issuing the Aquaculture License, including but not limited to:
    a. materials containing advice or information about section 56 of the *Fishery (General) Regulations*, and
    b. materials setting out DFO's policy or practice of allowing transfer of salmon *within a salmonid transfer zone pursuant to an aquaculture License under the* PARs.

Date: May 7, 2013

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This is Exhibit " O " referred to in the affidavit of Alexandra Morton sworn before me at Vancouver, BC this 28th day of November 20 16.

A Commissioner for taking Affidavits within British Columbia

MORGAN BLAKLEY

Federal Court Cour fédérale

Date: 20150506

Docket: T-789-13

Citation: 2015 FC 575

Ottawa, Ontario, May 6, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ALEXANDRA MORTON

Applicant

and

MINISTER OF FISHERIES AND OCEANS and MARINE HARVEST CANADA INC

Respondents

JUDGMENT AND REASONS

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I. Overview

[1] Under the authority of a license issued by the Minister of Fisheries and Oceans, Marine Harvest Canada Inc. operates a fish farm at Shelter Bay, British Columbia. In March, 2013, Marine Harvest transferred salmon smolts (that is, salmon which have undergone a physical change called "smolting" enabling them to live in salt water) from its Dalrymple hatchery (the hatchery) to the Shelter Bay fish farm (the fish farm). The smolts were subsequently sampled at the fish farm, and in June 2013 tested positive for piscine reovirus (PRV).

[2] Alexandra Morton (the applicant) is a biologist. She lives and works in the Broughton Archipelago, the area with the greatest density of fish farms on the British Columbia coast. Ms. Morton has researched aquatics since the 1990s and has longstanding concerns with respect to the effects of aquaculture on the health of the wild salmon population. She brought this proceeding in the public interest and her standing is not contested.

[3] Ms. Morton was troubled by the transfer of smolts that occurred in March 2013. In her view, the positive PRV test at their destination (the fish farm) demonstrated that the smolts had PRV at their origin (the hatchery), and therefore that Marine Harvest had transferred diseased fish contrary to the *Fishery (General) Regulations*, SOR/93-53 (*FGRs*). Ms. Morton contacted the Department of Fisheries and Oceans (DFO) to inquire as to the regulatory scheme governing such a transfer. In particular, Ms. Morton inquired about whether every transfer from a private hatchery to a fish farm required a transfer licence and, if so, whether such a licence was issued for Marine Harvest's transfer of the smolts which tested positive for PRV.

[4] In response to Ms. Morton's inquiry, Ms. Stacee Martin, DFO Co-Chair of the BC Introductions and Transfers Committee, advised that under DFO policies, the Pacific region was divided into nine Salmonid Transfer Zones, and that the regulatory scheme governing a specific transfer depended on whether or not the transfer was within a single Salmonid Transfer Zone or transited multiple Salmonid Transfer Zones. More specifically, Ms. Martin explained that transfers *between* Salmonid Transfer Zones require a transfer licence under the *FGRs*, whereas transfers *within* a single Salmonid Transfer Zone were regulated by the *Pacific Aquaculture Regulations*, SOR/2010-270 (*Aquaculture Regulations*). With respect to the transfer from the hatchery to the fish farm by Marine Harvest, Ms. Martin explained that this transfer was regulated by the *Aquaculture Regulations* because both the fish farm and the hatchery were situated within a single Salmonid Transfer Zone.

[5] Ms. Morton was concerned that the Salmonid Transfer Zone policy enabled the transfer of fish to occur under the regulatory authority of the *Aquaculture Regulations*, which provided, in her view, fewer safeguards against the transfer of fish than the *FGRs*. Ms. Morton therefore brought this application for judicial review. The application was framed, *inter alia*, on the ground that the condition in the licence granted to Marine Harvest authorizing the transfer of smolts from the hatchery to the farm was *ultra vires* the *Aquaculture Regulations*.

[6] As we will see, subsequent to the receipt of the applicant's memorandum of fact and law, the Minister resiled from the position that the license authorizing the transfer was governed by the *Aquaculture Regulations*. In his memorandum and at the hearing of this application, the Minister took the position that the authority to authorize the transfer derived from section 56 of

the *FGRs*. In consequence, the specific argument that the licence was *ultra vires* the *Aquaculture Regulations* became moot. Other grounds of challenge to the licence remained, however.

[7] The licence permits the transfer of fish by Marine Harvest subject to the satisfaction of certain conditions. The conditions governing the transfer of smolts from the hatchery to the fish-farms (essentially net-pens in the ocean) are set out in condition 3.1 of the licence. The issue is whether licence condition 3.1 meets or is consistent with the regulatory pre-conditions and requirements governing transfers established by section 56 of the *FGRs*.

[8] Subsection 22(1) of the *FGRs* stipulates that a licence condition cannot conflict with the *FGRs*. The applicant contends that the licence conditions conflict with the regulatory requirements that transferred fish "do not have any disease or disease agent that may be harmful to the protection and conservation of fish" (*FGRs*, section 56(b)). The applicant also says that the licence conflicts or is inconsistent with the regulatory requirements of section 56(c) that the release or transfer of fish "will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks." Further, Ms. Morton contends the licence condition allows the licensee to make transfer decisions which by regulation are reserved to the Minister, and thus are an impermissible delegation of the Minister's legislative responsibilities.

[9] For the reasons that follow, the application for judicial review is granted. I conclude that licence conditions 3.1(b)(ii) and 3.1(b)(iv) are inconsistent with the regulatory preconditions established by section 56 of the *FGRs* governing the transfer of farmed fish to the marine environment.

II. The regulatory scheme governing transfers

A. *The Fisheries (General) Regulations*

[10] The Minister's power to issue licences is found in section 7 of the *Fisheries Act*, RSC 1985, c F-14 (*Fisheries Act*). The section accords the Minister an "absolute discretion" to either "issue" or "authorize to be issued" licences for fisheries or fishing:

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, octroyer des baux et permis de pêche ainsi que des licences d'exploitation de pêcheries — ou en permettre l'octroi —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.

[11] Section 43 of the *Fisheries Act* reinforces the broad scope of the Minister's regulatory authority. This section allows the Governor in Council to make regulations for carrying out the purposes and provisions of the *Fisheries Act*, including:

(a) for the proper management and control of the sea-coast and inland fisheries;	(a) concernant la gestion et la surveillance judicieuses des pêches en eaux côtières et internes;
(b) respecting the conservation and protection of fish;	(b) concernant la conservation et la protection
[...]	[...]

(f) respecting the issue, suspension and cancellation of licences and leases;	(f) concernant la délivrance, la suspension et la révocation des licences, permis et baux;
(g) respecting the terms and conditions under which a licence and lease may be issued;	(g) concernant les conditions attachées aux licences, permis et baux;

[12] The *FGRs* establish an over-arching regulatory framework governing the management of the fishery. They also establish subcategories of licences, each of which is related to various aspects of the fishery. Thus, the key to understanding the scope of the Minister's discretion regarding a specific licence, such as the Shelter Bay licence, is to know which part of the *FGRs* applies, based on the activity or species in question. As the name of the regulations suggests, (*Fishery (General) Regulations*) the regulations apply generally, save where there is an inconsistency with more specific, listed regulations.

[13] Part VIII of the *FGRs*, the title of which is "Release of Live Fish into Fish Habitat and Transfer of Live Fish to a Fish Rearing Facility" is specifically directed to the transfer of fish, and, as noted earlier, is now conceded by the Minister to govern the transfer of smolts from the Dalrymple hatchery to the Shelter Bay fish farm. Section 54, found in Part VIII, stipulates that a licence is required to transfer farmed fish:

54. In this Part, "licence" means a licence to release live fish into fish habitat or to transfer live fish to a fish rearing facility.	54. Dans la présente partie, « permis » s'entend du permis autorisant la libération de poissons vivants dans leur habitat ou le transfert de poissons vivants dans des installations d'élevage.

[14] Section 56 establishes specific constraints on the Minister's discretion in respect of transfer licences. The Minister may only issue a licence if certain pre-conditions are met:

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 protection and conservation of fish; and	(b) les poissons sont exempts de maladies et d'agents pathogènes qui 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.

[15] The interface between this regulatory requirement and the conditions in the licence granted to Marine Harvest are at the heart of this application. Broadly speaking, Ms. Morton contends that the licence conditions are inconsistent with the regulatory pre-conditions established by section 56 of the *FGRs*, and therefore run afoul of the requirement of subsection 22(1) of the *FGRs* that licence conditions cannot be inconsistent. Further, as noted earlier, she submits that the licence conditions constitute an unlawful delegation of ministerial discretion and ministerial responsibility for protection and conservation of the fishery to Marine Harvest. The respondents say that the licence conditions conform to the requirements of section 56.

[16] I conclude on three contextual points.

[17] The *FGRs* and the *Aquaculture Regulations* do not operate in separate silos – instead, the regulations work together to ensure the proper management of aquaculture. In the result, the licence granted to Marine Harvest is effectively an aggregate licence, addressing subject matter both within the ambit of the *FGRs* and the *Aquaculture Regulations*. That is, the licence granted to Marine Harvest provides both a transfer licence under the *FGRs* and an aquaculture licence under the *Aquaculture Regulations*.

[18] In 2009 as a result of *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136, aff'd 2009 BCCA 481, the regulation of finfish aquaculture on Canada's Pacific coast was confirmed to be within the exclusive jurisdiction of Parliament. Since that time, finfish aquaculture on Canada's Pacific coast has been regulated under the *Aquaculture Regulations* and

the *FGRs*. As the decision under review observes "the licences [now federal] were largely based on the manner in which the industry was regulated under the previous provincial regime..."

[19] I note, parenthetically, that there is a context to this issue. In 2012, the Honourable Justice Cohen submitted his final report from the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River. The Commission of Inquiry began its work in 2009, the year in which the Fraser River Sockeye fishery had experienced its lowest return since the 1940s. The Government of Canada sought to identify the reasons for the decline and to determine whether changes were needed to fisheries management polices (Canada, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, *The Uncertain Future of Fraser River Sockeye* (2012, vol 3 at 2). Significantly, Justice Cohen found that there is *some* risk posed to wild sockeye salmon from diseases on fish farms and ensuring the health of wild stocks should be "DFO's number one priority in conducting fish health work" (*Cohen Commission* vol 2 at 113 and vol 1 at 474).

[20] With the historical and legislative landscape set, I turn to the licence itself.

B. ***The licence and appendix***

[21] As noted earlier, in correspondence with the applicant, DFO categorized the licence as being granted under the *Aquaculture Regulations*. This is unsurprising, given that the licence itself is titled "Finfish Aquaculture licence under the *Pacific Aquaculture Regulations*". It is now conceded that there is no authority to transfer fish in the *Aquaculture Regulations*. The *Aquaculture Regulations* are silent regarding the transfer of diseased fish.

[22] Condition 3 of the licence begins with the title "Transfer of Fish". Condition 3.1 states "[t]he licence holder may transfer to this facility live Atlantic or Pacific salmonids from a facility possessing a valid aquaculture licence issued pursuant to section 3 of the Pacific Aquaculture Regulations" provided the transfer conditions are satisfied. This is precisely the type of transfer contemplated by Part VIII of the *FGRs* which defines a Part VIII licence as a licence "to transfer live fish to a fish rearing facility". Given the importance of transfer decisions as evidenced by the overall scheme of the *FGRs*, it would be unreasonable to conclude that there was a *hiatus* in the regulatory scheme, such that transfers from the hatchery to the fish farm were unregulated. I conclude that condition 3.1 of the licence authorizing the transfer of fish is derived from Part VIII of the *FGRs* and that the terms of that licence must comply with section 56 of those regulations.

[23] Condition 3.1 of the licence provides for the transfer of fish (the subject of a transfer licence under the *FGRs*). The cultivation or capture of fish (the subject of an aquaculture licence under the *Aquaculture Regulations*) is addressed in other parts of the licence. Condition 3.1 reads:

> 3. Transfer of Fish
>
> 3.1 The licence holder may transfer to this facility live Atlantic or Pacific salmonids from a facility possessing a valid aquaculture licence issued pursuant to section 3 of the *Pacific Aquaculture Regulations* between the Fish Health zones described in Appendix VI, provided transfers occur within the same salmonid transfer zone as outlined in Appendix II and provided:
>
> > (a) the species of live salmonid fish are the same as those listed on the face of this licence;
> >
> > (b) the licence holder has obtained written and signed confirmation, executed by the source

> facility's veterinarian or fish health staff, that, in their professional judgment:
>
> > (i) mortalities, excluding eggs, in any stock reared at the source facility have not exceeded 1% per day due to any infectious diseases, for any four consecutive day period during the rearing period;
> >
> > (ii) the stock to be moved from the source facility shows no signs of clinical disease requiring treatment; and
> >
> > (iii) no stock at the source facility is known to have had any diseases listed in Appendix IV; or
> >
> > (iv) where conditions 3.1(b)(i) and/or 3.1(b)(iii) cannot be met transfer may still occur if the facility veterinarian has conducted a risk assessment of facility fish health records, review of diagnostic reports, evaluation of stock compartmentalization, and related biosecurity measures and deemed the transfer to be low risk.

[24] Both conditions 3.1(b)(iii) and 3.1(b)(iv) reference Appendix IV. Appendix IV is part of the licence and sets out what DFO has identified as eight "diseases of regional, national or international concern". The list includes seven specific fish diseases and one residual category encompassing "any other filterable agent either causing cytopathic effects in tissue culture or is associated with identifiable clinical disease in fish". Importantly, the preamble to Appendix IV states that the listed diseases "*can severely impact fisheries and affect regional and national trade so they warrant urgent notification and immediate attention.*"

[25] Condition 3.1 applies to fish transfers that occur *between* fish health zones and *within* a salmonid transfer zone. These zones are established by DFO policy, and cover different

geographical areas. However, section 56 of the *FGRs* does not distinguish between salmonid transfer zones or fish health zones. The scope of the regulatory requirements, being law, cannot be limited by policy. As such, section 56 applies to *all* fish transfer decisions, regardless of zone, and therefore the licence condition 3.1 governing transfer must be consistent with section 56.

III. Standard of review

[26] The applicant characterizes the issues in this proceeding as questions of jurisdiction, and argues that as such the licence condition should be reviewed on a correctness standard. The Minister and Marine Harvest disagree. They submit that the Court should adopt a highly deferential approach to the Minister's determination.

[27] In determining the standard of review, the Minister places considerable emphasis on the fact that the underlying science involved in licencing the aquaculture industry is complex. Relying on *McLean v British Columbia (Securities Commission)*, 2013 SCC 76 the Minister says that his decision is presumptively reasonable, and that the onus is on the applicant to demonstrate otherwise. The Minister relied on the presumption, and apart from the decision and licence, produced no record.

[28] Marine Harvest, for its part, predicates its position on the Minister's broad discretion to issue fishing licences and to specify licence conditions pursuant to section 7 of the *Fisheries Act*. This provision empowers the Minister to issue or authorize to be issued licences for fisheries or fishing in "[his] absolute discretion." Section 7, according to Marine Harvest, is a complete answer to any inquiry, of any nature or degree, into the licence conditions. Marine Harvest's

position, distilled to its essence, is that the Minister can do what the Minister wants. Alternatively, Marine Harvest contends, based on the expert evidence, that the licence conditions are reasonable.

[29] There is no question that the Minister has broad authority pursuant to section 7 of the *Fisheries Act*. As noted in *Malcolm v Canada (Minister of Fisheries and Oceans)*, 2013 FC 363, aff'd 2014 FCA 130, leave to appeal to SCC refused, [2014] SCCA No 350, the Minister has "the widest discretion" to make fisheries policy decisions. This discretion may be exercised, for example, when granting or refusing to grant licences pursuant to the *FGRs* or the *Aquaculture Regulations*.

[30] Nevertheless, ministerial discretion is framed and controlled by the *FGRs*, section 22 of which prohibits licence conditions that are inconsistent with the *FGRs*. That is, ministerial discretion exists except where it has been prescribed by the law. As the Court of Appeal observed in *Matthews v Canada (Attorney General)*, [1999] FCJ No 830 (CA) "however largely expressed", the Minister's discretion in respect of licence conditions is limited and governed by the objectives of the *Fisheries Act* and its provisions. The Supreme Court made the same point, in precisely relevant terms, in *Comeau's Sea Foods Ltd. v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, where, at paragraph 36, Major J speaking for the Court said:

> It is my opinion that the Minister's discretion under s. 7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, *no regulations currently being applicable*. [Emphasis added]

[31] In *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3, the Supreme Court discussed the *indicia* required to rebut the presumption of reasonableness, few of which are present in this case. Based on the prevailing jurisprudence, the standard of review analysis must start from the premise that reasonableness applies to the review of the Minister's licencing decisions: also see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36; *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40.

[32] In my view, the question of whether the licence conditions are consistent with section 56 of the *FGRs* is to be assessed against a reasonableness standard. The Minister, through the imposition of conditions, is seeking to implement or render operational, the obligations imposed by sections 56(a), (b) and (c). A licence condition that is inconsistent or contrary to a regulatory obligation would be *ultra vires*, but it would also be unreasonable. As I characterize the issue before the Court, the question is whether the licence conditions are a reasonable articulation, or expression, of the mandatory requirements of section 56.

IV. Preliminary observations

A. *Piscine reovirus (PRV) and heart and skeletal muscle inflammation (HSMI)*

[33] HSMI is an infectious disease found in farmed salmon. It causes abnormal swimming behaviour and anorexia in fish. HSMI does not present observable symptoms until 5-9 months following the transfer of smolts to the ocean. There is no question that it is a threat to aquaculture operations. Mortality can range from 0% to 20% of the population, and in one reported case in Norway, the loss of an entire stock.

[34] First identified in Norway in 1999, HSMI is now prevalent throughout Norwegian salmon farming operations. HSMI was discovered in Scotland in 2005, and more recently in Chile and Canada.

[35] The causal relationship between PRV and HSMI has not been conclusively established. However, the weight of the expert evidence before this Court supports the view that PRV is the viral precursor to HSMI. Lengthy and extensive research efforts in Norway designed to identify viruses, other than PRV, which may be responsible for HSMI, have not identified any other agent. Although HSMI has not been found in wild salmon, PRV is now found in 14% of the wild salmon population of the Norwegian coast.

B. *The record*

[36] Judicial review is focused on the decision itself. It is based on the material before the decision maker. As the Court of Appeal noted in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, as a general rule, the record before the court on judicial review is restricted to the evidentiary record before the decision maker.

[37] There are exceptions to this rule, one of which is to provide general background or context which might assist the court in understanding the issues. Much of the evidence tendered in this proceeding, and the use to which it is put, goes beyond the exception. Marine Harvest vigorously contests the causal relationship between HSMI and PRV, and seeks to establish there is no such causality. This misconceives the role of the Court on judicial review. The Minister

tendered no evidence, other than the page and one-half decision required by Rule 317 of the *Federal Courts Rules*. The Minister sheltered behind Marine Harvest's evidence. The Minister nonetheless, made unequivocal statements of science:

> HSMI has not been found in the Atlantic other than in Norway and Scotland. HSMI has never been diagnosed in any fish in the Pacific Ocean, including Pacific Salmon or farmed Atlantic Salmon.

[38] Given that Norway and Scotland are the two largest centers of farmed Atlantic salmon, the statement is more supportive of the applicant's view of the science. But that is not the point at this stage. The point is that assertions made in order to bolster the reasonableness of the Minister's exercise of discretion cannot be made without evidence.

[39] The Minister states that the onus is on the applicant to disprove that what the Minister says about science and the regulations is presumptively deemed reasonable. The Minister pleads that he was "guided by expert advisers" and that the licence conditions were based on "scientific criteria". But it is important to note that the Minister has said nothing about the science which might inform the reasonableness of the conditions. If the Minister wishes to establish that the discretion exercised took into account various factors and that there were relevant limitations in the science, the Minister, or ministerial officials, can say so. What the Minister cannot do is make unsupported statements of science. Nor can the Minister point to expert affidavits, drafted many months after the decision and infer that those considerations must necessarily have been taken into account by the Minister in the exercise of his discretion.

C. *The precautionary principle*

[40] The Minister contends that licence conditions 3.1(b)(i), (ii) and (iii) are reasonable and "take into account the reality of the current limitations of scientific knowledge and reflects a precautionary approach to fish transfers." That is, the conditions are intended, in the face of scientific uncertainty, to prevent transfers that may be harmful to the protection and conservation of fish. The Minister stresses that the licence conditions are so broad and in line with the precautionary principle that they result in healthy fish being held back from transfers. Notably, the Minister did not argue that licence condition (iv) was consistent with the precautionary principle; Memoranda of the Minister at paras 4, 58, 100-103.

[41] In light of this argument it is useful to consider the exact meaning of the precautionary principle and its application in a legal context. In *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40, Justice L'Heureux-Dubé adopted the precautionary principle and applied it as an element of statutory interpretation, noting at para 31:

> The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990):
>
> > In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
>
> Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, CEPA and the

> Precautionary Principle/Approach (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the Oceans Act, S.C. 1996, c. 31, Preamble (para. 6); Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33, s. 2(1)(a); Endangered Species Act, S.N.S. 1998, c. 11, ss. 2(1)(h) and 11(1).

[42] More recently, the Supreme Court of Canada considered the interface between the precautionary principle and an environmental regulatory scheme in *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52, at para 20. The Court referred to the principle as an emerging principle of international law, which informed the scope and application of the legislative provision in question.

[43] The precautionary principal recognizes, that as a matter of sound public policy the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to protect the environment, as there are inherent limits in being able to predict environmental harm. Moving from the realm public policy to the law, the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law: *Spraytech* at paras 30-31. However, except as discussed in Part VII, the legal contours of the principle need not be determined here, as this decision does not rest or depend on the application of the principle.

[44] Invoking the precautionary principle, the respondents submit that the licence conditions are intended, in the face of scientific uncertainty, to prevent transfers that may be harmful to the protection and conservation of fish. However, they also contend that that same scientific uncertainty with respect to whether PRV is the agent of HSMI justifies the transfer of PRV infected smolts. A lack of full scientific certainty is the very situation addressed by the

precautionary principle. The respondents' arguments with respect to the precautionary principle are inconsistent, contradictory and, in any event, fail in light of the evidence.

[45] The evidence before the Court demonstrates that there is a body of credible scientific study, conducted by respected scientists in different countries, establishing a causal relationship between PRV and HSMI. The evidence also indicates that there are scientists who question the link – but concede that no other disease agent has been identified as the culprit for HSMI. As noted previously, HSMI was first identified in Norway in 1999 and is now prevalent throughout Norwegian salmon farming operations. It has subsequently been found in Iceland, and more recently Chile. Extensive research in Norway designed to identify viruses, other than PRV, which may be responsible for HSMI, have not identified any other agent. Thus, although there is a healthy debate between respected scientists on the issue, the evidence, suggests that the disease agent (PRV) *may* be harmful to the protection and conservation of fish, and therefore a "lack of full scientific certainty should not be used a reason for postponing measures to prevent environmental degradation": *Spraytech* at para 31.

[46] In sum, it is not, on the face of the evidence, open to the respondents to assert that the licence conditions permitting a transfer of PRV infected smolts reflect the precautionary principle. The Minister is not, based on the evidence, erring on the side of caution.

[47] In making these observations about the precautionary principle, the Court is not arbitrating on the PRV/HSMI debate. Rather, the argument having been raised, and the assertion made that the conditions reflect a precautionary approach to aquaculture, the issue had to be

considered. To conclude, based on the evidence before me, the Minister cannot, in support of the reasonableness of the licence conditions and their nexus to the requirements of section 56, contend that they reflect a precautionary approach. I will return briefly to the precautionary principle as an aspect of the interpretation of subsection 56(b) of the *FGRs* later in these reasons.

[48] With these three preliminary observations made (the record, the scientific context and the precautionary principle) I turn to the question whether the licence conditions meet the threshold regulatory requirements. Before doing so, I reiterate that the standard of review is reasonableness, or, put otherwise, whether the conditions are a reasonable articulation of the regulatory preconditions. The answer to this question turns, not on whether PRV is, as a matter of scientific certainty, the viral agent of HSMI, nor whether fish that are PRV positive should be transferred; rather, the answer turns on the application of orthodox principles governing the interpretation of subordinate legislation.

V. Whether the licence conditions comply with section 56 of the *FGRs*

A. *Analytical framework*

[49] It is self-evident that a regulation that is inconsistent with the enabling substantive statutory provisions cannot carry out the purposes of the act (Denys C. Holland and John P. McGowan, *Delegated Legislation in Canada*, (Agincourt, Ontario: The Carswell Co. Ltd., 1989) at 182). Delegated legislation, such as the *FGRs*, has the same legal force as a statute and is interpreted using the same rules and techniques (Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007) at 11). Here, the inconsistency asserted is not between the act and the regulation, but the regulation and the licence. The same principles apply by analogy. Any

condition of the licence that conflicts with the substantive regulatory provisions cannot carry out the purposes of the regulatory scheme: *Matthews*.

[50] The point is made, perhaps unnecessarily given the well-established principles noted above, by subsection 22(1) of the *FGRs*, which directs that the Minister may not specify a condition in a licence that is inconsistent with the *Regulations*.

[51] The licence and its attached conditions cannot derogate from or be inconsistent with the *FGRs*. To draw an analogy, as Professor Ruth Sullivan explains in *Statutory Interpretation* at p 312, "the paramountcy of statutes over delegated legislation operates as a presumption" and in cases of conflict, "the statute is presumed to prevail." So too, the licence cannot grant that which the *FGRs* exclude. This applies with particular force where, as here, the language of the regulation requires certain pre-conditions be met before the Minister may issue a licence.

[52] The question of whether the licence satisfies its governing regulatory provisions requires analogy to the first principles of statutory interpretation. I rely on Driedger's modern principle of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983). In other words, a purposive, contextual and harmonious interpretation should be applied to section 56 of the *FGRs*: *Rizzo & Rizzo Shoes Ltd., Re* [1998] 1 SCR 27 at para 21.

[53] It is, however, imperative to remember that the standard of review is reasonableness, in this case, infused with deference given that this aspect of the applicant's argument asserts a substantive inconsistency between what the regulations require of the Minister, and the articulation of those requirements in the form of conditions on a licence.

B. ***Section 56 of the FGRs***

[54] Section 56 under Part VIII of the *FGRs* provides for prerequisites to the issuance of a licence to transfer fish. The section 56 prerequisites apply prior to and during the currency of a licence. Importantly, the section 56 prerequisites do not govern the conduct of a licensee but rather *govern the conduct of the Minister* in issuing a licence to transfer fish under section 56. Section 56 states:

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 protection and conservation of fish; and	(b) les poissons sont exempts de maladies et d'agents pathogènes qui 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.

[55] In applying a statutory interpretation analysis, I look to the language of section 56(b). First, the *FGRs* do not define "disease" or "disease agent"; however, the licence defines "disease" as "an abnormality of form or function and can be caused by a suite of infectious, non-infectious and inherent factors." Further, and although outside of the legislative scheme, the final report of the Cohen Commission concluded that "a host fish is diseased if it is behaviourally or physiologically comprised" and a "pathogen" as an "agent (such as a virus, bacteria, or sea louse) that causes disease" (*Cohen Commission* vol 3 at 20).

[56] The plain meaning of the language "*any* disease or disease agent" suggests that the phrase is not limited to *only* those few diseases prescribed by policy as listed in Appendix IV. The Minister's legal duty under section 56 extends to *any* disease or disease agent that "may be harmful to the protection and conservation of fish." Interpreting section 56(b) in this manner is consistent with a purposive and contextual approach, as it supports conservation of the resource, the Minister's primary obligation under the *Fisheries Act*: *R v Marshall*, [1999] 3 SCR 533 at para 40. It is also consistent with the precautionary approach which the Minister says was taken into account. I will address this issue further in Part VII of these reasons.

[57] Again, a purposive, contextual and plain meaning analysis of the language "that *may* be harmful" suggests this phrase means any disease or disease agent that *might be harmful* to the protection and conservation of fish. This interpretive approach is again consistent with the precautionary principle, the essence of which is that where a risk of serious or irreversible harm exists, a lack of scientific certainty should not be used as a reason for postponing or failing to take reasonable and cost-effective conservation and management measures to address that risk (*Cohen Commission* vol 3 at 20). I note, in this regard, that although HSMI was first identified in 1999, it was in Scotland in 2005 and subsequently in Chile, it would be an unreasonable inference to draw from the evidence that it will not appear in farmed Atlantic salmon on the Pacific Coast.

[58] The precautionary principle has been applied in international agreements to which Canada is a party (such as the *Convention on Biological Diversity*), domestic legislation (for example the *Oceans Act* or the *Species at Risk Act*). The Supreme Court of Canada has also relied on the precautionary principle in interpreting regulations directed to public health and the environment: *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 30-32; *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 at para 20.

[59] In the language of "... the protection and conservation of fish", the word "protection" does not stand for "management"; rather, the word means "preservation": *Canada (Minister of Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA at para 114. Finally, section 2 of the *Fisheries Act* broadly defines "fish" to include *inter alia* parts of fish, and the eggs, sperm,

spawn, larvae, spat and juvenile stages of fish. Importantly, "fish" pursuant to Part VIII of the *FGRs* is not limited to wild fish, but includes non-native fish that are cultivated.

[60] With that said, I turn to the question whether the licence prescribes lower standards for when diseased fish may be transferred than required by section 56(b).

C. ***Licence condition 3.1(b)(i)***

[61] Licence condition 3.1(b)(i) establishes clear, objective criteria governing transfers that are demonstrably linked to the Minister's regulatory obligations under section 56. Condition 3.1(b)(i) allows for transfers only where mortalities from infectious diseases do not exceed 1% per day, for any four consecutive day period during the rearing period. This licence condition is a reasonable articulation of the subsection 56(b) requirements.

D. ***Licence condition 3.1(b)(ii)***

[62] Condition 3.1(b)(ii) provides that a licensee may transfer fish if the stock "shows no signs of clinical disease requiring treatment." Ms. Morton contends that, in two ways, condition 3.1(b)(ii) is narrower than section 56(b). First, condition 3.1(b)(ii) allows the licensee to transfer fish from a diseased stock provided that disease does not "require treatment". Ms. Morton submits that whether treatment is needed for farmed salmon may have no nexus to the risk posed to the "protection and conservation of fish". Second, condition 3.1(b)(ii) allows the licensee to transfer fish from a stock infected with a disease agent that has not yet presented as disease.

[63] Based on a purposive, contextual and plain meaning analysis of the language in both provisions, I agree with the applicant that condition 3.1(b)(ii) maintains a lower standard than that prescribed by section 56(b) of the *FGRs*. The condition contradicts the plain language of section 56(b). Section 56(b) stipulates that no transfer may take place if they have "any disease or disease agent" that may be harmful to the transfer of fish. The licence condition, in contrast, allows transfers unless the fish *show signs* of clinical disease requiring treatment.

[64] The PRV/HSMI relationship is a useful foil to demonstrate the discrepancy between the regulatory requirement and the licence. Clinical signs of HSMI are not manifest until 5-9 months following transfer of the smolts to the ocean. Section 56(b), on its face, anticipates testing for latent disease agents. The licence relieves Marine Harvest from this obligation imposed by law.

[65] Condition 3.1(b)(ii) requires that the stock to be moved from the source facility "*shows no signs* of clinical disease". Showing no sign of disease is certainly a lower threshold than the regulatory scheme demands, that is, that the fish "do not *have* any disease *or disease agent*." That is, the condition as presently stated allows for a transfer where the fish have a disease, or *disease agent*, but are not presenting or showing signs of such a disease. Condition 3.1(b)(ii) is inconsistent with and contrary to the section 56(b) regulatory obligation. Section 22 of the *FGRs* is engaged.

[66] Second, it is clearly within the Minister's discretion to establish licence conditions for testing fish stock to ensure that the fish "do not have any disease or disease agent that may be harmful to the protection and conservation of fish." However, no criteria are provided to Marine

Harvest within condition 3.1(b)(ii), as to what diseases may be harmful to the protection and conservation of fish. Importantly, the focus of this regulatory requirement is on "fish" and not the "stock". The regulation is directed to the health of the resource generally, and not the health of the farmed product or stock. According to condition 3.1(b)(ii), as presently drafted, it is unclear as to whether and how Marine Harvest's fish health staff must determine whether the fish have any disease or disease agent using objective, prescribed scientific measures, or, alternatively, whether all that is required is a quick glance in the tank to assess whether the fish are showing signs of disease. There is no nexus or scientific linkage between the regulatory requirement (directed to the protection of the resource) and the licence condition (directed to the stock).

[67] For this further reason, condition 3.1(b)(ii) maintains a lower standard than is required by the regulatory scheme and is thus inconsistent with section 56(b) of the *FGRs*.

E. ***Licence conditions 3.1(b)(iii)***

[68] Condition 3.1(b)(iii) provides that a licensee may transfer fish if "no stock at the source facility is known to have had any diseases listed in Appendix IV." As was previously noted, Appendix IV is part of the licence and sets out eight "diseases of regional, national or international concern" that according to the licence, "can severely impact fisheries and affect regional and national trade so they warrant urgent notification and immediate attention."

[69] In my view, condition 3.1(b)(iii) is consistent with section 56(b). Condition 3.1(b)(iii) precludes transfer where stock is known to have had any diseases listed in Appendix IV – that is,

where fish are known to have had any diseases that can "*severely* impact fisheries." This is a reasonable articulation of the section 56(b) requirement that a fish transfer occur only where the fish do not have any disease or disease agent that *may be harmful* to the protection and conservation of fish.

F. *Licence condition 3.1(b)(iv)*

[70] Condition 3.1(b)(iv) allows the licensee to override conditions 3.1(b)(i) and 3.1(b)(iii) if the facility veterinarian has conducted a risk assessment of facility fish health records, a review of diagnostic reports, an evaluation of stock compartmentalization, and related biosecurity measures and deems the transfer "low risk".

[71] This condition also allows the licensee to transfer fish from stock known to have one of the diseases of *regional, national or international concern* that can "severely impact fisheries" in Appendix IV. This licence condition undoubtedly conflicts with section 56(b) of the *FGRs* and the regulatory duty imposed on the Minister to allow transfer only where the fish "do not have any disease or disease agent that may be harmful to the protection and conservation of fish." Further, the licence condition allows transfer of diseased fish on the assessment of the facility veterinarian that the transfer is of "low risk". Effectively, the condition circumvents the regulatory requirements under section 56 and licences Marine Harvest to transfer through less rigorous conditions than required by law.

[72] It seems almost too clear to state that the Minister cannot create any licence conditions which would in fact sidestep or nullify the *FGRs*. However, that is the effect of the override

provision in the licence. Licence condition 3.1(b)(iv) is inconsistent with section 56(b) of the *FGRs*. It is also unreasonable as it is, on its face, internally inconsistent. A transfer cannot be of low risk when it allows the transfer of fish with diseases which have the potential to "severely impact" the fishery at an international level.

[73] Licence condition 3.1(b)(iv) also fails for further reasons to which I now turn.

VI. Whether the delegation at issue was valid

A. *Whether delegation occurred*

[74] I have concluded that both conditions 3.1(b)(ii) and 3.1(b)(iv) are unreasonable as they are inconsistent with and contrary to section 56(b) of the *FGRs*. However, condition 3.1(b)(iv) also fails on a second ground, that is, the Minister has not properly delegated to Marine Harvest.

[75] The Applicant argues that the Minister is the decision-maker responsible for licensing and transfer decisions under section 56 of the *FGRs*, and that this authority cannot be delegated to the aquaculture industry. The licence, it is said, is inconsistent with section 56 because the licensee, rather than the Minister, decides whether a transfer of fish is permissible. According to the Applicant, ensuring that the decision-making authority under section 56 remains with the Minister minimizes the risk that less onerous fish health standards are imposed by industry, and ensures that the Minister's accountability under both statute and regulation to conserve and protect the fishery is not evaded.

[76] The Minister takes a different approach, and submits that it is common for licences to be issued with conditions that a licensee is required to follow when engaging in the licensed activity – without the direct supervision of the Minister. A section 56 licence, under which the licensee decides whether or not to transfer is consistent with the mandatory conditions set down by the *Regulations*. Finally, Marine Harvest argues that nothing in the *Fisheries Act* or either the *FGRs* or *Aquaculture Regulations* states that the Minister cannot use and allow industry to make section 56 decisions. There is no rule against administrative sub-delegation.

[77] As a result of the divergent arguments made by the parties, the first question is necessarily whether sub-delegation has occurred. In my view, it has. Section 43 of the *Fisheries Act* authorizes the Governor in Council to make regulations respecting the management and control of fisheries, the conservation of fish, and to issue licences. Section 56(b) of the *FGRs* delegates to the Minister the ability to issue a licence "provided that the fish do not have any disease or disease agents that may be harmful to the protection and conservation of fish."

[78] The Minister states that he has crafted licence conditions which fulfill the section 56(b) requirements. However, it is the licensee, Marine Harvest, who in practice determines whether those conditions have been met. That is, although the Minister issues the section 56 licence and determines the licence conditions, the Minister has sub-delegated to the licensee the ultimate determination as to whether a transfer is permissible.

B. *Whether delegation is permissible under the FGRs*

[79] Sub-delegation is "the granting by a delegate to another...of some part of the authority granted to the delegate by Parliament" (Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure before Administrative Tribunals* (loose-leaf) (Toronto: Carswell, 1988) (2012 updated) at 5-20). There is a general presumption against sub-delegation in administrative law, referred to as the latin maxim *delegatus non potest delegare*: a delegate may not re-delegate (John Willis, "Delegatus Non Potest Delegare" (1943) 21 Can Bar Rev 257).

[80] The presumption against sub-delegation does not apply, however, when the action is purely administrative or of such a character that no significant degree of discretion or independent judgment is involved. It only applies to discretionary decisions, legislative or adjudicative decisions: see *Forget v Quebec (Attorney General)*, [1988] 2 SCR 90. In the case at hand, the sub-delegate, Marine Harvest, has been given legislative authority in the form of a discretion to exercise independent judgment regarding the transfer of fish pursuant to condition 3.1(b) of the licence. As Marine Harvest has the ability to exercise discretion when deciding whether to transfer fish, the presumption against sub-delegation is engaged. However, the presumption against sub-delegation is just that, a *presumption*. It is not a rule of law, and is therefore rebuttable with either express or implied statutory authorization (*Brown and Evans*, at 13-17). Thus, the Minister may further delegate the authority granted to him by Parliament under section 56 of the *FGRs*, through express or implied authorization. There is no express authorization in the *FGRs* for the Minister to sub-delegate authority under section 56 to the aquaculture industry. As such, the question is whether the *FGRs* can be interpreted to impliedly authorize a sub-delegation of the Minister's authority.

[81] I do not think that the scope of section 56 is so narrow as to preclude the Minister from sub-delegating to the aquaculture industry. Section 56 can be interpreted to impliedly authorize sub-delegation of administrative and operational responsibilities if a pragmatic and functional approach is applied. I agree with Justice Dymond's analysis in *R v Cox*, 2003 NLSCTD 56, at para 70 that the size and complexity of DFO's mandate requires delegation of administrative functions, provided the criteria are objective, discernable and clear.

[82] Therefore, I find that the *FGRs* impliedly authorize the Minister to delegate to Marine Harvest. However, although sub-delegation is *permissible*, the question remains: did the Minister *properly* delegate to Marine Harvest?

C. ***The Minister did not properly delegate to Marine Harvest***

[83] For the exercise of a delegated power to be proper, the delegation must provide for standards, rules and conditions to guide the decision-making process (*Vic Restaurant v Montreal (City)*, [1959] SCR 58, [1958] SCJ No 69 at 99). Subordinate legislation must contain decisional criteria that restrain the discretion given to the exerciser of the power (*Brown and Evans*, at 13-32 and 13-33). Applying this principle to the case at hand means that the licence must contain objective standards or criteria governing the exercise of discretion. Unlimited discretion cannot be conferred on a sub-delegate, and supervisory control over the delegate should be retained (Sara Blake, *Administrative Law in Canada*, 5th ed (Markham, Ontario: LexisNexis Canada Inc., 2011) at 145). Absent objective criteria, the Minister could be said to have abdicated the responsibilities imposed under section 56.

[84] In this regard, it is instructive to juxtapose what is required of the Minister by law and what is left in the discretion of the licensee. Recall that section 56 allows the Minister to issue a licence if:

a) The release or transfer of the fish would be in keeping with the proper management and control of fisheries;

b) The fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and

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.

[85] These obligations may be delegated and given operational expression if the discretion exercised remains that of the Minister. The Minister does this, not by making individual transfer decisions (as counsel for the Minister suggests this would necessarily require) but rather by establishing objective criteria governing how the ministerial discretion, in the hands of Marine Harvest, is exercised. As we will see, the subjective and imprecise language of "low risk" in licence condition 3.1(b)(iv) falls short of that requirement.

[86] The transfer conditions cannot be reasonable in the absence of objective criteria. In my view, the standard of review, in this context, seeks only to find a reasonable correspondence or nexus between the obligations on the Minister under the *FGRs* and the expression or articulation of those obligations in the licence conditions. The absence of criteria to guide how "low risk" in condition 3.1(b)(iv) is to be interpreted is not reasonable.

[87] The delegation at hand is not proper for two reasons: first, because the licence improperly confers unlimited discretion under condition 3.1(b)(iv) onto the sub-delegate, without any standards or criteria for the exercise of discretion; and second, because the Minister has not retained supervisory control over the sub-delegate.

[88] Condition 3.1(b)(iv) of the licence confers unlimited discretion onto the sub-delegate, Marine Harvest. This provision allows a transfer of fish to occur even where the stock at the facility have any diseases listed in Appendix IV of the licence, or when their mortalities have exceeded 1% per day if the facility veterinarian, an employee of Marine Harvest, deems the transfer to be of "low risk". However, the licence does not at any point define or provide objective criteria with respect to "low risk". Nor is it clear as to whom or what the term "low risk" applies to – low risk to the farmed stock? Low risk to the wild stocks? Low risk to the consumers of fish? Nor is any timeframe indicated in respect of which the risk assessment is to be made. Subsection 56(b) authorizes transfer only if the fish do not have a disease or disease agent "that may be harmful to the protection and conservation of fish." This language, interpreted consistent with the Minister's over-arching mandate to preserve and protect the fishery, requires a long-term assessment of the implications of a transfer.

[89] Further, the delegation is also improper because the Minister has not retained supervisory control over the sub-delegate. Under condition 3.1(b)(iv) of the licence, Marine Harvest may transfer diseased fish without the knowledge, approval, or supervision of the Minister. This does not align with section 56 of the *FGRs*, nor does it align with the primary objective of the *Fisheries Act*. As the Supreme Court of Canada has held, the Minister's primary objective under

the *Fisheries Act* is the conservation of the resource, and "this responsibility is placed squarely on the Minister and not on aboriginal or non-aboriginal users of the resource": *R v Marshall*, [1999] 3 SCR 533 at para 40. If the Minister is to delegate under section 56, he must retain supervisory control over transfers of fish to ensure that the primary objective of resource conservation is met.

[90] The requirement of supervisory control arises from the face of the *FGRs* themselves. Sections 56(a), (b) and (c) are all directed to the protection, management and conservation of the fishery as a whole; matters which the fish health staff of a licenced facility cannot, in the absence of clear and objective criteria, have in mind. Indeed, counsel for the respondents conceded that in making an assessment as to whether the transfer was of "low risk", Marine Harvest's employees only considered the extent of the disease in the particular tank to be transferred.

[91] As previously stated, there is no criteria provided within the licence to guide the decision-making process as to the definition of "low risk". It is therefore left to the facility veterinarian, in his or her unlimited discretion, to define what is and is not "low risk". Condition 3.1(b)(iv) therefore authorizes transfers in the absence of criteria which relate to the obligation cast on the Minister under sections 56(a), (b) and (c). There is, therefore, no nexus or correspondence between the regulatory obligation on the Minister, and condition 3.1(b)(iv).

[92] The Minister points to the requirement that written confirmation that, in the opinion of the Marine Harvest fish health staff or veterinarian, the transfer conditions have been met, and that a copy must be kept on file.

[93] It is, perhaps, too obvious to state that a requirement to keep a record of a decision to transfer under condition 3.1(b)(iv), does not, in and of itself, allow for ministerial control. It comes too late. The stock will be in the marine environment and the associated risks engaged. Documentation may assist in ensuring accountability for decisions, but it bears no effective relationship to the clear legal obligation imposed by section 56 that there be *no* transfers if the fish have diseases or disease agents that may be harmful to the protection and conservation of fish. No amount of record keeping will justify the exercise of a delegated power that is not exercised according to clear, objective criteria.

[94] It is useful to return to first principles – what is delegated is an administrative function, something which can be executed in an operational environment. In the context of the *Fisheries Act*, this has particular resonance given that what is in issue is a statutory duty to protect and conserve the fishery, a responsibility which the Supreme Court of Canada confirms rests "squarely on the Minister". Here, however, considerable discretion is left in the hands of a private party to make risk decisions about a public resource. Documenting that decision does not, in and of itself, satisfy the requirement imposed by law that there be "no transfers that may be harmful to the protection and conservation of fish."

[95] I note, in conclusion, that the Minister led no evidence as to how either condition 3.1(b)(ii) or 3.1(b)(iv) might satisfy the regulatory requirements imposed on the Minister.

VII. The precautionary principle and licence conditions 3.1(b)(ii) and (iv)

[96] I have concluded that licence conditions 3.1(b)(ii) and (iv) are inconsistent with subsection 56(b) on the basis of first principles governing the interpretation of subordinate legislation. While not necessary to the disposition of this application, I return to the relationship between the precautionary principle and the licence conditions and what is a second basis for their invalidity. These two licence conditions are also inconsistent with subsection 56(b) in light of the precautionary principle.

[97] In my view, subsection 56(b) of the *FGRs*, properly construed, embodies the precautionary principle. First, subsection 56(b) prohibits the Minister from issuing a transfer licence if disease or 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).

[98] The consequence of interpreting subsection 56(b) consistently with the precautionary principle is that the licence conditions must also reflect the precautionary principle. As the licence conditions cannot derogate from or be inconsistent with subsection 56(b), they therefore cannot derogate from the precautionary principle. As noted earlier, the Minister did not attempt to justify that licence condition 3.1(b)(iv) was consistent with the precautionary principle, but confined his argument in this respect to licence conditions 3.1(b)(i), (ii) and (iii).

[99] In my view, the Minister's argument cannot stand. For the reasons given, conditions 3.1(b)(ii) and (iv) are inconsistent with section 56(b) and thus with the precautionary principle. The conditions dilute the requirements of subsection 56(b), a regulation designed to anticipate and prevent harm even in the absence of scientific certainty that such harm will in fact occur.

VIII. Conclusion and remedy

[100] The disposition of this application turns on orthodox principles of public law governing the interpretation and application of subordinate legislation. Speaking for the Court in *Bristol-Myers Squibb Co. v Canada (Attorney General)*, 2005 SCC 26, at para 26, Justice Binnie reminds us that the regulations are not to be considered in light of their own limited objects and factual context, rather, that the intent of the statute transcends the intent of the regulations. He continues, at paragraph 38, "This point is significant. The scope of the regulation is constrained by its enabling legislation." So too are the licences. Their terms are constrained by the statutory duty cast on the Minister and the regulatory pre-conditions and requirements governing transfers. Licences cannot be issued that do not conform to the legislation, and the Minister cannot improperly delegate his responsibilities under the *FGRs* for the protection and conservation of the fishery.

[101] The applicant does not seek to invalidate the entire licence; rather she seeks an order declaring the offending conditions invalid and severing them from the licence. I agree that a limited remedy is in the public interest. Licence conditions 3.1(b)(ii) and 3.1(b)(iv) do not meet the requirements under section 56 of the *FGRs*. Those conditions are of no force and effect and are severed from the licence issued to Marine Harvest.

[102] It is for the Minister and not the Court to devise licence conditions that are consistent with the standards required in section 56 of the *FGRs*. Therefore, I turn to the question whether the judgment of the Court should, in the public interest, be suspended, and to that end, draw analogy to suspensions of declarations in a constitutional law context.

[103] The Supreme Court of Canada considered the issue of suspension of declaratory relief in *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 166-169, weighing the consequences of immediate invalidity against the consequences of a suspended declaration. Ultimately, the Court held that although neither alternative was without difficulty, given that immediate invalidity would leave prostitution totally unregulated, moving "abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated" this "would be a matter of great concern to many Canadians." Therefore, the declaration of invalidity was suspended for one year.

[104] In the present case, while the consequences of immediate invalidity are not of the same order or dimension as in *Bedford*, the interrelationship between section 56 of the *FGRs* and Part VIII licence conditions will affect other licences. The Minister contends that as many as 120 licences, due to expire at the end of 2015 could be affected. Further, as licence condition 3.1(b)(iv) is declared of no force and effect there could be implications for existing aquaculture operations, including fish recently transferred to the marine environment. The applicant, on the other hand, urges a short suspension of judgement, as further delay increases the risk to conservation and the protection of fish. Ms. Morton notes that it is during the spring and fall migrations of salmon that increases proximity between farmed and wild salmon.

[105] The power to suspend judgment should be used sparingly (*Bedford*, para 167), and only where there is evidence of a compelling public interest. There are also limits to the *Bedford* analogy in this case. Here, there is an existing legal scheme in place governing the transfer of fish, namely Part VII of the *FGRs*. This declaration does not create a legislative hiatus; only portions of the licences are affected – all other aspects of the licence conditions remain in effect. Balancing these considerations, I am satisfied that a limited suspension of judgment is in the public interest. This judgment will be suspended for four (4) months from the date of its issue.

IX. Costs

[106] The genesis of this litigation, as described above, relates to the applicant's concern that Marine Harvest was transferring fish under the *Aquaculture Regulations* rather than the *FGRs* – a position maintained by DFO until it filed its memorandum of argument, no affidavit having been filed by the Minister. Accordingly, though the Minister correctly identified condition 3.1 as relating to a transfer licence pursuant to the *FGRs*, DFO initially represented to the applicant that condition 3.1 related to an aquaculture licence. The applicant's concerns about the licence being regulated under the *Aquaculture Regulations* when condition 3.1 related to the transfer of fish merely reflected the applicant's understanding of the licence as she was informed by DFO. This confusion, originating with DFO's position regarding the regulatory scheme underlying the licence, contributed to many red herrings in this case which distracted from the central issue: whether the transfer conditions in section 3.1 of the licence are consistent with the requirements under section 56 of the *FGRs*. These considerations reinforce the appropriateness of the usual rule that costs are awarded to the successful party.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1) The application for judicial review is granted, with costs.

2) Licence conditions 3.1(b)(ii) and 3.1(b)(iv) of the licence issued February 28, 2013 to Marine Harvest Inc. are inconsistent with the regulatory pre-conditions imposed on the Minister of Fisheries and Oceans by section 56 of the *Fishery (General) Regulations* and are declared invalid and to have no force and effect.

3) This judgment is suspended for four (4) months from the date of its issue.

4) Costs are awarded to the applicant. If the parties cannot agree on costs, submissions of no more than five (5) pages may be made on quantum of costs within ten (10) days of the date of this decision. The order in respect of costs is not suspended.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-789-13
STYLE OF CAUSE:	ALEXANDRA MORTON v MINISTER OF FISHERIES AND OCEANS AND, MARINE HARVEST CANADA INC
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 9 AND 11- 13, 2014
JUDGMENT AND REASONS:	RENNIE J.
DATED:	MAY 6, 2015

APPEARANCES:

Margot Venton Lara Tessaro	FOR THE APPLICANT
Steven Postman Lisa Nevens	FOR THE RESPONDENT MINISTER OF FISHERIES AND OCEANS
Christopher Watson Christopher Harvey Ian Knapp	FOR THE RESPONDENT MARINE HARVEST CANADA INC

SOLICITORS OF RECORD:

Margot Venton, Lara Tessaro and Morgan Blakley Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT MINISTER OF FISHERIES AND OCEANS
MacKenzie Fujisawa LLP Barristers & Solicitors Vancouver, British Columbia	FOR THE RESPONDENT MARINE HARVEST CANADA INC

This is Exhibit " U " referred to in the affidavit of Alexandra Morton sworn before me at Vancouver, BC this 28th day of November 2015

A Commissioner for taking Affidavits within British Columbia

MORGAN BLAKLEY

From: BCITC / CITCB (DFO/MPO) ITC@dfo-mpo.gc.ca
Subject: RE: Information request
Date: July 22, 2016 at 5:38 PM
To: Alex Morton gorbuscha@gmail.com

Ms. Morton,

In response to all of your questions, DFO's Introductions and Transfers Committee (ITC) is not requiring testing for PRV or HSMI as part of applications to transfer salmon at this time. The department does not gather information on the presence of PRV or HSMI in relation to salmon transfers.

The role of PRV in the aquatic ecosystem is not well understood at this time. DFO's current science understanding on PRV can be found at http://www.dfo-mpo.gc.ca/science/aah-saa/species-especes/aq-health-sante/prv-rp-eng.html.

As you are a member of the Strategic Salmon Health Initiative's (SSHI) Public Interest Panel, you will be aware that DFO scientists, along with provincial and international scientists, are conducting investigations to clarify the presence or absence of microbes in Pacific salmon. The SSHI seeks to determine what disease agents might affect Pacific salmon in their natural habitats and potential interactions of disease agents between salmon aquaculture and wild Pacific Salmon.

DFO will continue to assess new scientific information as it becomes available both from this study, and from others, and is prepared to adapt the ITC's transfer protocols accordingly.

Sincerely,

DFO's Introductions and Transfers Committee

From: Alex Morton [mailto:gorbuscha@gmail.com]
Sent: 2016–June-28 9:25 AM
To: BCITC / CITCB (DFO/MPO)
Subject: Information request

To the Introductions and Transfer Committee:

I would like to know more about how the Introductions and Transfers Committee (ITC) is dealing with Piscine Reovirus (PRV). I make this request in light of my victory in *Morton v Minister of Fisheries and Oceans and Marine Harvest Canada Inc*, 2015 FC 575 and the recent diagnosis of Heart and Skeletal Muscle Inflammation (HSMI) in British Columbia and Chile.
Can you please answer the following questions:

1. In the case of transfers from hatcheries to fish farms, do you require that fish are tested for PRV as part of the application for transfer licence? If so, who undertakes the testing, what tests are performed and who is reviewing the results?
2. In the case of transfers between fish farms, do you require that fish in a farm be tested for PRV or HSMI as part of the application for a transfer licence? If so, who undertakes the testing, what tests are performed and who is reviewing the results?

3. For each release or transfer of fish, do you know whether they have PRV or HSMI?

4. Have you authorized any releases or transfers of PRV infected fish since May 6, 2015?

You response is kindly requested July 15, 2016. Is this timeframe is too short, please let me know when I can expect an answer.

Thank you,

Alexandra Morton

This is Exhibit " Y " referred to in the affidavit of Alexandra Morton sworn before me at Vancouver, BC this 28th day of November 2016

A Commissioner for taking Affidavits within British Columbia

MORGAN BLAKLEY

Fisheries and Oceans Canada

Pacific Region
Suite 200 – 401 Burrard Street
Vancouver, British Columbia
V6C 3S4

Pêches et Océans Canada

Région du Pacifique
Piece 200 – 401 rue Burrard
Vancouver (C.-B.)
V6C 3S4

September 29, 2016

By email:
mblakley@ecojustice.ca
mventon@ecojustice.ca
gorbuscha@gmail.com

Attention: Alexandra Morton, Morgan Blakely and Margot Venton:

Thank you for the letter from Ecojustice dated August 30, 2016 to both the Introductions and Transfers Committee (ITC) of the Department of Fisheries and Oceans, and to the Minister of Fisheries and Oceans. We write to respond on behalf of the ITC and the Minister.

We also write further to the ITC's email dated July 22, 2016, responding to Ms. Morton's email of June 28, 2016.

The subject of all of these communications is Ms. Morton's request for confirmation from DFO as to how DFO treats Piscine Reo-virus (PRV) and heart and skeletal muscle inflammation (HSMI) for the purposes of transfers of salmon between aquaculture facilities.

In our email of July 22, 2016, we confirmed that DFO does not require testing for PRV or HSMI as part of applications to transfer salmon at this time. We referred Ms. Morton to the DFO webpage setting out a written summary of DFO's understanding on PRV and HSMI. Since that date, DFO has been revising, and continues to revise, the written summary to better clarify its scientific understanding on HSMI. DFO intends to update the DFO webpage when the revisions are complete.

In response to the August 30, 2016 letter from Ecojustice, we repeat the confirmations given in our July 22, 2016 email to Ms. Morton: DFO does not require testing for PRV or HSMI as part of applications to transfer salmon at this time. DFO will continue to assess new scientific information as it becomes available, both from the Strategic Salmon Health Initiative (SSHI) and other studies, and is prepared to adapt the ITC's transfer protocols accordingly.

At this point in time, HSMI is not considered a disease of concern and is not listed as such by the Canadian Food Inspection Agency or the OIE – World Organization of Animal Health. However, through ongoing research, fish health testing (through the audit program), and fish disease reporting (through the conditions of licence), DFO will continue to monitor the situation and assess whether any changes to the ITC's protocols become necessary.

Yours Sincerely,

Lauren Lavigne
A/Regional Manager Aquaculture Programs
Fisheries and Oceans Canada
lauren.lavigne@dfo-mpo.gc.ca

Canada

Form 223 (Rule 223)

Vancouver File No.: T-1710-16

FEDERAL COURT

BETWEEN:

ALEXANDRA MORTON

Applicant

AND:

MINISTER OF FISHERIES AND OCEANS

Respondent

AFFIDAVIT OF VINCENT ERENST

I, Vincent Erenst, marine biologist, of Campbell River, in the Province of British Columbia, AFFIRM THAT :

1. I am the Managing Director of Marine Harvest Canada Inc. ("Marine Harvest") and as such have personal knowledge of the facts and matters hereinafter deposed to, except where the same are stated to be made upon information and belief, and as to such facts I verily believe the same to be true.

2. I have been the Managing Director of Marine Harvest Canada since July 2007. I have worked in the aquaculture industry for 34 years in various positions, including in production, production management and as managing director for various companies.

3. Marine Harvest is a company engaged in the business of salmon farming on the west coast of British Columbia. It is licensed to operate 6 hatcheries and 56 marine-based farms (though not all are stocked and operational at the same time). In total, it produces between 40,000 and 45,000 tonnes of Atlantic salmon each year. Marine Harvest is the largest salmon farming producer in British Columbia.

4. Transferring fish from land-based freshwater hatcheries to net cages in the marine environment is an integral part the salmon farming process. Farmed salmon are initially hatched in land-based freshwater hatcheries and then cultivated in either Marine Harvest's freshwater lake facility or its land-based hatcheries, where they are grown for at least 12 months until they reach the smoltification stage. The fish are then transferred to Marine Harvest's marine sites for grow out.

5. Farmed salmon are also transferred between marine sites. The primary reasons to transfer fish between marine sites are: (a) abiotic environmental conditions; (b) license conditions; and (c) parasite infection avoidance. These reasons are explained below.

(a) Abiotic environmental conditions: Abiotic (non – living) environmental conditions (i.e. water salinity and current speed) dictate the tolerance levels and optimal living conditions for each stage of the life cycle of the fish. Juvenile salmon (smolts) that are ponded from freshwater hatcheries to sea are vulnerable at high current facilities. Smolts ponded to facilities with lower current speeds are able to maximize energies for growth and hence perform better in the early stages of sea water rearing. Once fish reach a size where faster currents are not debilitating but are beneficial (i.e. additional dissolved oxygen availability) the fish are transferred to higher energy sites. It is also preferred to stock smolts into facilities with lower water salinity to ease the transition from fresh water to salt water.

(b) Licence conditions: License conditions stipulate the permitted maximum biomass of fish that can be present at each facility. As each site is unique in location and ecological diversity, each site license reflects a specific allowable biomass. Licensed biomass levels range from several hundred to several thousand tonnes of production. Smaller sites are used for smolt rearing. The practice of using sites specifically for smolt rearing and on-growing enables longer fallow periods at both operations. Longer fallow periods support sustainable use and best management practices.

(c) Parasite infection avoidance: Certain areas on the coast are prone to higher parasite loads than others. One parasite in particular, Kudoa (Kudoa thrysites), has been noted to infect fish at an early stage (post smolt transfer to sea). Smolts ponded to areas with lower Kudoa parasite prevalence have shown lesser infection rates than smolts ponded into areas with higher prevalence. Manifestation of infection rarely occurs in fish with low infection levels. Kudoa does not manifest itself in fish with low infection levels. Hence, utilizing a staged process of ponding smolts to an area of lesser Kudoa prevalence followed by a transfer once fish are less susceptible to infection, supports both effective fish health management and good quality product.

6. Now produced to and shown to me and marked as **Exhibit "A"** to this my Affidavit is a true copy of the current finfish aquaculture licence issued by the Minister of Fisheries and Oceans for Marine Harvest's marine site at Shelter Bay. While the allowable peak biomass will vary between sites, all of Marine Harvest's marine licences are in substantially the same form as the licence attached as Exhibit "A".

7. The licence deals with, among other things, the transfer of fish to the Shelter Bay marine site. Condition 2.3 of the licence requires that all fish transfers to the site must be authorized by the BC Introductions and Transfers Committee (the "ITC"). To obtain a transfer licence from the ITC, Marine Harvest must provide a fish health attestation that the criteria in Condition 2.1 are satisfied and an application to transfer the fish to DFO. For transfers from hatcheries to marine sites, a DFO representative will usually attend at the site to review records and conduct an inspection.

8. I am informed by Dr. Diane Morrison, a veterinarian employed by Marine Harvest as its Director of Fish Health and Food Safety, that Marine Harvest has since 2010 tested thousands of samples of its fish for PRV and HSMI. Dr. Morrison has informed me that PRV has been found in some of our hatcheries. I am further informed by Dr. Morrison that none of Marine Harvest's fish have tested positive (by histology) for HSMI at any point in the freshwater and saltwater production stages.

9. Currently, the ITC does not require Marine Harvest to test samples of fish for PRV. The ITC currently permits fish with PRV to be transferred to marine sites, and between marine sites.

10. I have reviewed the Notice of Application underlying this proceeding. As I understand it, Ms. Morton seeks an order declaring the ITC's decision or policy of not testing for PRV and/or HSMI, and permitting the transfer of fish with PRV and/or HSMI, to be unlawful.

11. If the relief sought by Ms. Morton is granted it will severely impact Marine Harvest – she attacks the legal basis for Marine Harvest's transfer of fish. If the ITC's decision or policy to allow fish with PRV to be transferred is successfully challenged, Marine Harvest's legal right to transfer fish with PRV to its marine sites and in between its marine sites will be undermined.

12. I am advised by Marine Harvest's counsel, Chris Watson, that he received a copy of Ms. Morton's affidavit in this proceeding, sworn November 28, 2016, on or about December 3, 2016.

13. Now produced to and shown to me and marked as **Exhibit "B"** to this my Affidavit is a true copy of a letter Mr. Watson emailed to counsel for the parties to this proceeding on December 9, 2016, wherein Mr. Watson sought the parties' consent to adding Marine Harvest as a party.

14. Now produced to and shown to me and marked as **Exhibit "C"** to this my Affidavit is a true copy of a letter from Steven Postman, counsel for the Minister of Fisheries and Oceans, emailed to Mr. Watson on December 13, 2016, wherein Mr. Postman wrote that the Minister consented to the addition of Marine Harvest (and Cermaq Canada Ltd.) as a party to this proceeding.

15. Now produced to and shown to me and marked as **Exhibit "D"** to this my Affidavit is a true copy of an email from Morgan Blakley, counsel for Alexandra Morton, sent

to Mr. Watson on December 14, 2016, wherein Mr. Blakley wrote that Ms. Morton does not consent to the addition of Marine Harvest (nor Cermaq Canada) as a party to this proceeding.

16. Ms. Morton has brought other legal proceedings in which she has challenged the salmon farming business. These include:

(a) *Morton v. British Columbia (Agriculture and Lands) et al*, 2009 BCSC 136; and

(b) *Morton v. Minister of Fisheries and Oceans et al*, 2015 FC 575.

17. Now produced and shown to me and marked as **Exhibit "E"** to this my Affidavit is a true copy of the reasons for judgment in *Morton v. British Columbia (Agriculture and Lands) et al*, 2009 BCSC 136. The reasons for judgment in 2015 FC 575 are attached as Exhibit "O" to Ms. Morton's Affidavit.

18. I make this affidavit in support of an application by Marine Harvest for an order that it be added as a party to this proceeding.

AFFIRMED BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 18th day of January, 2017.

A Commissioner for Taking Affidavits in the Province of British Columbia

Vincent Erenst

CHRISTOPHER J. WATSON
Barrister & Solicitor
MacKENZIE FUJISAWA
1600-1095 West Pender Street
Vancouver, BC V6E 2M6
604-689-3281

This is Exhibit "A" referred to in the affidavit of Vincent Erenest sworn before me at Vancouver, British Columbia, this 18th day of January 2017.

A Commissioner for taking Affidavits for the Province of British Columbia

Fisheries and Oceans Canada | Pêches et Océans Canada

Canada

Marine Finfish Aquaculture Licence under the Fisheries Act

Licensed For: Aquaculture
Licence No: AQFF 115311 2016/2022
ISSUED TO: Marine Harvest Canada Inc.
124 - 1334 Island Hwy
Campbell River, British Columbia V9W 8C9

Date Issued: Jul 01, 2016
Expiry Date: Jun 30, 2022

This licence is issued under the authority of the *Fisheries Act* and confers, subject to provisions of the *Fisheries Act* and Regulations made there under, the authority to carry out aquaculture activities including cultivation and harvest of fish and prescribed activities under the conditions included herein and/or attached hereto.

It is the responsibility of the licence holder to obtain all other forms of authorization from federal or provincial agencies that may have jurisdiction for marine finfish aquaculture facilities. As well, it is the licence holder's responsibility to be informed of, and comply with, the *Fisheries Act* and the regulations made there under, in addition to these conditions.

The above licence holder is authorized by this licence to carry out aquaculture activities at the following location and for the following species:

Facility Reference Number	Location and Legal Description
1350	Shelter Bay, Richards Channel Unsurveyed Crown Foreshore or land covered by water being part of the bed of Shelter Bay, Range 1, Coast District Land File No: 1407748 PFMA Area: 12-13

Licensed Species
1. Atlantic Salmon (*Salmo salar*) 2. Sablefish (*Anoplopoma fimbria*) 3. Chinook Salmon (*Oncorhynchus tshawytscha*) 4. Rainbow Trout (*Oncorhynchus mykiss*)

Combined Peak Biomass (tonnes)	**3500**

AQUACULTURE MANAGEMENT
Ensuring Sustainable Fisheries

Site Specific Conditions:

1. The licence holder shall ensure all juvenile sablefish are obtained from licenced hatchery sources only.

Required Record Keeping and Reporting: Details are contained within the attached conditions of this licence.

Compliance Advisory: No person carrying out any activity under the authority of this licence must contravene or fail to comply with any condition of this licence.

The licence holder is legally required to ensure that annual fees for this licence are paid each year not later than the anniversary date of this licence. The annual licence fee must be calculated as set out in section 3 of the *Pacific Aquaculture Regulations.*

A copy of this licence must be kept on site at the licensed facility and be available for inspection by a Fishery Officer or Fishery Guardian.

This licence includes further conditions that are included herein and/or attached hereto. These conditions form part of the licence and may not be removed.

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PART A. DEFINITIONS

"Absolute sea lice inventory" means the calculated total number of lice within a farm determined by multiplying fish number on the farm by the average lice count per fish;

"Attestation" means a written declaration made by a qualified individual who bears witness to, confirms or authenticates;

"Acoustical deterrent" means a device that is used underwater and is intended to generate an aversive response in marine mammals and for the purpose of this licence includes, but are not limited to, explosives, incendiary devices, and electronic sound recordings;

"Biofouling" means the organisms that attach and/or live on nets and other structures (excluding herring spawn);

"Broodstock" means fish used to generate gametes;

"Containment structures" means net pens, bag cages, tanks and similar structures used to contain finfish for the purposes of aquaculture;

"Containment structure array" means a group of containment structures physically attached to each other, or in the case of circular structures, up to a maximum of 60 m apart;

"Department" means Fisheries and Oceans Canada;

"Disease" means an abnormality of form or function and can be caused by a suite of infectious, non-infectious and inherent factors. Specifically:

> "Clinical disease" is a stage of the disease continuum that reflects anatomic or physiologic changes that are sufficient to produce recognizable signs of a disease;
>
> "Infectious disease" means a disease caused by the invasion and growth of a microorganism in or on a fish in such a way that it affects the form or function of that fish; and
>
> "Infectious outbreak'' means an occurrence of disease in a population as determined by the attending veterinarian with the indicating morbidity or mortality rate substantially higher than its normal level;

"Evidence of escape" includes, but is not limited to, any visual or physical evidence that demonstrates a release of fish from the facility, including a significant decline in feed demand that is not otherwise explained or inventory discrepancies that are not otherwise explained;

"Facility" means the collective structures used for the purposes of aquaculture, including but not limited to, net pens, walkways, barges, floats and living accommodations plus associated lines and anchors;

"Fish Health Event (FHE) means a suspected or active disease occurrence within an aquaculture facility that requires the involvement of a veterinarian and any measure that is intended to reduce or mitigate impact and risk that is associated with that occurrence or event;

"Harvest" means removal of live fish for market;

"Harvest/transfer pens" means pens that are secured for less than 90 days to the main cage array for the purpose of feeding, handling, holding, harvesting or moving fish;

"High slack tide" means that point in time in any give location where the water depth has reached its maximum height (above chart datum) and any water movement has ceased, up until the current reverses direction;

"Incidental catch" means any wild fish from within the facility caught during harvest, movement of fish between or within facilities, or net removal;

"Licence holder" means the individual or corporation operating the facility;

"Marine mammal" includes cetaceans, pinnipeds and sea otters;

"Mortalities" means fish that have died within the containment structure array during a production cycle but does not include cultivated fish killed during harvest activities;

"Mortality event" means:

(a) fish mortalities equivalent to 4000 kg or more, or losses reaching 2% of the current facility inventory, within a 24 hour period; or

(b) fish mortalities equivalent to 10,000 kg or more, or losses reaching 5%, within a five day period;

"Pathogen" means a microorganism causing damage (pathology) in or on a fish. These include parasites, bacteria, rickettsia and viruses many of which are common and naturally present in the ecosystem;

"Peak biomass" means the maximum biomass of finfish within a facility during a production cycle;

"Production cycle" means:

(a) the period of time from stocking the containment structures to the time of harvest or removal of all finfish, prior to the facility being restocked; or

(b) for facilities containing broodstock, from the period of time immediately after a peak biomass up to and including the next peak biomass;

"Production site" means a facility where fish of the same age class are entered at the same time, grown and harvested until the site is empty but may also have broodstock kept continuously on site in dedicated pen(s) for breeding purposes;

"Qualified individual" means an individual employed by or contracted by an aquaculture corporation who possesses a combination of knowledge, expertise and experience necessary to complete a task;

"Sea lice abundance threshold" means three motile *Lepeophtheirus salmonis* per fish as determined by a minimum sample of 20 live fish from three pens. In the event three pens can not be sampled, calculate the mean sampling average with data available;

"Tonnes (t)" means 1000 kg;

"Transfer" means the movement of live fish to or from a licensed facility or hatchery;

"Year class" means the grouping of fish based on their time spent within the marine environment. Year class 1 represents a juvenile fish group that shares an approximate sea water entry date (e.g. within 4 months) plus the subsequent 12 months. Year class 2 refers to the fish group which remains in the sea water after the initial 12 month rearing period, but does not include broodstock.

PART B. LICENCE CONDITIONS

Finfish Condition of Licence

1. Production

1.1 The combined peak biomass of cultivated fish within an authorized containment structure array must not exceed the amount set out on page 1 of this licence.

1.2 The licence holder must report peak biomass information as follows:

(a) for production sites, the licence holder must submit to the Department, starting July 1, 2016 notification of the actual date and tonnage of the peak biomass event for each production cycle, for the term of the licence within 30 days of its occurrence;

(b) for facilities with fish continuously on site, the licence holder must submit to the Department a notification of the actual date and tonnage of each peak biomass event for the term of this licence no later than January 15, 2017 and annually thereafter, and must include data from the previous calendar year.

1.3 The licence holder must submit to the Department starting July 15, 2016 and annually on the 15th of each month thereafter for the term of this licence:

(a) a seven month rolling inventory plan for all licensed species using the template set out in Appendix I-A(i), including biomass, number of fish, age class and harvest activities at this facility. One month of the plan must reflect the calculated inventory at this facility for the previous month and the remaining six months must be the projected inventory. This plan will include data when no production is occurring; and

(b) transfers to and from this facility for the previous month using the template set out in Appendix I-A(ii). This report is required only if transfers occurred.

1.4 The licence holder must complete the Population Harvest Declaration Form as set out in Appendix I-B which must accompany the harvested fish and be provided to the processor.

2. Transfer of Fish

2.1 Subject to section 2.3, the licence holder may transfer fish to this facility from another facility possessing a valid aquaculture licence issued pursuant to section 3 of the *Pacific Aquaculture Regulations* provided that the following conditions are met:

(a) the fish are live Atlantic or Pacific salmonids;

(b) the species of live salmonid are the same as those listed on the face of this licence;

(c) transfers occur within the same Salmonid Transfer Zone as set out in Appendix II; and

(d) the licence holder has obtained written and signed confirmation, executed by the source facility's veterinarian, fish health staff, or facility manager, that, in their professional judgement:

(i) mortalities, excluding eggs, in any stock reared at the source facility, have not exceeded 1% per day due to any infectious diseases, for any four consecutive day period during the rearing period;

(ii) the stock to be moved from the source facility shows no signs of clinical disease; and

(iii) no stock at the source facility is known to have had any diseases listed in Appendix III.

2.2 The original or a copy of the written and signed confirmation, described in section 2.1(d) must:

(a) be kept at this facility and available for inspection by the Department; and

(b) accompany all shipments of fish to and from this facility, except for movement of harvested fish.

2.3 From July 1, 2016 until further notice, the licence holder may not carry out transfers pursuant to section 2.1 herein. During that period the licence holder must apply to the BC Introductions and Transfers Committee to obtain an authorization to transfer fish.

2.4 For transfers of fish to this facility that are not authorized pursuant to section 2.1 the licence holder must possess a valid licence, obtained by applying to the BC Introductions and Transfers Committee, which will liaise with the appropriate Department licensing officials.

3. Containment Array Requirements

3.1 The licence holder must comply with the Containment Array Plan(s) attached to this licence with respect to location and containment structures. The containment structures at the facility may be less than that in the Containment Array Plan(s), but must not exceed it.

3.2 If the containment structure array is anchored for the first time or re-anchored, the licence holder must submit to the Department, prior to transferring fish to this facility, or within 30 days if fish are already on site:

(a) an attestation completed by a qualified individual(s) confirming that the facility infrastructure is installed in such a way and using such equipment as to withstand the oceanographic and meteorological conditions of the licensed location; and

(b) an accurate Containment Array Plan including locational information (+/- 10 m) for each corner of the containment structure array at high slack tide, and cage number.

3.3 The licence holder must notify the Department when planning to change from one approved containment structure array to another 10 days prior to transferring fish to this facility.

3.4 Harvest/transfer pens may be used in the same location for up to 90 calendar days. The licence holder must ensure that:

(a) harvest/transfer pens remain empty or in an alternate location for the equivalent time that they are in operation; and

(b) facility records of harvest and transfer pen usage are maintained and available upon request of the Fishery Officer or Fishery Guardian. These records must include location, start and end dates of harvest/transfer pen use.

4. Fish Health

4.1 The licence holder culturing salmonids must comply with the Health Management Plan (HMP) as set out in Appendix IV. Any proposed amendments to the HMP will be considered a request for licence amendment by the licence holder to the Department.

4.2 Starting October 15, 2016 and annually on October 15th thereafter for the term of the licence, the licence holder culturing salmonids must submit to the Department, for its considered response:

(a) the complete facility-specific proprietary Health Management Standard Operating Procedures (HMSOPs), with modified sections identified; or

(b) inform the Department if no changes made to HMSOPs.

4.3 The licence holder must comply with carcass management, including mortality events as defined in Part A, as described in its salmonid HMP or, in the case of non-salmonid licence holders, as described in a separate Carcass Management Plan (CMP) attached as set out in Appendix IV-A.

4.4 The salmonid HMP or the non-salmonid CMP must include procedures for the following measures:

(a) collecting, categorizing, recording, storing and disposing of fish carcasses, including:

(i) the regular removal of carcasses to carcass storage containers;

(ii) reporting to the Department as per sections 7.4 and 7.5;

(iii) bio-security protocols;

(iv) the secure location of stored carcasses while awaiting transfer to land-based facilities;

(v) the procedures to prevent contents from leaking into receiving waters;

(vi) the secure transfer of stored carcasses to land-based facilities; and

(vii) the methods used to sanitize carcass storage containers, equipment and other handling facilities or vessels;

(b) a mortality event procedure, which will include:

(i) notification to the Department of a mortality event defined in Part A "Mortality Event" not later than 24 hours after discovery, providing as much detail as outlined in Appendix V-A;

(ii) not later than 10 calendar days after the mortality notification, submission to the Department a completed Appendix V-A, with subsequent update reports every 10 days thereafter if the specific mortality continues;

(iii) actions to handle the additional biomass on site associated with the mortality event of the magnitude defined in Part A of the licence; and

(iv) identification of vessels that will be used to collect and transport mortalities to on-land facilities in the case of elevated mortality events.

4.5 Should a Fish Health Event occur, the licence holder must:

(a) take immediate action to manage the event by implementing a response procedure to minimise the potential spread of pathogens if an infectious disease is diagnosed;

(b) undertake follow up measures to evaluate the Fish Health Event and the efficacy of the mitigation measures taken;

(c) submit a notification to the Department not later than seven calendar days after the event; and

(d) submit to the Department the therapeutic management measures as set out in Appendix V-B.

5. Fish Health Records

5.1 The licence holder must keep at this facility, unless otherwise indicated, complete, up-to-date and accurate written or electronic records of stocking and fish health activity for the facility. Records must include the following:

(a) stocking and fish health activity for the facility as set out in Appendix V-C; and

(b) the use of all therapeutants, pest control products and anaesthetics as set out in Appendix V-D.

5.2 The licence holder must ensure that Fish Health Event and carcass assessment records, in written or electronic form, are reviewed by the licence holder's veterinarian and/or fish health staff to assess patterns in fish health and to facilitate reporting of "Fish Health Event" as per section 4.5(c) and "Mortality by Category" as per section 7.4.

6. Sea Lice Monitoring

6.1 The licence holder must follow a sea lice monitoring program in accordance with the monitoring protocols set out in Appendix VI.

6.2 Sampling of sea lice is not required when:

(a) a facility cultivating Atlantic salmon or trout is being harvested and there are fewer than four stocked containment structures with fish remaining; or

(b) fewer than 30 calendar days have passed since the completion of fish transfer to the third containment structure; or

(c) the anaesthetic withdrawal time would delay the current rate of harvest; or

(d) fish have been medicated for sea lice within the previous 21 days; or

(e) fish are being medicated or otherwise managed for a fish health event; or

(f) an ongoing environmental issue would lead to additional fish stress or harm if handled.

6.3 Sampling of sea lice is required in three containment structures when four or more containment structures are actively being used to cultivate Atlantic salmon or trout. If less than four containment structures are actively being used to cultivate Atlantic salmon or trout, sampling is required in at least one containment structure.

6.4 Starting March 1, 2017 the licence holder must conduct annual sampling between March 1 and June 30 for the term set out in this licence. The licence holder cultivating Atlantic salmon and trout must carry out a sea lice abundance assessment every two weeks, at minimum, for fish held in containment structures for more than 30 calendar days. Where data collected in Appendix VI-A indicates the sea lice abundance threshold of three motile *Lepeophtheirus salmonis* has been exceeded, the licence holder must:

(a) within 15 calendar days of the discovery, implement a plan which will reduce the absolute sea lice inventory within the containment structure array; and

(b) notify the Department as per section 7.1 and 7.3.

6.5 Starting July 1, 2016 the licence holder must conduct sampling annually between July 1 and February 28 for the term set out in this licence. The licence holder cultivating Atlantic salmon and trout must carry out a sea lice abundance assessment once every month for fish held in containment structures for more than 30 calendar days. Where data collected in Appendix VI-A indicates the sea lice abundance threshold of three motile *Lepeophtheirus salmonis* has been exceeded, the licence holder must:

(a) increase monitoring to at least once every two weeks;

(b) within 30 calendar days of the first discovery, provide a plan to address the exceedance to the Department, for its considered response; and

(c) notify the Department as per section 7.1.

6.6 Starting July 1, 2016 the licence holder must ensure that sea lice monitoring is conducted quarterly, for the term set out in this licence, on cultivated Pacific salmon at the containment structure array. Sea lice abundance must be documented and available for review by a Fishery Officer or Fishery Guardian upon request. Should the average motile *Lepeophtheirus salmonis*

exceed three lice per cultivated Pacific salmon, the licence holder must notify the Department as per section 7.3.

7. Sea Lice, Health and Mortality Reporting

7.1 The licence holder, cultivating Atlantic Salmon and trout, must submit to the Department starting July 15, 2016 monthly reports on the 15th of each month thereafter for the term of this licence as set out in section 6.4 and 6.5, using the template in Appendix VI-A.

7.2 Environmental data associated with the facility, as set out in Appendix VI-B, must be collected and maintained at this facility and made available to a Fishery Officer or Fishery Guardian upon request.

7.3 Starting March 1, 2017 to June 30, 2017 and annually every March 1st to June 30th period for the term of this licence, should the sea lice abundance threshold exceed three motile *Lepeophtheirus salmonis* per cultivated salmonid, the licence holder must report to the Department for its considered response, not later than seven calendar days after the discovery:

(a) the abundance results of the sea lice monitoring; and

(b) the plan as outlined in section 6.4 including actions and management response to be initiated.

7.4 The licence holder must record "Mortality by Category" for fish within the containment array. The reports must be submitted to the Department, not later than July 15, 2016 and every three months thereafter for the term of this licence, as set out in Appendix V-B. A report is required for all facilities in operation.

7.5 July 1, 2016 and quarterly thereafter for the term of the licence, the licence holder must maintain and submit to the Department, records of all wild or enhanced fish mortalities collected during routine carcass recovery, following the template set out in Appendix VII.

8. Escape Prevention, Reporting and Response

8.1 The licence holder must have in place and follow an Escape Prevention and Response Plan including all elements outlined in Appendix VIII to prevent the escape of cultivated fish.

8.2 If an escape or a suspected escape of cultivated fish from the containment structure array occurs, the licence holder must take immediate action to prevent further escapes.

8.3 The licence holder must notify the Department of any escape or evidence of escape of cultivated fish from this facility within 24 hours after discovery. The notification must include the date and time of escape and any therapeutants administered through feed as set out in Appendix IX.

8.4 The licence holder must submit to the Department a complete follow-up report, as set out in Appendix IX not later than seven calendar days after the escape or suspected escape.

9. Incidental Catch

9.1 The licence holder must design and use nets and other gear or equipment in a way that reduces the risk of incidental catch, and causes the least amount of harm to incidental catch.

9.2 Unless otherwise directed by the Canadian Food Inspection Agency or the Department, the licence holder must ensure that any live incidental catch are immediately returned to waters outside the aquaculture facility in a manner that causes it the least harm.

9.3 The licence holder must retain all dead incidental catch and dispose of them in the same manner that cultivated stock carcasses are disposed of, as set out in section 4.4.

9.4 The licence holder must maintain incidental catch records as set out in Appendix VII and must submit to the Department in the following manner:

(a) for facilities that have fish continuously on site, a report must be submitted on January 15, 2017 and annually every January 15th thereafter for the duration of the licence. Records from the previous calendar year must be included; or

(b) for all other facilities, a report must be submitted within 15 calendar days of the final date of harvest that includes all records generated during the production cycle. The licence holder must submit a follow-up report if more incidental catch and/or herring spawn is discovered after all containment nets are removed.

10. Management of Marine Mammal Interactions

10.1 The licence holder must have in place and follow a Marine Mammal Interaction Management Plan that includes all the elements of Appendix X.

10.2 Marine mammal acoustical deterrents must not be used.

10.3 Upon discovery of a live entangled marine mammal, the licence holder must make all reasonable attempts to free the marine mammal without harm.

10.4 The licence holder must notify the Department of any marine mammal drowning mortality or entanglement (live or dead) not later than 24 hours after discovery. The notification must include the date and time of discovery and as much of the detail set out in Appendix XI-A as possible.

10.5 Not later than seven calendar days after the initial notification pursuant to section 10.4 the licence holder must submit to the Department a complete follow-up report of any marine mammal drowning or entanglement (live or dead), using the template set out in Appendix XI-A.

10.6 In the event that deterrence efforts fail, the licence holder is authorized to dispatch harbour seals and California sea lions which are within 30 m from the edge of any net pen associated with the containment structure array, and:

(a) are within or attempting to enter the containment structure array; and

(b) that represent an imminent danger to aquaculture equipment and infrastructure, the safety of persons in the facility or the fish cultivated in the facility.

10.7 Only employees and/or agents of the licence holder who meet all of the following qualifications may dispatch harbour seals or California sea lions pursuant to section 10.6:

(a) possess a valid Federal Possession and Acquisition Licence (PAL) issued under the *Firearms Act* and are able to produce it upon demand by a Fishery Officer or Fishery Guardian; and

(b) carry photo identification and current contact information, and additionally, in the case of an agent, the name of the business, business owner, business licence number, current contact information and produce it upon request by a Fishery Officer or Fishery Guardian.

10.8 All firearms used to dispatch harbour seals or California sea lions must have a muzzle velocity of not less than 1,800 feet per second, and a muzzle energy of not less than 1,100 foot pounds. Ammunition must be factory produced and the box available for inspection. The use of hand loads is not permitted under the authority of this licence.

10.9 If a harbour seal or a California sea lion is shot under the authority of this licence, every reasonable attempt must be made to retrieve it and ensure that it is dead.

10.10 As soon as it is practical, the licence holder must make all reasonable efforts to recover every harbour seal or California sea lion killed under the authority of this licence and must, for every harbour seal or California sea lion that is retrieved, dispose of the carcass in accordance with applicable Federal, Provincial, and Municipal legislation.

10.11 The licence holder must:

(a) record and notify the Department of any shooting or retrieval efforts of a harbour seal or California sea lion not later than 24 hours after the event as set out in Appendix XI-B; and

(b) submit to the Department a complete report in accordance with Appendix XI-B, no later than seven calendar days after any shooting of a harbour seal or California sea lion of this licence.

11. Protection of Fish Habitat

11.1 The installation and removal of this operation is authorized under section 35(2)(a) of the *Fisheries Act*.

11.2 The licence holder must maintain records at this facility of in-water net cleaning for the purposes of biofouling removal, as set out in Appendix XII.

11.3 The licence holder must ensure that only anchoring equipment is in contact with the sea bed.

11.4 The licence holder must collect and retain, with minimal leakage, blood generated during harvest and dispose of it at a licensed processing facility.

11.5 The licence holder must ensure all debris generated or used at this facility is collected or treated and disposed of in accordance with applicable Federal, Provincial, and Municipal legislation.

12. Operation of Vessels

12.1 The licence holder must post signage directing all vessels not involved in the cultivation of fish to dock at the designated docking station.

12.2 The licence holder must monitor and post restricted use signs in those areas where vessels not involved in the cultivation of fish are not permitted access.

13. Annual Aquaculture Statistical Report

13.1 Starting January 25, 2017 and annually on January 25th thereafter for the term of this licence, the licence holder must complete and submit to the Department the Annual Aquaculture Statistical Report as set out in Appendix XIII for the previous calendar year.

14. Use of Lights

14.1 The licence holder may use lights to promote fish growth and alter fish physiology and must record the following:

(a) type of lights used;

(b) the intensity of lights used;

(c) the number of lights used; and

(d) dates and times when the lights are used (period of day; season).

14.2 Starting February 15, 2017 and annually on February 15th thereafter for the term of this licence, the licence holder must submit to the Department annual light use reports summarizing results from section 14.1 for the previous calendar year.

15. Administrative Matters

15.1 Unless otherwise noted under specific conditions of this licence, the licence holder must keep all records required by these conditions in the following manner:

(a) with respect to duration:

(i) at this facility for the duration of the production cycle; and

(ii) in a suitable location, at this facility, in a corporate office, or other accessible storage off-site for a minimum of four additional years;

(b) accessible, legible and protected from damage; and

(c) in either electronic or paper versions.

15.2 Unless otherwise noted in specific licence conditions, all reports and submissions required by this licence must be submitted to the Department as follows:

(a) AQFF.General@dfo-mpo.gc.ca for reports required from sections 1, 3, 9, 11 and 14 of this licence;

AQFF.FishHealth@dfo-mpo.gc.ca for all reports required from sections 2, 4, 5, 6 and 7 of this licence;

AQFF.FishEscapes@dfo-mpo.gc.ca for all reports required from section 8 of this licence;

AQFF.MarineMammals@dfo-mpo.gc.ca for all reports required from section 10 of this licence;

fishstats@dfo-mpo.gc.ca for all reports required from section 13 of this licence;

(b) when notified, please submit to the following updated email addresses:

DFO.AQFFGeneral-AQFFGénéral.MPO@canada.ca for reports required from sections 1, 3, 9, 11 and 14 of this licence;

DFO.AQFFHealth-AQFFSanté.MPO@canada.ca for all reports required from sections 2, 4, 5, 6 and 7 of this licence;

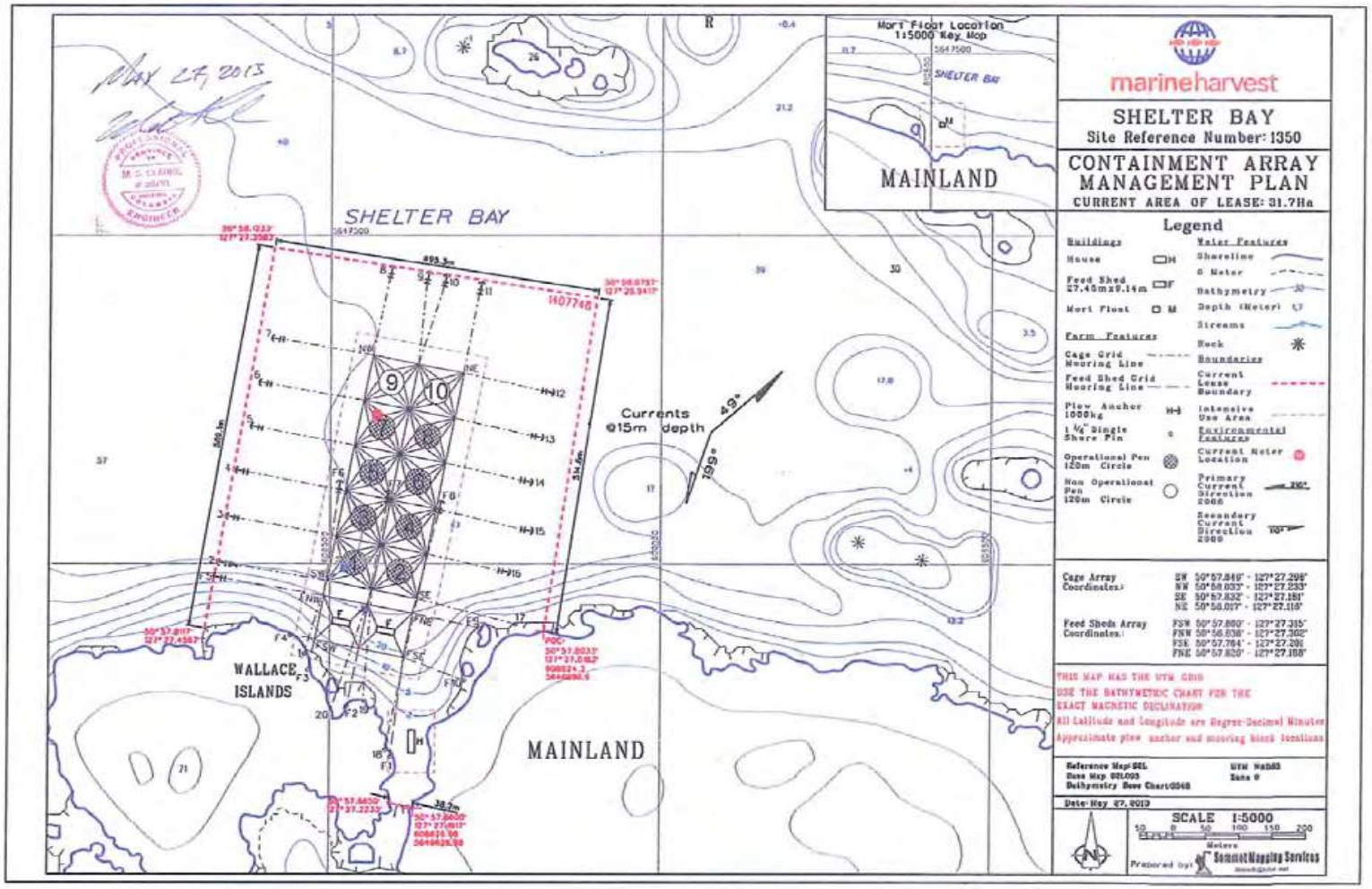
DFO.AQEscape-AQÉchapper.MPO@canada.ca for all reports required from section 8 of this licence;

DFO.AQFFMammals-AQFFMammifères.MPO@canada.ca for all reports required from section 10 of this licence;

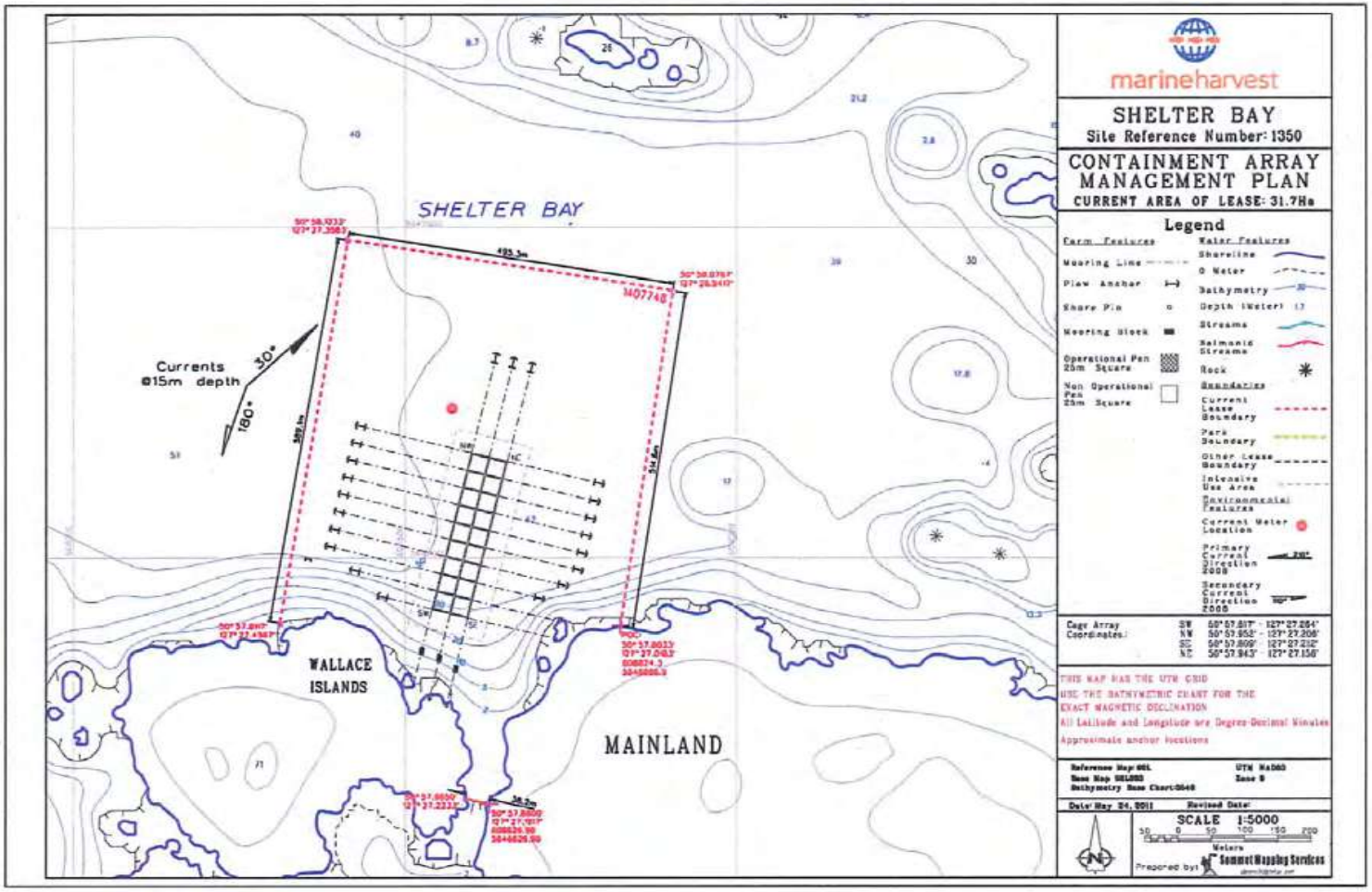
DFO.AASR-RSSA.MPO@canada.ca for all reports required from section 13 of this licence; or

(c) to the Departmental aquaculture database.

CONTAINMENT ARRAY PLAN



CONTAINMENT ARRAY PLAN



APPENDIX I-A(I): INVENTORY PLAN

LEGEND (Colour Indicates Status and Year Class)	
	Transfers (see transfer details in Appendix I-A(ii)
	Harvest
0	Fallow
	Year 1
	Year 2
	Brood

Date of Submission: _____

Facility Name	Facility Ref. #	Fish Species		Previous Month	Current Month	Month 2	Month 3	Month 4	Month 5	Month 6
			Biomass (T)							
			Population							
			Biomass (T)							
			Population							
			Biomass (T)							
			Population							
			Biomass (T)							
			Population							
			Biomass (T)							
			Population							
			Biomass (T)							
			Population							

Notes: _____

APPENDIX I-A(II): DETAIL OF MONTHLY STOCK TRANSFERS

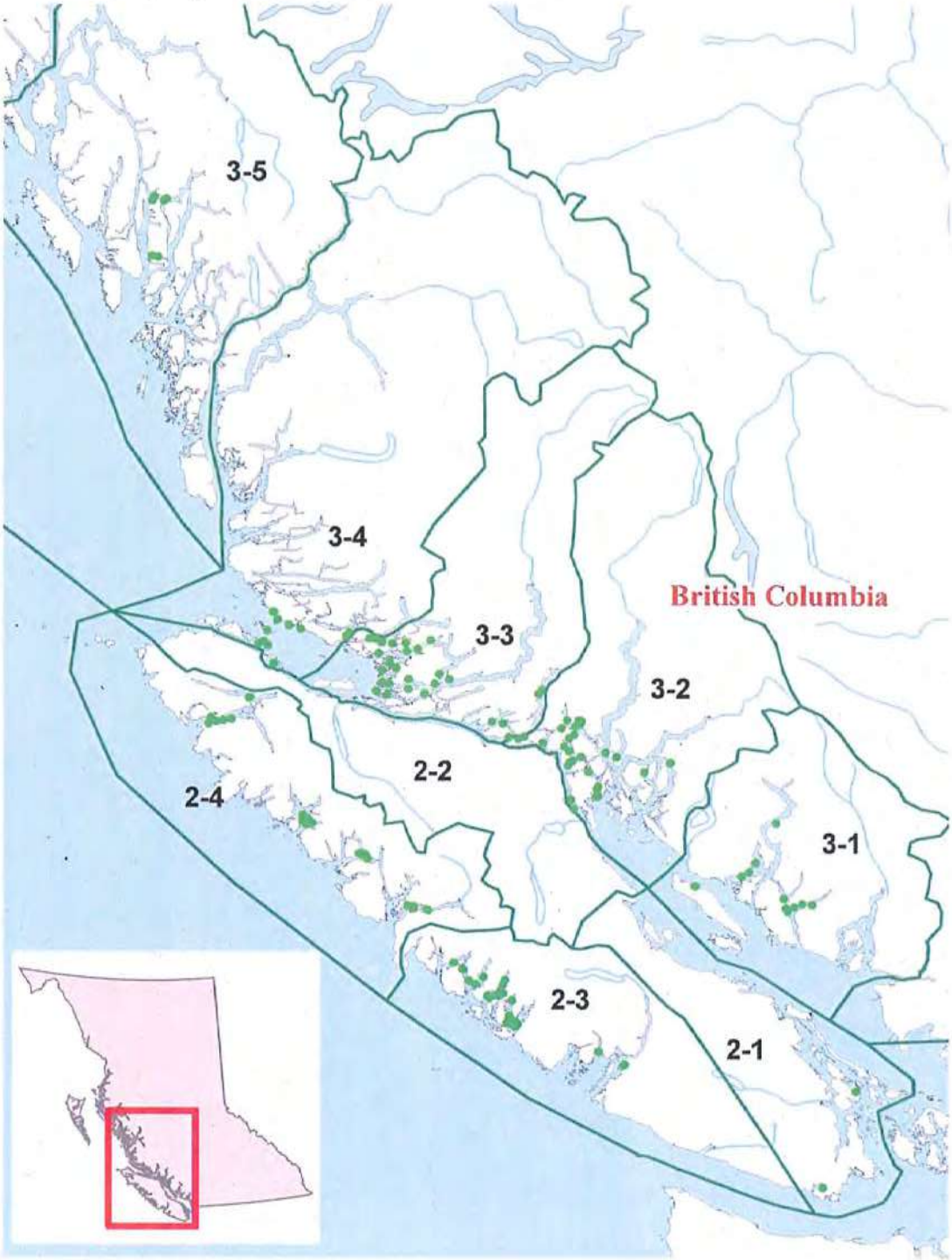
Company Name: _____

Month/Year: _____

				Source			Receiving		
Introductions & Transfers (I&T) Licence #	**Species**	**Date(s) of Transfer**	**# Fish Transferred**	**Facility Name**	**Facility Reference #**	**Fish Health Zone (see Appendix I-A(iii))**	**Facility Name**	**Facility Reference #**	**Fish Health Zone (see Appendix I-A(iii))**

Notes: _____

APPENDIX I-A(III): FISH HEALTH ZONES



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APPENDIX I-B: POPULATION HARVEST DECLARATION FORM

All sections of this appendix must be completed unless otherwise directed in applicable licence conditions or by the Department

PART A.

Company Name:

Address:

Phone number:

Aquaculture Facility Number:

Fish ID or Lot #	Date of Harvest	Fish Species and Common Names	Quantity Shipped (pieces)

Name of Market Venue, Distributor, Next Grower, or Processor:

PART B. Details of Drug/Chemical Treatment While Fish in this Lot Held at the Licence Facility
Details of Last Drug/Chemical Treatment:

1. Name of Drug and Prescription No. (if any)	2. Date Treatment Commenced	3. Date Treatment Ended
• •		

4. Treatment Information (withdrawal time prescribed, how applied to animals (in-feed or bath), amount per Kg of feed, etc.)

Treatment file and details are available at rearing site: Yes No

5. Name of Prescribing Veterinarian

Name of Person Responsible for Administering the Treatment	Signature of Person Responsible for the information of this declaration Date:

This form may be used by a licence holder or their agent to satisfy the information requirements specified in licence condition 1.4 concerning shipping of fish/seafood to a market venue or processing plant. This form must accompany the fish/seafood and must be retained by the market or processing licensee for a period of one year. Please note that this form must be submitted even if there has been no drug treatment of the animals in the shipment.

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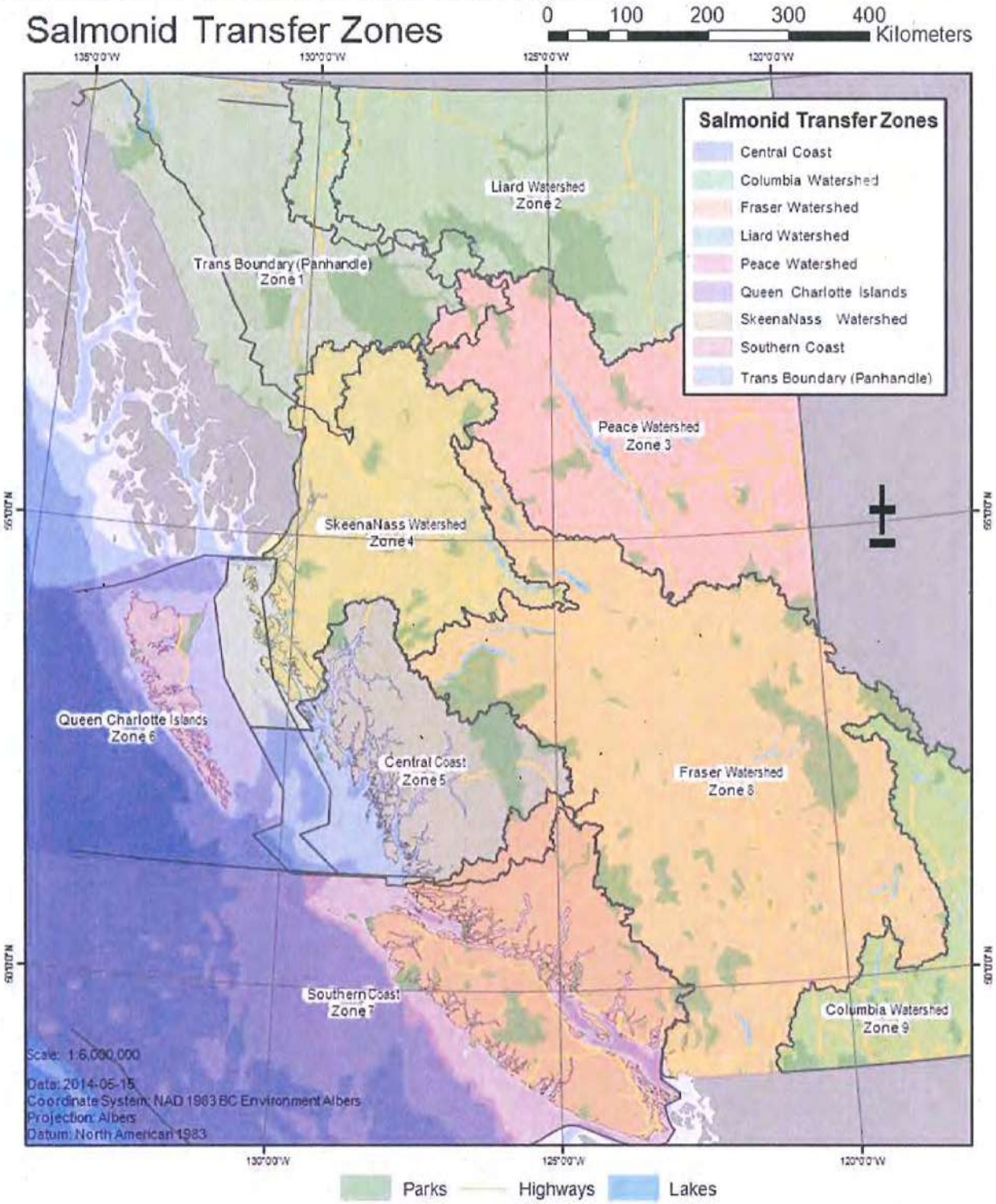
APPENDIX II: SALMONID TRANSFER ZONES



AQUACULTURE MANAGEMENT
Ensuring Sustainable Fisheries

APPENDIX III: DISEASES OF REGIONAL, NATIONAL OR INTERNATIONAL CONCERN

The diseases and pathogens listed below are considered either exotic to British Columbia (BC) or, such as IHN that is known to exist in BC, have the potential to emerge from the ecosystem in the Pacific region. These diseases can severely impact fisheries and affect regional and national trade so they warrant urgent notification and immediate attention.

Infectious Hematopoietic Necrosis (IHN) (causative agent: Infectious hematopoietic necrosis virus (rhabdovirus)
Infectious Pancreatic Necrosis (IPN) (causative agent: Infectious pancreatic necrosis virus (birnavirus)
Viral Hemorrhagic Septicemia (VHS) – other than the endemic VHS Genotype IVa (causative agent: Viral hemorrhagic septicemia virus (rhabdovirus)
Infectious Salmon Anemia (ISA) (causative agent: Infectious salmon anemia virus (orthomyxovirus)
Oncorhynchus masou Virus Disease (OMV) (causative agent: *Oncorhynchus masou* virus (herpes virus)
Any other filterable replicating agent causing cytopathic effects in cell lines specified by the Minister or is causative of identifiable clinical disease in fish
Whirling Disease (causative agent: *Myxobolus cerebralis*)
Cold Water Vibriosis (Hitra disease) (causative agent: *Vibrio salmonicida*)

Appendix IV

Salmonid Health Management Plan (HMP)
of Marine Harvest Canada

Template updated May 2016. Fisheries and Oceans Canada, Aquaculture Management Division (DFO- AMD) of British Columbia

1 OBJECTIVES, PERSONNEL & EXECUTIVE SUMMARY

The Health Management Plan (HMP) submitted to Fisheries and Oceans Canada as part of both the Marine and Freshwater/Land-based Finfish Aquaculture Licences serves three purposes: i) to outline good health conditions for cultured finfish raised by Marine Harvest Canada within the marine ecosystem; ii) to reflect a commitment by Marine Harvest Canada to comply with the principles, concepts, and required elements of fish health management when culturing finfish or gametes thereof in, or destined for, the marine environment, unless otherwise depicted by site-specific conditions of licence (i.e. culturing finfish in any open-water ecosystem) and; iii) to be used by Marine Harvest's facility staff for training and for day-to-day interaction with the fish, and by other fish health staff who are responsible for maintaining and monitoring good health status of the fish, and by the Licence Holder's Health Management Team who makes decisions related to fish health.

This document forms one of two components of Marine Harvest Canada's overall Health Management Plan (HMP): i) concepts; and ii) proprietary Standard Operating Procedures (SOPs). As an appendix of the Finfish Aquaculture Licence, this document is the publicly available component and commits to ensure and maintain the health and wholesomeness of its cultured finfish. It also commits Marine Harvest Canada to abide by four key principles of the management of health:

1. Characterizing the health status of the animal population
2. Identifying and managing risks
3. Reducing exposure to disease-causing agents
4. Judicious application of chemicals and drugs

Functionally, this document applies to Marine Harvest Canada's open-water containment arrays (net pens or solid wall) and to open-water body broodstock-rearing facilities. A number of health concepts herein may refer to an SOP that coincides with other health concepts (eg. both biosecurity and fish handling may refer to the same net changing SOP, common to both concepts. In addition, SOPs may be identified as either site-specific or practiced at all Licence Holder's facilities.

The proprietary SOPs cited in this HMP document are initially submitted in their entirety to Fisheries and Oceans Canada's Aquaculture Management Division (DFO-AMD) for review and response. Annually thereafter a complete facility specific proprietary Health Management Standard Operating Procedures (HMSOPs), with sections modified in the previous calendar year identified, to be submitted for Departmental review and response. If no changes were made in the past calendar year the Department to be advised and no submission required.

1.1 Personnel Duties and Responsibilities

1.1.1 Veterinarian

Marine Harvest Canada's attending Veterinarian (either staff or private contract vet), in conjunction with fish health staff, has agreed to be responsible in overseeing matters of fish health management for Marine Harvest Canada. The Veterinarian is licensed in BC and fosters a lawful Veterinarian-client-patient relationship with the Licence Holder. The Veterinarian is responsible for disease diagnoses, interpretations, and writing prescriptions and is expected to exercise good medical judgment in matters of fish health. Veterinary contact information is posted and available to on-site fish health staff.

1.1.2 Fish health manager / technicians / team

Job descriptions for the Fish Health Manager, Fish Health Technicians, Fish Health Biologist and other positions are available at the Head Office of Marine Harvest Canada. This "Fish Health Management Team" refers to those persons, including the Veterinarian, who are responsible for major fish health decisions. The Team is responsible for identifying and managing risks in an attempt to maximize fish health.

1.1.3 Facility staff play a role

As per conditions of licence, all facility staff have read and abide by this HMP and relevant operational SOPs, signed-off, and practice appropriate hygienic procedures supportive of fish health. General farm staff may be assigned specific fish health duties from time to time.

1.1.4 Contact names and numbers

Contact names and numbers for key fish health personnel, including emergency numbers for regulatory authorities and services, are posted in readily accessible location(s) at each facility.

2 HEALTH CONCEPTS & REQUIRED ELEMENTS

2.1 Biosecurity

Disease-causing agents (pathogens) may be spread by sick fish (wild or cultured) through the water, on shared equipment, other animals, or inadvertently by personnel, visitors or their personal gear. Entrance of potential pathogens is minimized by supporting an effective biosecurity "barrier" at each facility. Biosecurity measures apply to all personnel, visitors, divers, suppliers, regulators, vessels, and all equipment. Biosecurity has three main goals: keeping fish healthy, keeping pathogens out, and keeping disease from spreading. See the heading below: "Keeping Pathogens Out' for operational SOPs.

2.2 Keeping Fish Healthy

Keeping fish as healthy as possible is critical in preventing disease from arising at the containment facility, and/or from spreading within a facility.

2.2.1 Single year-class farms

Containment arrays (i.e. production farms, not including broodstock holding facilities) ideally contain a single year-class of finfish livestock to minimize the transmission of pathogens between age classes of fish. In other words, an 'all stock in; all stock out' approach is encouraged. However, due to siting or production limitations Marine Harvest Canada is acknowledged by the Department to raise multi-year-class fish at this specific location.

2.2.2 Suitable rearing environment and security

Marine Harvest Canada is responsible for ensuring a suitable rearing environment for the fish so they remain healthy. Requirements related to materials used in the construction and maintenance of rearing units provide security and minimize risk of potential escape or harm to fish. Active facilities are staffed daily or are locked, alarmed, secured or otherwise monitored to control entry and deter vandalism.

Refer to proprietary SOPs in Section(s) Document # SW135 Document # SW824 Document # SW957 Document # SW958 Document # SW959 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.2.3 Normal fish behaviour is observed

Fish are routinely monitored for signs of normal health and disease. All staff are familiar with normal fish appearance and behaviour. Early detection of altered activity is key to maintaining health and disease management so changes in behaviour and physical condition are logged and reported to facility managers upon discovery. To minimize stress and mortality, fish are held at cost-effective, species-specific densities.

2.2.4 Predator control

Predators include birds, other fish, and mammals. Reasonable, due diligent attempts are made to exclude predators from the facility and from interacting with the fish. As detailed and required in the conditions of licence Marine Harvest Canada follows mitigation procedures striving toward minimal predator interaction with the cultured fish.

Refer to proprietary SOPs in Section(s) Document # SW137 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.2.5 Feed and nutrition

The objective of good nutrition is to optimize fish health and growth so fish receive sufficient quantity and quality of feed. Marine Harvest Canada has procedures in place for healthy, hygenic delivery of feed to fish. Proper storage of feed is essential to maintaining its nutritional quality. Feed is stored in structures designed to minimize spillage, spoilage, and wildlife's access to feed. Feed is also protected from extremes of heat, sunlight and moisture.

Refer to proprietary SOPs in Section(s)
Document # SW952
Document # SW953
Document # SW129
of Marine Harvest Canada's SOP manual or Best Management Practices.

2.3 Fish Handling Techniques

2.3.1 Routine handling techniques

Marine Harvest Canada's fish handling procedures - including types of equipment used and equipment maintenance - are designed to minimize stress, injury, escape and predisposing fish to disease. Observing fish during handling, and for a period after handling, ensures any negative effects are noted and steps are taken to mitigate impact. Staff minimize the time fish are exposed to stressful events such as crowding and out-of-water events (i.e. moving, counting, grading, tagging, injecting, etc.). Each handling event is logged.

Refer to proprietary SOPs in Section(s)
Document # SW102
Document # SW106
Document # SW109
Document # SW114
Document # SW136
Document # SW822
Document # SW955
of Marine Harvest Canada's SOP manual or Best Management Practices.

2.3.2 Harvesting

If fish are being live-hauled to a processing plant measures are taken to minimize their stress during handling and transport. If fish are stunned and bled at the containment array they are stunned using humane procedures. Stress reduction is practiced to as great a degree as possible. Marine Harvest Canada's specific slaughter objectives and conditions vary yet specific harvest procedures (i.e. seine, brail, pump, etc.) are detailed in the SOP. Blood water is contained to the best of Marine Harvest Canada's ability to minimize leakage. For specific diseases of concern, eg. IHN viral infections, special harvest SOPs apply.

Refer to proprietary SOPs in Section(s)
Document # SW138
Document # SW804
Document # SW818
Document # SW139
of Marine Harvest Canada's SOP manual or Best Management Practices.

2.4 Monitoring Water Quality

Marine Harvest Canada routinely monitors and records water quality parameters at its facilities to ensure optimal fish health. Monitoring varies between specific licence

holdings depending on location and hydrographic specifics of the local environment yet dissolved oxygen, water clarity, and temperature monitoring are minimal requirements.

2.4.1 Contingency plans

Marine Harvest Canada maintains a contingency of procedures in the event of deterioration of water quality and procedures vary depending on cause. Cessation of feeding is immediate. Water quality monitoring is enhanced to determine the problem and to estimate how long the problem may persist. Fish are monitored more closely for the duration of the event and will not be handled until water quality is deemed acceptable. Records of these events, findings and actions are kept.

Refer to proprietary SOPs in Section(s) Document # SW110 Document # SW118 Document # SW964 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.5 Keeping Pathogens Out

Reasonable and necessary precautions are taken to mitigate infections at the facility. Often pathogens indigenous to the ecosystem are difficult to exclude from open or semi-open ecosystems but the development of disease can be minimised or prevented.

2.5.1 Personnel / Visitor / Diver / Supplier movement

Where possible, personnel and visitors avoid travel between Marine Harvest Canada's containment arrays. If such travel is unavoidable, personnel and visitors adhere to all biosecurity procedures at each facility. Procedures are posted or explained to all visitors as part of the visitor log-in event. Suppliers are advised of containment array procedures and delivery-order in advance. Suppliers attending multiple facilities may be denied access. Staff will notify suppliers and divers if any specific disease of concern arises.

Refer to proprietary SOPs in Section(s) Document # SW126 Document # SW800 Document # SW805 Document # SW818-2 Document # SW821 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.5.2 Equipment / Vehicle movement

Where possible, Marine Harvest Canada equipment is not shared between containment arrays. This includes fish handling equipment, vehicles, feeding, monitoring and other equipment. Equipment is kept as clean as possible at all times to prevent possible spread of pathogens; it is cleaned and disinfected after each use and re-stored to its proper location. Equipment drying is also practiced when possible. Items which must be used at more than one facility are subject to biosecurity and disinfection measures.

Refer to proprietary SOPs in Section(s) Document # SW115

Document # SW812
Document # SW815
Document # SW817
Document # SW809
of Marine Harvest Canada's SOP manual or Best Management Practices.

2.5.3 Moving fish between facilities

Transferring fish between culture facilities is minimized; however, due to siting or production objectives Marine Harvest Canada may relocate fish provided required licences issued by the Introductions and Transfer Committee are obtained in advance, carried during transport, and filed at both source and receiving facilities. Particular care is taken to avoid undue fish stress, transmission of pathogens, or the possibility of escape. Where well-boats are used, water quality is closely maintained and monitored to minimize stress during transport.

Refer to proprietary SOPs in Section(s)
Document # SW955
Document # SW138
Document # SW819
Document # FW260
of Marine Harvest Canada's SOP manual or Best Management Practices.

2.6 Monitoring Fish Health and Disease

Marine Harvest Canada's fish are monitored at least once daily for any unusual behaviour, visible lesions or other signs of illness. Changes in behaviour and physical condition are reported to management or fish health staff. Water quality is also routinely monitored (as above).

2.6.1 Carcass collection

Mortality is natural in all populations. All efforts are made by Marine Harvest Canada to minimize infection and disease within a containment array. Optimal hygiene, disinfection, and carcass collection helps to maintain population health. Carcasses are collected, classified and recorded on a routine and frequent basis to minimize the potential spread of pathogens and to minimize the attraction of predators. If mass mortality arises, it is managed according to licence conditions and its specific SOP.

Refer to proprietary SOPs in Section(s)
Document # SW124
Document # SW108
of Marine Harvest Canada's SOP manual or Best Management Practices.

2.6.2 Carcass classification

Carcasses are examined for obvious cause(s) of mortality and/or signs of disease. As detailed and required in the conditions of licence, Marine Harvest Canada records and reports the classifications of mortality at least as follows, and the Fish Health

Management Team of Marine Harvest Canada is notified of any unusual counts or types of lesions / mortality:

- Environmental (oxygen, water quality, storms, entrapment, nutritional)
- Fresh "silvers"
- Handling or transport damage (trauma)
- Maturation
- Old (decomposed)
- Poor performers
- Predator attack
- Dead wild finfish carcasses (number and type, eg. herring-like, rockfish-like, etc.)

Diagnostic sampling is conducted as per Marine Harvest Canada's procedures, or upon instruction by the Veterinarian, the Fish Health Management Team, or the Department (DFO-AMD), and recorded and reported as per licence.

Refer to proprietary SOPs in Section(s) Document # SW133 Document # SW809 Document # SW810 Document # SW811 Document # SW813 Document # SW816 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.6.3 Specific fish health procedures

2.6.3.1 Anaesthetizing and sedating fish

A variety of fish health procedures require that fish be sedated or anaesthetized for welfare and to minimize stress. Registered anaesthetics are obtained through a veterinarian. Anaesthetized fish are monitored closely at all times. Adequate water quality of the anaesthetic bath, in particular available dissolved oxygen, is maintained.

Refer to proprietary SOPs in Section(s) Document # SW144 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.6.3.2 Sea lice monitoring (Marine licences only)

Sea lice abundance (i.e. counts) requires monitoring to make effective control and management decisions; requirements are detailed in conditions of licence.

Refer to proprietary SOPs in Section(s) Document # SW822 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.6.3.3 Vaccinating fish

Vaccines are administered occasionally at containment arrays and form part of an integrated fish health management program. Vaccines are biologic substances that are stored (refrigerated), handled, and applied as per manufacturer's instructions. Marine

Harvest Canada staff are appropriately trained prior to undertaking a vaccination procedure.

Refer to proprietary SOPs in Section(s) Document # FW320 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.6.3.4 Euthanasia

In the uncommon event where numerous fish are euthanized (eg. to facilitate specific fish measurements, sampling, mercy-killing, or culling), it is recorded and conducted in as humane a manner as possible, facilitating a rapid and irreversible loss of consciousness.

Refer to proprietary SOPs in Section(s) Document # SW116 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.7 Fish Health Records

Many records are computerized and form part of the integrated licence holder record-keeping system. Backups are maintained. Marine Harvest Canada provides adequate system training and documentation to authorized facility personnel, including data entry and report creation. Record-keeping, storage, reporting and Marine Harvest Canada's Fish Health Management Team review is followed as per conditions of licence.

2.8 Fish Disease Outbreaks / Emergency

A fish health emergency is any situation where the health of a fish population is suddenly at risk. This may be due to disease-causing agents (such as a pathogenic virus) or to abrupt water quality changes (such as plankton blooms, a toxin, or a sudden, severe decline in dissolved oxygen). Vigilant monitoring, recording and early detection is key to good management of health emergencies.

An outbreak is defined as an unexpected occurrence of mortality or disease. Not all outbreaks are infectious or fish health emergencies. Infectious diseases may differ in how contagious they are and therefore how easy or difficult they are to control. Rapid response is essential but will be determined on a case-by-case basis in conjunction with the Veterinarian, the Fish Health Management Team, and/or by regulatory authority. Once an outbreak / emergency has been recognized, specific steps are followed. The objective is to keep the pathogen concentration (or load) as low as possible and to prevent spread of the problem within or off the facility. Biosecurity is enhanced.

Refer to proprietary SOPs in Section(s) Document # SW130 Document # SW802 Document # SW806 Document # SW814 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.9 Escaped Medicated Fish

The requirements and procedures related to fish escapes are conditions of licence. In the unlikely event of large, medicated, cultured fish escaping from the containment array (i.e. those with drug residues), Marine Harvest Canada's facility staff will immediately inform their Veterinarian and Fish Health Management Team who, in turn, will contact the Department Veterinarian(s) of DFO-AMD as soon as possible to facilitate the potential need of a general fisheries advisory and/or closure.

Refer to proprietary SOPs in Section(s) Document # SW954 Document # SW962 Document # SW951 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.10 Handling Drugs and Chemicals

Fish health and survival is sometimes optimized with judicious use of veterinary prescribed therapeutants. The Veterinarian attending Marine Harvest Canada maintains a veterinarian-client-patient relationship to facilitate diagnoses and prescription treatments. These decisions are taken considering both the welfare of fish and the ecosystem.

2.10.1 Medicated feed storage, administration and inventory

Medicated feed, if used, is stored in clearly marked bags, easily distinguishable from non-medicated feed. The medicated feed is inventoried and recorded daily as the feed is offered to the fish according to prescription. A Material Safety Data Sheet (MSDS) for all medications used at the facility is on-site and readily accessible. Marine Harvest Canada ensures that all chemicals are handled safely by appropriately trained staff, taking suitable precautions.

Refer to proprietary SOPs in Section(s) Document # SW122 Document # SW123 Document # SW801 of Marine Harvest Canada's SOP manual or Best Management Practices.

2.10.2 Treatment records

As per conditions of licence specific and detailed records of medicated feed administration are kept on-site for the entire time the fish are present. In combination with inventory records, the fish groups that were treated are readily identifiable through treatment and withdrawal times. A copy of the treatment history will accompany the target fish to another containment array if the fish are subsequently moved. Marine Harvest Canada does not harvest fish until they have cleared the withdrawal period prescribed by the Veterinarian. As per regulations and licence, when fish are delivered to a processing plant a Population Harvest Declaration accompanies harvest fish to ensure seafood safety and wholesomeness.

Refer to proprietary SOPs in Section(s) Document # SW820

of Marine Harvest Canada`s SOP manual or Best Management Practices.

2.10.3 Chemicals and Biologicals

2.10.3.1 Disinfectants, chemicals, and biologicals

Disinfectants and chemicals are stored in clearly marked containers. An MSDS for each disinfectant at the facility is on-site and readily accessible. Marine Harvest Canada ensures that all chemicals are handled safely by appropriately trained staff, taking suitable precautions.

Biologicals include vaccines. Where applicable, these products are stored refrigerated and handled as per manufacturer's instructions. A product insert for each vaccine at the facility is on-site and readily accessible.

Refer to proprietary SOPs in Section(s)
Refer to proprietary SOPs in Section(s)
Document # SW803
Document # S/FW902
Document # SW961
Document # SW963
Document # SW825
of Marine Harvest Canada's SOP manual or Best Management Practices.

3 BROODSTOCK – SPECIAL CONSIDERATIONS

Broodstock may be held at marine, brackish, or freshwater facilities. All fish health aspects of this HMP appendix apply (e.g., biosecurity, routine monitoring, treatments, emergencies, records) though they differ between saltwater and freshwater facilities. For example, water quality monitoring and contingency planning will differ between marine and freshwater broodstock sites.

3.1 Suitable Rearing Environment

Marine Harvest Canada is responsible to provide a suitable, safe and secure rearing environment. Escape and predation prevention is essential.

3.2 Feed and Nutrition

Broodstock often require specially formulated diets to meet their nutritional requirements prior to full maturation. Broodstock feeding strategies differ from those of production fish, particularly as they begin to mature and stop feeding. Proper storage of these diets is essential to maintaining their nutritional value; feed is stored in structures designed to minimize spillage, spoilage, and wildlife's access to feed; feed is also be protected from extremes of heat, sunlight and moisture.

Refer to proprietary SOPs in Section(s)
Document # FW552.6

of Marine Harvest Canada's SOP manual or Best Management Practices.

3.3 Biosecurity

Marine Harvest Canada raises mature broodstock for a period of time longer than production fish. Where possible, designated staff and equipment are selected to interact with broodstock. Strict disinfection and hygiene procedures are in place. At freshwater facilities shared by other fish year-classes, biosecurity is particularly vital to prevent the transfer of pathogens from the mature fish to susceptible young fry.

To minimize two-way transmission of disease, mature broodstock are held at a designated facility or in a portion of a facility, removed from production or hatchery fish. Broodstock in freshwater may use a separate water supply.

Refer to proprietary SOPs in Section(s)
Document # FW552.2
of Marine Harvest Canada's SOP manual or Best Management Practices.

3.4 Selection and Handling

Broodstock are handled individually at least once. Aquaculture facility personnel select broodstock for specific traits, and all broodstock are sorted by sex and for "ripeness", i.e. whether or not they are fully mature. Handling individual brood fish is be done with care and with minimal stress to prevent negative effects on gametes (eggs and milt). Anaesthesia and sedation is used to minimize time and exposure to anaesthetic compounds, and to provide gentle handling and recovery.

Refer to proprietary SOPs in Section(s)
Document # FW552.3
Document # FW552.7
of Marine Harvest Canada's SOP manual or Best Management Practices.

3.5 Medications

Broodstock are medicated for specific infections prior to maturation, particularly for those infectious pathogens that may be transmitted "vertically", i.e. from parent to egg. The type and timing of applied medications is determined by Marine Harvest Canada's Veterinarian and Fish Health Management Team. The medications are used according to prescription and are inventoried and recorded daily. A Material Safety Data Sheet (MSDS) for all medications used at the facility is on-site and readily accessible. Marine Harvest Canada ensures that all medications are handled safely by appropriately trained staff, taking suitable precautions.

Refer to proprietary SOPs in Section(s)
Document # FW180
Document # FW552.4
of Marine Harvest Canada's SOP manual or Best Management Practices.

3.6 Egg and Milt Collection

Egg and milt collection is conduction in as hygienic a manner as possible to prevent transmission of pathogens to other broodstock or progeny. Brood fish are anaesthetized and gametes are harvested. Females are euthanised in a humane manner. Males, if used for multiple egg takes, are monitored for recovery from anaesthesia and returned to holding unit(s). Proper hygiene and disinfection is practiced.

Refer to proprietary SOPs in Section(s) Document # FW552.1 of Marine Harvest Canada's SOP manual or Best Management Practices.

3.7 Disease Screening

Disease screening procedures are conducted at the time of spawning to mitigate risk of vertical transmission of pathogens to progeny. Tests performed are at the discretion of the Veterinarian but may include: screening for BKD (female broodstock) and viral screening. Additional testing may be performed at the discretion of the Veterinarian. Samples for disease screening are collected using aseptic technique. The location of progeny from sampled fish is tracked until such time the screening results are received and reviewed by the Veterinarian and/or Fish Health Management Team.

3.8 Egg Disinfection

Eggs are safely disinfected following fertilization and water hardening. This disinfection is conducted either at the Broodstock facility or once the gametes enter the hatchery.

Refer to proprietary SOPs in Section(s) Document # FW105 of Marine Harvest Canada's SOP manual or Best Management Practices.

3.9 Egg (and/or Milt) Transportation

Pre-arranged permits are required when eggs or milt are transported and permits must accompany the gametes during transport. Transport occurs in clean, labelled containers with secure lids. Strict disinfection and biosecurity procedures are followed to prevent transmission of pathogens from the broodstock facility to the hatchery.

Refer to proprietary SOPs in Section(s) Document # FW552.5 of Marine Harvest Canada's SOP manual or Best Management Practices.

3.10 Identifying Progeny

Female brood are labelled and corresponding eggs are clearly labelled to match (by date and parents or batch of parents).

3.11 Records

Records are kept for egg-take and broodstock pathogen screening. Records accompany each shipment of eggs from the broodstock facility to the hatchery receiving the eggs, whether destined for on-site or off-site incubation.

APPENDIX V-A: URGENT NOTIFICATION (& FOLLOW-UP REPORTS) OF MORTALITY EVENTS

All sections of this appendix must be completed unless otherwise directed in appliable licence conditions or by the Department

Discovery Date Of Event mm/dd/yyyy	Fish Health Zone (see Appendix I-A(iii))	Facility Reference #	Company Name	Facility Name	Fish Type Cultured	Fish Production Category	Suspected No. Of Fish Dead or Affected	Suspected Proportion Affected (%)	Suspected Carcass Biomass (kg)	Event Type	Probable Cause Or Diagnosis	Action Taken	Information Relevant To Event (i.e. species of algae, environmentals, contributing factors, other context)

Pick lists:

Fish type
- Atlantic
- Chinook
- Coho
- Sablefish
- Other-explain

Fish category
- Production
- Smolts
- Brood
- Other-explain

Event type
- Mortality Event
- Disease of App.III
- Infectious outbreak
- Non-inf. Outbreak
- Cull event
- 10-day follow report
- Summary report
- Other - explain

Probable cause
- Low D.O.
- Algae bloom
- Poor smolt
- Excess crowding
- Handling
- Transport
- Bathing
- Bacterial
- Viral
- Predation
- As yet unknown
- Other -explain

Action taken
- None required
- Resolved
- Ongoing correction
- Ongoing monitoring
- Harvest
- Treatment
- Carcass removal
- Cull
- Other -explain

Explain: _____

APPENDIX V-B: MORTALITIES BY CATEGORY

Licence Holder Name: _____ **Reporting Year:** _____ **Reporting Period:** _____ **Calendar Month:** _____

Facility Name: _____ **Facility Reference #:** _____ **Landfile #:** _____ **Fish Health Zone:** _____ **(see Appendix I-A(iii))**

Cultured Species	Other Species - Specify	Fish Production Category	Environmental	Fresh 'Silver'	Handling / Transport	Maturation	Old (Decomposed)	Poor Performer / Cull	Predator Attack	Mortality Total	Fish Health Category	Veterinary Diagnosis	Occurence Category	Mitigative Action	Therapeutant, Pest Control Product Used (and Completed)	Brand Name	Drug Identifier Number (DIN)	Dosage (Dose & Duration)	Weight of Active Therapeutant(s) Used (kg)	Anaesthetic Used During Month	General Notes
Pick List	Specify the species if selected "Other" in Pick List	Pick List	format: 0 - 999999	format: 0 - 999999	format: 0 - 999999	format: 0 - 999999	format: 0 - 999999	format: 0 - 999999	format: 0 - 999999	Do Not Enter	Pick List		Pick List	Pick List	Pick List				format: 0 - 999999	Pick List	

APPENDIX V-C: STOCKING AND FISH HEALTH ACTIVITY

Further to the definition of "Fish Health Staff" in Part A, the designated staff are considered qualified for this role if they have adequate post-secondary or on-the-job training and experience in the recognition of disease signs. Veterinarians are the only professionals qualified to make diagnoses and prescribe treatment of fish diseases.

Records of stocking and fish health activity shall include the following:

(a) inventory records (including source, number, pen/container number and lot of fish at the facility);

(b) daily feed consumption and growth rate;

(c) mortality records including: collection dates, carcass classification and documentation of morbidity;

(d) signs of increased morbidity;

(e) fish health and stress monitoring observations during handling or otherwise when noteworthy activities occur such as: predation, strong currents, influx of wild fish to the facility;

(f) biosecurity-related records including: visitor log, equipment cleaning, moving, and disinfection, footbath or equipment changes;

(g) records of fish health-related activity including: medications, lice counts, sorts, splits, fish health or veterinary inspection dates;

(h) records of mortality events, infectious outbreaks, urgent health-reporting;

(i) daily water quality records;

(j) records of non-therapeutic mitigative actions taken to prevent or mitigate disease such as: withholding feed due to blooms, deploying tarps and diffusers, the use of nutritional supplements, reducing densities, net changes or cleaning;

(k) records of samples collected for surveillance and diagnostic laboratory analyses related to fish health (record may reside at headquarter office);

(l) all veterinarian or fish health staff reports (at headquarter office); and

(m) records of reporting fish health information to Federal authorities (at headquarter office).

APPENDIX V-D: USE OF THERAPEUTANTS, PEST CONTROL PRODUCTS AND ANAESTHETICS

Records of the use of all therapeutants, pest control products and anaesthetics shall include the following:

(a) the facility reference number and the name of licence holder;

(b) the species of finfish cultivated at the facility;

(c) the name of the prescribing veterinarian;

(d) a log naming all therapeutants, pest control products and anaesthetics administered and when;

(e) how therapeutants and pest control products were administered and the dosage;

(f) the therapeutic schedule including the date treatment commenced;

(g) the final date of treatment or anaesthesia;

(h) the veterinarian's name and signature responsible for each therapeutant, pest control product and anaesthetic used;

(i) the detailed records of in-feed medication or pest control product administered;

(j) with the exception of source hatchery records (to be held at head office), traceability records and copies of previous medication from smolt entry facilities shall accompany all fish groups both within and off-site, and shall include:

(i)therapeutant records of the previous 90 days;

(ii)anaesthetic records for the previous 21 days;

(iii)pest control product records for the previous 21 days.

(k) any accidental mixing of treated fish and non-treated fish must be recorded; thereafter the mixed group will be considered tainted until the withdrawal period is reached.

APPENDIX VI: SEA LICE MONITORING PROTOCOLS

(Protocols applicable for Atlantic salmon and trout only)

Definitions

Lice life stages

Lepeophtheirus salmonis (Leps)	Adult female Includes adult female lice, with egg strings (i.e. gravid) or without egg strings Motile Lice Includes all 'not permanently attached' free-moving life stages: Adult females (as above) Adult males Pre-adult male and female lice
Caligus sp.	Total numbers of motile *Caligus* species
Both of the above	Chalimus Attached early stages of both *Caligus* and *Lepeophtheirus* species. Both species are categorized simply as chalimus since louse identification at these early life stages is not practical at the facility.

Year class 1 and 2 – see definitions in Part A of this licence.

Broodstock	Broodstock may initially enter saltwater directly into designated broodstock pens, or be entered to a production farm and later become designated broodstock populations, yet remain at the production farm or be relocated to broodstock facilities.

1. Sea Lice Sampling Protocols – Production Year classes 1 and 2

1.1. Other than the exemptions of COL s.6.2 sampling at each facility shall be conducted in a minimum of three containment structures, i.e. pens. Pens chosen for sampling shall include:

(a) one "reference" or "index" pen (i.e. first pen entered in the system, or the pen with the highest probability of having lice burden based on historical facility information). The fish from this pen are assessed EVERY sampling event; and

(b) two additional pens selected at random for each sampling event.

(c) not withstanding COL s. 6.2 (a), efforts should be made to restrict the "3 pen sampling event" to a 5-calendar-day period, that is the time between conducting sampling from the 1st pen to the 3rd.

1.2. In order to ensure a random sample of fish are collected from the pen:

(a) numerous fish shall be initially captured using a seine net (or alternate method provided it ensures a crowding and representative collection of the pen's entire population).

(b) a minimum sub-sample of 20 live fish (i.e. 5 groups of 4 fish) shall be randomly collected using a dip net.

1.3. Fish shall then be placed in an anaesthetic bath (i.e. 'tote') or humanely euthanized (e.g. in cases where biological sampling is lethal).

1.4. Physical handling shall be minimized to protect the fish and avoid dislodging lice.

1.5. All sampled fish shall be examined for the presence of lice regardless of the health status or size (i.e. robust, moribund or runt).

1.6. Sea lice on each selected fish shall be discriminated, counted and recorded for reporting in the following four categories:

- Adult Lep females (with or without egg strings)
- Other motile Leps (including adult males, and preadults)
- Chalimus (non-motiles, regardless of species), and
- *Caligus* (combined totals of adults and preadults)

} Motile

1.7. When sampling of each pen is completed, water in the anaesthetic tote shall be examined for detached sea lice. Lice dislodged and found within the handling totes must also be counted and categorized in the manner above, recorded as the 'tote count,' and included in the calculation of the total lice number (per pen) and average abundance (per fish).

2. Sea Lice Sampling Protocols for Broodstock

2.1. Broodstock shall be sampled in the same manner as production fish until their second winter at sea (i.e. the broodstock pens may be selected in the normal course of selecting three pens on the farm during the month for sampling including bi-weekly counts). If a broodstock pen is randomly selected, 20 fish shall be sampled.

2.2. In January/February of their second and subsequent winters at sea:
(a) a broodstock population on broodstock facilities shall be selected for sampling. Twenty broodstock from one pen shall be assessed.
(b) a broodstock population at production facilities, that are of a different year class than the production fish at that same location, shall be selected for sampling. Twenty broodstock from one pen shall be assessed.

2.3. After January/February of the year in which those brood are anticipated to spawn as two-winter brood, and to reduce handling-related injuries and stress on broodstock:
(a) all sea lice monitoring shall be conducted opportunistically (or via other husbandry sampling). In other words, all sea lice monitoring shall be coordinated with other routine broodstock handling procedures, such as sorting, moving or medicating.
(b) broodstock shall be subject to a visual inspection twice per month for the presence of sea lice and any associated grazing blemishes and observations recorded.

3. Licence Holder Recording and Reporting Requirements

3.1. Licence holder's records shall contain the following information for reporting as per Condition of Licence, Section 7 and Appendix VI-A. The records shall contain the:
(a) date and details of the most recent use of anti-sea louse products;
(b) sampling date of each pen count;

(c) year class of the sampled fish;
(d) unique pen identifier;
(e) number of fish sampled for each pen for each sampling event;
(f) sampling method used;
(g) total number of lice counted, per pen (including the detached lice in the anaesthetic bath);
(h) lice counts separated into four categories as described above (at a minimum); and
(i) action taken if calculated trigger abundances are reached.

3.2. Calculated Pen averages, Sampling Event averages, and Farm Abundance records shall be stored at the facility and made available upon request by the Department.

3.3. Reporting "null" (0) in Appendix VI-A and an explanation is required if no lice monitoring was undertaken at an active production facility.

APPENDIX VI-A: SEA LICE REPORT

Licence Holder Name: _____ Reporting Year: _____ Reporting Period: _____

Facility Name: _____ Facility Reference Number: _____

Sampling Done This Month (Y/N)	If No Sampling, Explain	Sampling Event Start Date	Pen ID	Reference Pen (Y/N)	Final Sea Water Entry Date	Pen Sample Date	Number of Fish Sampled	Sampling Method	Adult Females L. salmonis	Motile L. salmonis	Chalimus	Motile Caligus	Action Taken	Start date (if Rx or PC approval)	Comments

Pick Lists:

No sample:

Harvest ongoing
Fish < 4 pens
Fallow
Recent transfer
Emamectin <21 d
H2O2
Meds ongoing
Environmental
Pathogen threat
Other - explain

Sampling method:

Box seine
Full seine
Dipnet-feed
Weights
Harvest
Brood sort
Visual estimate
Fresh carcass
Cull/Mort event
Other - explain

Action taken:

None required
Bi-weekly counts
Harvesting
Harvest Pending
Treatment Ongoing
Treatment Pending
Culled
Cull Pending
Other -explain

APPENDIX VI-B: ENVIRONMENTAL RECORD

All sections of this appendix must be completed unless otherwise directed in applicable licence conditions or by the Department

Sampling Date (YYYY/MMM/DD)	Fish Health Zone (see Appendix I-A(iii))	Facility Reference #	Company Name	Facility Name	Temperature 0-1m degC	Temperature 5m degC	D.O. 5m ppm	Salinity 0-1m ppt	Salinity 5m ppt

Notes (i.e. Occurrence of harmful algal blooms): _____

APPENDIX VII: INCIDENTAL CATCH AND WILD MORTALITIES

Licence Holder Name: _____ **Facility Reference Number:** _____ **Final Date of Harvest:** _____

Facility Name: _____

				Species Caught		Number of Pieces			Observed Herring Spawn		
Event Type	**Date of Catch**	**Reporting Year**	**Reporting Month**	**Species Common Name**	**Species Scientific Name**	**Released (Pieces)**	**Mortalities (Pieces)**	**Average Weight (grams)**	**Pacific Herring Spawn Extent (sq metres)**	**Pacific Herring Spawn Cover (% / sq metre)**	**Comments**

Pick Lists:

Event Type
- Harvest
- Transfer
- Net Observation
- Carcass Recovery

Species Common Name
- Pacific Herring
- Herring-like
- Pacific Sardine
- Chinook Salmon
- Coho Salmon
- Pink Salmon
- Unidentifiable
- Pacific Cod
- Ling Cod
- Walleye Pollock
- Sablefish
- Unidentified Cod
- Perch
- Perch-like
- Mackerel
- Sculpin
- Quillback Rockfish
- Yellowtail Rockfish
- Copper Rockfish
- Yelloweye Rockfish
- Other Rockfish
- Flat fish
- Other (1)
- Other (2)
- Other (3)

APPENDIX VIII: ESCAPE PREVENTION AND RESPONSE

Escape Prevention through Maintenance of Cage and Net Integrity

A – General Equipment Design, Use and Maintenance

1. The licence holder must ensure all containment structures (including net pens), nets, cage support systems and other system components such as weights, anchoring equipment and predator nets shall be designed, constructed, installed, maintained and repaired in such a manner that preserves structural integrity and prevents escape of cultured fish resulting from damage caused by interactions with other equipment, the physical environment and marine mammals.

2. The licence holder must ensure that containment structures, cage support systems and other system components that are beyond repair are retired from service.

3. The licence holder must ensure all equipment is designed and constructed to be compatible with other containment structure components so there is no chafing that contributes to weak points in any part of the containment structure

4. The licence holder must ensure each net pen or similar structure used to contain fish has an inventory control number that is permanently affixed to the net in an accessible location.

5. The licence holder must ensure that all active net pens are attached to the cage support system as the primary point of attachment.

6. The licence holder must ensure that jump nets that extend at least one metre above the surface of the water are installed at the top of any net pen that does not have a permanently attached mesh top or similar barrier.

7. The licence holder must install containment nets and anti-predator nets in a manner that ensures nets are taut at all times.

8. At the request of the Department, the licence holder must demonstrate that net materials are strong enough to resist tearing and subsequent risk of fish escape.

B – Inspections and Record Keeping

9. The licence holder must ensure that nets are tested and inspected by a qualified individual for integrity and strength prior to being installed at facilities, and again when they are removed from the water and prior to re-installation. The requirements for this complete out-of-water servicing and inspection of net pens are as follows:
    a. Complete visual inspections of the entire net pens must be completed for signs of abrasions, tears or holes;
    b. Any damage to the net pen must be repaired;
    c. The net strength must be tested for new nets and assessed and tested as appropriate for operational nets; and
    d. Records kept as per section 12 of this licence.

10. The licence holder must ensure that daily above-water visual inspections are conducted of active net pens, support systems, anchoring system and anchoring-line buoy orientation, and that any damage or irregularities which increase the risk of escape are corrected or repaired immediately and records kept as per section 12 of this licence.

11. The licence holder must ensure that complete underwater inspections and repair of active net pens and any similar structures that contain fish take place as follows:
    a. Inspections are conducted by divers; or
    b. If an alternative method is used, at the request of the Department, the licence holder must demonstrate that the inspection quality is comparable to diver method; and
    c. Inspections must occur prior to fish entry;
    d. Active nets must be inspected at least every 60 days;
    e. In addition to paragraph 11(d), active nets must be inspected immediately after any operational activity or event that increases the risk of net failure, including but not limited to: harvesting, grading, extreme environmental conditions, net pen changes, fish delivery, recurring predator interactions, vandalism or towing of active containment structure;
    f. Any damage or irregularities identified which increase the risk of escape are corrected or repaired immediately, and
    g. A record of these inspections and repairs shall be kept as per section 12 of this licence.

12. The licence holder must ensure that complete written records are maintained for the entire life of each net pen and available for inspection by the Department, including:
    a. Owner of net and inventory control number;
    b. Net fabricator and date of net fabrication;
    c. If different from paragraph 12 (b), containment pen manufacturer's name and date produced;
    d. Size and gauge of mesh and dimensions of net pen;
    e. If applicable, the date of net retirement;
    f. Type and date(s) of any anti-foulant treatment on nets;
    g. Accumulated in-water service time;
    h. Initial and operational out-of-water servicing and inspection information as per section 9 of this Appendix, including:
        i. Date and location of testing;
        ii. Company and name of person conducting the test;
        iii. Whether net was tested wet or dry;
        iv. Approximate ambient temperature at test;
        v. Breaking strength test results for each location tested along with manufacturer's published mesh-breaking strength; or
        vi. If an alternate net technology is used where net breaking cannot occur or there is no manufacturer mesh-breaking information, a description of the alternate testing methodology must be provided; and
        vii. General comments and notes on overall condition of net;
    i. The accumulated time-in-water since the most recent complete out-of-water servicing and inspection;
    j. Details and the dates of each inspection under section 10 of this Appendix, including:
        i. Date and person conducting inspection;
        ii. Irregularities noted;
    k. Underwater inspection information as per section 11 of this Appendix, including:

i. Method of inspection;
ii. Diver or other professional's name and company;
iii. Date of inspection;
iv. Purpose of inspection (eg. routine, following an event, etc.);

l. A description and the dates of all repairs, including reasons for repairs, made to the net cage following any kind of inspection must be recorded.

13. The complete net record as per section 12 must be kept at the facility where it is in use during the life of the net, and following net retirement, must be retained for at least one year and kept at the licence holder's head office.

C – Escape Prevention and Response Plans (EPRP)

14. The licence holder must have in place an Escape Prevention and Response Plan (EPRP) describing the response to a fish escape or suspected escape including, but not limited to:
    a. The means to prevent further escapes;
    b. The means to recapture any fish that have escaped containment nets but still within the perimeter netting;
    c. The means to contain any fish that have escaped and are in the vicinity of the facility (excluding the use of fishing gear such as seines or gillnets but could include equipment like dip nets which would reduce the risk of incidental catch);
    d. The means to rectify the deficiency that caused the escape;
    e. Required recording and reporting of escape information; and
    f. Equipment and location of equipment required for escape response.

APPENDIX IX: ESCAPE NOTIFICATION FORM

Licence Holder Name: _____ Contact Name: _____ Contact Phone No: _____

Contact Email: _____ Facility Name: _____ Facility Reference No: _____

Current Licence No: _____ Reporting Submission Date: _____

Escape Date (YYYY-MM-DD)	Incident Time (HH:MM) (24hrs)	Escaped Species (Common Name)	Estimated Number Escaped	Average Weight (grams)	Date Stocked (YYYY-MM-DD)	Stock Source Facility Name	Drug Administered (Name of Drug*)	Treatment Start Date (YYYY-MM-DD)	Treatment End Date (YYYY-MM-DD)	Prescribing Veterinarian Name	Prescribed Withdrawal Period	Inventory Lots Treated **

Incident Cause*:** _____

Planned Mitigation Measures*:** _____

Comments: _____

* List each therapeutants (still within the prescribed withdrawal period) administered to these finfish
** Identification of the groups/pens #s of finfish treated
*** Describe in detail

Pick Lists:

Escaped Species type:

Atlantic	Rockfish
Chinook	Sablefish
Coho	Sockeye
Halibut	Steelhead
Pilchard	Wolf Eel
Rainbow	Other

Drug Type:

No Drug	Erythromycin
Oxytetracycline	TMS
Florfenicol	Metomidate
Tribrissen	Clove Oil
Romet	Other - explain in comments
Emamectin	

APPENDIX X: MARINE MAMMAL INTERACTION MANAGEMENT PLAN

Company	
Location	
Facility Ref. #	
Date of Submission	

The Marine Mammal Interaction Management Plan is intended to describe policies, procedures, infrastructure, and other measures aimed at mitigating conflict with marine mammals at marine finfish aquaculture facilities including those resulting from entanglements and where lethal control methods are required. The following document is to be completed for each site and must include completed entries for each of the sections listed. Licence holders may submit a plan for multiple facilities provided mitigation measures are identical for all those facilities. The list of these facilities should be provided on the first page of the plan.

Outline:

1. Mitigation
    a. Infrastructure
        i. Anti-Predator Nets, type, height, depth, location, etc (Diagram)
            1. Mesh size, material
            2. Maintenance schedule
                a. Inspection
                b. Repair
        ii. Perimeter Fencing
            1. Type and distribution
            2. Maintenance Schedule
                a. Inspection
                b. Repair
    b. Non-Lethal Deterrents
        i. Approved Devices
            1. Procedures
            2. Staff Training
    c. Interaction Recording Standard Operating Procedures
        i. Templates/Forms
            1. Procedures
            2. Staff training
        ii. Photos/Video
            1. Procedures
            2. Staff Training

2. Lethal Control
    a. Company/Site Policy and Standard Operating Procedures
        i. Procedure
            1. Detailed Circumstances
        ii. Qualified Personnel

1. Qualification Process
    a. Training/testing/Marine Mammal Identification
    b. Ongoing Training
2. Credentials and Personal Identification Information
    a. Identification Procedures
    b. Credential Verification Procedures
    c. Contact Information

3. Site Specific Recommendations
    a. Company Policy
    b. Site Policy

APPENDIX XI-A: MARINE MAMMAL INCIDENT REPORT

Licence Holder Name: _____ **Contact Name:** _____ **Contact Phone Number:** _____

Facility Name: _____ **Facility Reference Number:** _____ **Contact Email:** _____

Incident Date	Incident Time	Fish on Site? (Y/N)	Average Weight (grams)	Predator Species (Common Name)	Incident Type	Animal Condition	System Component	Photos Taken? (Y/N)	Carcass Stored Pending DFO Advice? (Y/N)	Mammal Released? (Y/N)	Carcass Discarded? (Y/N)	Other Action Taken? (Y/N)	Prior Mitigation Measures	Incident Cause	Corrective Measures Taken	Comments

Pick Lists:

Predator Species
- California Sea Lion
- Harbour Seal
- Other

Incident Type
- Drowning
- Entanglement

Animal Condition
- Fresh
- Moderate-advanced decomposition

System Component
- Containment Net
- Predator Net
- Shark Guard
- Other

APPENDIX XI-B: MARINE MAMMAL AUTHORIZED KILL REPORT FORM

Licence Holder Name: _____ **Facility Reference #:** _____ **Facility Name:** _____

Contact Name: _____ **Contact Phone Number:** _____ **Contact Email:** _____

Date of Kill	Time of Kill	Fish on Site? (Y/N)	Average Weight (grams)	Predator Species (Common Name)	Animal Sank? (Y/N)	Conflict Date	Conflict Behaviour Observed	Action Taken? (Y/N)	Prior Mitigation Measures	Incident Cause	Corrective Measures Taken	Comments

Pick Lists: Predator Species
California Sea Lion
Harbour Seal
Other

APPENDIX XII: BIOFOULING REMOVAL REPORT

All sections of this appendix must be completed unless otherwise directed in applicable licence conditions or by the Department

Facility Name: _____

Facility Reference #: _____ Cultured Species: _____

Site Contact Person: _____ Telephone Number: _____

Date	Cleaning Equipment/Procedure	Nets/Infrastrusture					Average Size of Mussels >2cm	Comments
		Type	Number	Cumulative Area (m^2)	Anti-foulant Type	Date of Application		

Notes: _____

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Canada

APPENDIX XIII: ANNUAL AQUACULTURE STATISTICAL REPORT

Once completed, this document is confidential within the provisions of the *Access to Information and Privacy Act*.

For Internal Use Only

Reporting Year:	Licence Type:	Facility Number:	Landfile Number:
Licence Holder:			

Introduction

In British Columbia, Fisheries and Oceans Canada is the lead authority responsible for regulating the aquaculture industry. Production statistics collected through this form may be used for analytical and operational purposes and will be shared with other government partners for statistical use. These organizations agree to take appropriate steps to protect all sensitive personal and commercial information, and to release data only in aggregated form.

In compliance with licences issued under the *Pacific Aquaculture Regulations*, all aquaculture licence holders are required to complete the Annual Aquaculture Statistical Report (AASR) under Section 61 of the Federal *Fisheries Act*.

The completed forms for each calendar year are due no later than January 25 of the following year.

Instructions for Completing the AASR

- ►This form is for use by shellfish, marine finfish and freshwater/land-based aquaculture licence holders.
- ►Complete all sections of this form, unless otherwise indicated
- ►Print in **BLACK INK** and using **BLOCK LETTERS**.
- ►This form must be completed and submitted via email to fishstats@dfo-mpo.gc.ca and DFO.AASR-RSSA.MPO@canada.ca or mailed to the address provided. To request an electronic spreadsheet version of this form, email fishstats@dfo-mpo.gc.ca and DFO.AASR-RSSA.MPO@canada.ca.
- ►Provide weights and measures using metric (e.g. kg, cm) unless other units are indicated.

Section 1 - Harvest for Food Market Sales

Were any fish or shellfish sold for Food Market Sales? ○ Yes ○ No

Species (provide full common or latin name)	**Weight (kg)**	**Quantity** (For Shellfish Only)	**Quantity Unit of Measure** (For Shellfish use Lbs, Dozens or Gallons)	**Value ($)**	**Product Type** (Round, Live, Fresh Dressed Head On, Fresh Dressed Head Off, Frozen Dressed Head On, Frozen Dressed Head Off, Fresh Fillets, Frozen Fillets, or Other (specify))

Section 2 – "U-Catch-Em" Sales

Note: Section 2 only applies to Freshwater/Landbased facilities

Were there any U-Catch-Em Sales? ○ Yes ○ No ○ Not Applicable

Species (provide full common or latin name)	**Average Length (cm)**	**Total Number**	**Total Weight (kg)**	**Total Value ($)**

Section 3 – Processing Information

Were any fish or shellfish processed? ○ Yes ○ No

Who processed your fish or shellfish? _____

AQUACULTURE MANAGEMENT
Ensuring Sustainable Fisheries

Fisheries and Oceans Canada | Pêches et Océans Canada

Canada

Annual Aquaculture Statistical Report (cont'd)

Reporting Year:

Facility Reference #:

Section 4 – Sales for Restocking or Ongrowing Purposes

Note: Include sales only – not purchases or acquisitions

Were any fish/shellfish sold for restocking or ongrowing? ○ Yes ○ No

Species (provide full common or latin name)	Life Stage (Eggs, Fry/Fingerlings, Juveniles/Smolts, Adults or Seed, Larvae)	Cultch Type (Shellfish Only)	Number Sold in BC (not exported)	Number exported	Total Value ($)

Section 5 – In-zone Introductions & Transfer Information

Note: Section 5 only applies to Freshwater/Land Based and Shellfish facilities.

Did you stock your site during the reporting year from an in-zone source? ○ Yes- complete Page 3 ○ No

Section 6 – Subtidal On-bottom Shellfish Seeding

Note: Subtidal refers to culture activities occurring on the bottom, below low tide.

Did you conduct subtidal shellfish seeding for any species this year? ○ Yes- complete Page 5 ○ No

Section 7 – Stock on Hand and Future Plans

Note: Section 7 only applies to Freshwater/Land Based and Shellfish facilities.

Will this site be actively culturing during the next reporting year? ○ Yes ○ No

If this site had any stock on hand as of December 31, **list all species:** _____

_____

_____

Section 8 – Declaration

DECLARATION: I have read all information contained on this report and it is true to the best of my knowledge and belief.

Name (print)	*Signature*	*Date*
Position in Company	*Email address*	*Phone #*

AQUACULTURE MANAGEMENT
Ensuring Sustainable Fisheries

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Canada

Annual Aquaculture Statistical Report (cont'd)

Reporting Year:

Facility Reference #:

Section 5 Continued – In-Zone Introductions & Transfers Information

O Not Applicable

Complete this section if you answered "Yes" to Section 5.

Complete the table below if you answered **Yes** to question Section 5 **AND** the transfer(s) **did not require** a separate Introductions & Transfers Licence. Otherwise, check "Not Applicable" in the space above.

Examples for Shellfish include: Initial stocking of a site(s) with shellfish seed from a within-zone hatchery

Examples for Freshwater/Land-based include: Introduction of fish, for land-based, U-catch and other FW facilities, from a within-zone source.

Provide one line per species (i.e. all transfer data for each species should be aggregated and reported on a single line)

Species Brought on Site	Source (provide aquaculture facility reference number or commercial licence number)	Total Number of Fish Transferred	Total Number of Transfers

This is Exhibit "B" referred to in the affidavit of Vincent Erenest sworn before me at Vancouver, British Columbia, this 18th day of January 2017.

A Commissioner for taking Affidavits for the Province of British Columbia

CHRISTOPHER J. WATSON*
DIRECT LINE: 604 443 1235
EMAIL: cwatson@macfuj.com
WEB: www.macfuj.com

*Law Corporation

MACKENZIE FUJISAWA LLP
BARRISTERS & SOLICITORS

OUR FILE NO. M6073 018

December 9, 2016

VIA EMAIL

Ecojustice
214 – 131 Water Street
Vancouver, BC V6B 4M3

Attention: Margot Venton

Department of Justice
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Attention: Steven Postman

Dear Ms. Venton and Mr. Postman:

Re: Morton v. Minister of Fisheries and Oceans
Federal Court No. T-1710-16

We are counsel for Marine Harvest Canada Inc. ("Marine Harvest"). We write with respect to the above-captioned application for judicial review, in which Marine Harvest is not named as a party.

We have reviewed the notice of application and the affidavit of Ms. Morton sworn November 28, 2016. This latest judicial review challenges the operation of the licensing regime in which Marine Harvest does business. The relief your client seeks will directly impact Marine Harvest.

Marine Harvest hereby seeks your client's consent to be added as a party respondent to the proceeding. Please respond to indicate if your client will consent to same. If you do not consent then we will bring an application for Marine Harvest to be added as a respondent.

We look forward to your response.

Yours truly,

MACKENZIE FUJISAWA LLP

Per:
CHRISTOPHER J. WATSON

M6073/0018/00239602

This is Exhibit "C" referred to in the affidavit of Vincent Erenest sworn before me at Vancouver, British Columbia, this 18th day of January 2017.

A Commissioner for taking Affidavits for the Province of British Columbia

Department of Justice Canada
Ministère de la Justice Canada

Department of Justice
900 - 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Telephone: (604) 666-5353
Facsimile: (604) 775-5942

December 13, 2016

By Email

Fasken Martineau
2900 - 550 Burrard Street
Vancouver, British Columbia
V6C 0A3
Attention: Kevin O'Callaghan

Mackenzie Fujisawa LLP
1600 – 1095 West Pender Street
Vancouver, British Columbia
V6E 2M6
Attention: Christopher J. Watson

Dear Mesdames/Sirs:

Re: Morton v. Minister of Fisheries and Oceans
Court No.: T-1710-16
Our File: 8752447

Thank you for your respective letters, both dated December 9, 2016. We consent on behalf of our client, the Minister of Fisheries and Oceans, to the addition of Marine Harvest Canada Inc. and Cermaq Canada Ltd. as respondents to the above-captioned application, subject to our review of the terms of a draft consent order.

Yours truly,

Steven C. Postman

c.c. Morgan Blakley
Margo Venton

This is Exhibit "D" referred to in the affidavit of Vincent Erenest sworn before me at Vancouver, British Columbia, this 18th day of January 2017.

A Commissioner for taking Affidavits for the Province of British Columbia

Christopher Watson

From: Morgan Blakley <mblakley@ecojustice.ca>
Sent: Wednesday, December 14, 2016 4:20 PM
To: Kevin O'Callaghan; Christopher Watson
Cc: Margot Venton; Postman, Steven; Nevens, Lisa; Liang, Rebecca
Subject: RE: 520 - Morton v DFO

Hi Kevin and Chris,

Ms. Morton does not consent to having Marine Harvest or Cermaq added as parties to the proceeding. We do not think either company is directly affected within the meaning of Rule 303. Their legal rights are not in issue, unlike in the last lawsuit where Ms. Morton was directly challenging the lawfulness of conditions in Marine Harvest's aquaculture Licence.

Further, if you are intent on proceeding with a motion not withstanding our position that your client is not directly affected, you should know that Ms. Morton and the MFO appear to agree in principle that this lawsuit should be case managed, including any motions by Cermaq and Marine Harvest for standing. Hopefully I, Steve or Margot should be able soon to send you our proposed (or finalized) consent for case management.

Finally, I note that Margot and I are unavailable tomorrow and Friday. I will be available next week from Monday to Wednesday, after which our office closes for winter holidays until Tuesday January 3, 2017.

Sincerely,

Morgan

From: Kevin O'Callaghan [mailto:kocallaghan@fasken.com]
Sent: Wednesday, December 14, 2016 11:29 AM
To: Morgan Blakley <mblakley@ecojustice.ca>; Christopher Watson <CWatson@macfuj.com>
Cc: Margot Venton <mventon@ecojustice.ca>; Postman, Steven <steven.postman@justice.gc.ca>; Nevens, Lisa <Lisa.Nevens@justice.gc.ca>; Liang, Rebecca <Rebecca.Liang@justice.gc.ca>
Subject: RE: 520 - Morton v DFO

Morgan,

As stated in our letter, the Application itself is aimed at the practice of moving fish in an aquaculture operation. This has a direct and obvious effect on our clients. Your client is well aware of this effect, having named Marine Harvest in past challenges in relation to the transfer of fish. There is no reason for your deliberation on this matter to take any additional time. We will begin our preparations for an application, unless we hear from you today. As with our letter, we will be relying on this email chain with respect to costs.

Kevin

Kevin O'Callaghan* | Partner

T. +1 604 631 4839 | M. +1 604 351 7127 | F. +1 604 632 4839

kocallaghan@fasken.com | http://www.fasken.com/en/kevin-ocallaghan

Fasken Martineau DuMoulin LLP
2900 - 550 Burrard Street, Vancouver, British Columbia V6C 0A3

FASKEN MARTINEAU

VANCOUVER CALGARY TORONTO OTTAWA MONTREAL QUEBEC CITY LONDON JOHANNESBURG

*law corporation

WWL AWARDS

Fasken Martineau DuMoulin
Mining
LAW FIRM OF THE YEAR 2016

Rock On.
2016 Global Mining Law Firm of the Year: *Who's Who Legal*
Winner of this award for the 8th time.
Learn more about Fasken Martineau's Global Mining Group

From: Morgan Blakley [mailto:mblakley@ecojustice.ca]
Sent: December-13-16 4:48 PM
To: Christopher Watson; Kevin O'Callaghan
Cc: Margot Venton; Postman, Steven; Nevens, Lisa; Liang, Rebecca
Subject: 520 - Morton v DFO

Hi Chris and Kevin,

We have received your letters dated December 9, 2016. We cannot provide a response by December 14th (as requested by Cermaq) as we need to consider your requests and get instructions from our client.

Should you have any specific reasons you think you are directly affected in a legal sense by this application, please let us know. Otherwise, we will provide our client's response in due course.

Sincerely,

Morgan Blakley
Barrister and Solicitor | Ecojustice
As Canada's only national environmental law charity, Ecojustice is building the case for a better earth.<http://www.ecojustice.ca/>

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This is Exhibit "E" referred to in the affidavit of Vincent Erenest sworn before me at Vancouver, British Columbia, this 18th day of January 2017.

A Commissioner for taking Affidavits for the Province of British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Morton v. British Columbia (Agriculture and Lands),*** 2009 BCSC 136

Date: 20090209
Docket: S083198
Registry: Vancouver

Between:

Alexandra B. Morton, Pacific Coast Wild Salmon Society, Wilderness Tourism Association, Southern Area (E) Gillnetters Association, and Fishing Vessel Owners' Association Of British Columbia

Petitioners

And

Minister of Agriculture and Lands, The Attorney General of British Columbia on Behalf of The Province Of British Columbia, and Marine Harvest Canada Inc.

Respondents

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Petitioners	Gregory J. McDade, Q.C. Lisa C. Glowacki
Counsel for the Respondent Minister of Agriculture and Lands and the Attorney General of British Columbia	Nancy E. Brown Veronica L. Jackson Cory Bargen a/s
Counsel for the Respondent Marine Harvest Canada Inc.	Christopher Harvey, Q.C. Andrew Scarth a/s
Date and Place of Hearing:	September 29 and 30, and October 1 and 2, 2008 Vancouver, B.C.

INTRODUCTION

[1] This action concerns the jurisdiction of the Province of British Columbia ("Province") to enact legislation with respect to finfish aquaculture in the Province's coastal waters.

[2] The petitioners seek declarations that:

a) sections 13(5), 14, and 26(2)(a) of the ***Fisheries Act***, R.S.B.C. 1996, c. 149 [the B.C. ***Fisheries Act***]; the ***Aquaculture Regulation***, B.C. Reg. 78/2002; sections 1(h) and 2(1)

of the ***Farm Practices Protection (Right to Farm) Act***, R.S.B.C. 1996, c. 131; and/or the ***Finfish Aquaculture Waste Control Regulation***, B.C. Reg. 256/2002; are *ultra vires* the Province of British Columbia, invalid and of no force or effect pursuant to s. 52 of the ***Constitution Act, 1867***;

b) a pending decision of the respondent Minister of Agriculture and Lands concerning tenure no. 1405180 would be *ultra vires* and invalid; and

c) a pending decision of the respondent Province and the respondent Minister of Agriculture and Lands to renew aquaculture licence no. 000821 would be *ultra vires* and invalid.

[3] The petitioners also seek orders prohibiting the respondent Province and Minister of Agriculture and Lands from deciding to renew tenure no. 1405180 and licence no. 000821 or exercising any powers pursuant to the regulatory regime relating to ocean finfish aquaculture. That tenure and that licence were issued to the respondent Marine Harvest Canada Inc. ("MHC") by the Province of British Columbia pursuant to s. 14 of the B.C. ***Fisheries Act*** and ss. 11 and 18 of the ***Land Act***, R.S.B.C. 1996, c. 245.

[4] The petitioners argue that the exclusive jurisdiction to regulate the management and the protection of fisheries in Canada is vested in Parliament pursuant to s. 91(12) of the ***Constitution Act, 1867***.

[5] The Minister of Agriculture and Lands and the Attorney General of British Columbia (the "provincial Crown") argue that the impugned legislation is within the legislative authority granted to the Province by ss. 92(5) (management of lands), 92(13) (property and civil rights), 92(16) (matters of local or private nature in the Province), and 95 (agriculture in the Province) of the ***Constitution Act, 1867***.

THE IMPUGNED LEGISLATION

[6] The full text of the impugned provisions of the B.C. ***Fisheries Act*** and the ***Farm Practices Protection (Right to Farm) Act*** can be found in the Appendix to this decision. I have not included the full text of the impugned regulations.

a) The B.C. *Fisheries Act*

[7] The petitioners challenge ss. 13(5), 14, and 26(2)(a) of the B.C. ***Fisheries Act***. Section 13(5) establishes the provincial aquaculture licensing scheme, while s. 14(1) sets out the procedure to apply for such a licence and s. 14(2) gives the minister discretion on the decision to grant licences.

[8] Section 26(2)(a) gives the Lieutenant Governor in Council the power to make regulations "for safe and orderly aquaculture".

b) The Aquaculture Regulation

[9] The petitioners have challenged the validity of this regulation as a whole.

[10] This regulation is intended to prescribe and monitor "safe and orderly aquaculture" as permitted by s. 26(2)(a) of the B.C. ***Fisheries Act***. Among other things it creates an inspection regime, addresses escapes of farmed fish, sets out the requirements for aquaculture cages, and deals with drug treatments for farmed finfish.

c) The *Farm Practices Protection (Right to Farm) Act*

[11] The petitioners argue that ss. 1(h) and 2(1) of this ***Act*** are *ultra vires* the Province. I will summarize these sections here.

[12] Under s. 1(h) of the ***Farm Practices Protection (Right to Farm) Act***, licensed aquaculture is included in the definition of "farm operation" and thus subject to the protection of this ***Act***. Section 2(1)(a) then limits the liability of farmers for nuisance with respect to "odour, noise, dust or other disturbance arising from the farm operation", while s. 2(1)(b) prohibits injunctions or other court orders from preventing the farmer from conducting that farm operation.

d) The *Finfish Aquaculture Waste Control Regulation*

[13] The petitioners also challenge the validity of the entirety of this regulation.

[14] The ***Finfish Aquaculture Waste Control Regulation*** does just that: it regulates the waste produced by finfish aquaculture. It is established pursuant to the ***Environmental Management Act***, S.B.C 2003, c. 53. This regulation applies to all finfish farms and includes provisions for registration, waste discharge standards, pre-stocking requirements, domestic sewage requirements, best management practices, monitoring and reporting, remediation, fees, and offences and penalties.

BACKGROUND

[15] Mr. Gavin Last is the Assistant Director, Aquaculture Policy Branch, employed by the British Columbia Ministry of Agriculture and Lands ("MAL"). He obtained a law degree from the University of Saskatchewan, and is a certified aquaculture technician. In his affidavit in these proceedings, he stated that he "is responsible for the sustainable development, implementation and management of the province's aquaculture industry". He referred to the Province's Land Use Operational Policy which in turn refers to the ***Land Act***; the B.C. ***Fisheries Act***; the federal ***Fisheries Act***, R.S.C. 1985, c. F-14 [the federal ***Fisheries Act***]; the ***Canadian Environmental Assessment Act***, S.C. 1992, c. 37; and the ***Navigable Waters Protection Act***, R.S.C. 1985, c. N-22.

[16] The provincial policy lists the various responsibilities recognized by the Province as follows:

> Responsibility for the regulation and licensing of aquaculture in British Columbia is shared by a number of provincial and federal agencies.
>
> The Ministry of Agriculture and Lands is the lead provincial agency for aquaculture industry development. Under the authority of the *Fisheries Act*, MAL is responsible for the development and regulation of the aquaculture industry, evaluating the suitability of production proposals and providing licensing for aquaculture operations. It is also responsible for land-use allocation decisions and provides tenure rights to Crown land, foreshore and aquatic Crown land on behalf of the province under authority of the *Land Act.*
>
> The Ministry of Environment is responsible for regulating waste management, environmental monitoring and enforcement.
>
> Fisheries and Oceans Canada (DFO) is responsible for the regulation and management of wild finfish and shellfish fisheries (with the exception of wild oyster harvesting), marine navigation and major project reviews under the federal *Fisheries Act, Navigable Waters Protection Act,* and *Canadian Environmental Assessment Act.*

[17] Mr. Last's reference to the exception from federal government responsibility for wild oysters is the result of the delegation, by statute, of that responsibility from the federal government to the provincial government in the early 20th century. This agreement, entered into in October 1912, was "in pursuance of the '***Fisheries Act***' and of Chapter 23 of the Statutes of Canada, 1912 entitled 'An Act to amend the Fisheries Act' and under the authority of an Order in Council dated the 19th day of September, A.D. 1912" (the "Oyster Fisheries Agreement").

[18] The Oyster Fisheries Agreement gave the Province of British Columbia jurisdiction to grant exclusive leases of its aquatic lands between the high and low tide marks for aquaculture of oysters.

[19] Mr. Last asserted in his affidavit that the following issues relate to salmon farming:

- real property (security over the land),
- private *vs.* common property (the fish),
- fish health (wild and farmed),
- non-indigenous species (e.g. Atlantic salmon),
- water quality and environmental factors (waste containment and discharge, including dead fish),
- conflicting land or resource uses,
- marketing,

- product quality assurance and safety, and
- the purchase and use of therapeutants.

[20] Mr. Last swore that, for the purposes of this case, the only main governmental entities were the Department of Fisheries and Oceans Canada ("DFO"), Transport Canada, Environment Canada, the MAL, Land and Water B.C. and the B.C. Ministry of Environment. Mr. Last asserted that the operation of an aquaculture facility in British Columbia was viewed by the Province as a provincial matter under the provincial Legislature's authority over property and civil rights in the Province and generally all matters of a merely local or private nature in the Province, assigned to the provinces under ss. 91(13) and 92(16) of the ***Constitution Act, 1867***, respectively.

[21] Mr. Last asserted in his affidavit that although only the federal government initially granted licences for salmon farms pursuant to s. 7 of the federal ***Fisheries Act***, that licensing was "probably ultra vires the federal ***Fisheries Act*** in the context of private property and fishing rights", based upon Mr. Last's understanding of the decision of the Ontario Labour Relations Board in ***504578 Ontario Ltd. v. Great Lakes Fishermen & Allied Workers' Union***, [1986] O.L.R.B. Rep. 1691; aff'd. (1986), (*sub. nom* ***Re 504578 Ontario Ltd. and Great Lakes Fishermen, etc., Union***) 31 D.L.R. (4th) 765, (*sub. nom* ***Re 504578 Ontario Ltd. and Great Lakes Fishermen, etc., Union***) 56 O.R. (2d) 781 (H.C.); further aff'd [1990] O.L.R.B. Rep. 117 (C.A.); leave to appeal ref'd [1990] S.C.C.A. No. 233.

[22] Gary Caine is the Acting Manager, Regional Operations, Aquaculture Policy Branch of the MAL. He, too, swore an affidavit in these proceedings. He explained the layers of administration within the provincial structure to licence and manage aquaculture in British Columbia.

[23] Mr. Caine described the DFO as the "lead agency for the federal government" to ensure that each proposed new aquaculture site complies with the federal ***Fisheries Act***, Environment Canada as responsible for researching and regulating aquaculture impacts on wildlife and birds, Transport Canada for administering the ***Navigable Waters Protection Act*** and the ***Environmental Assessment Act*** as they apply to aquaculture, Health Canada for setting standards for acceptable levels of contaminants in aquaculture products and licences drugs for use in aquaculture, and the Canada Food Inspection Agency for inspecting aquaculture products and feeds to ensure consumption safety and adherence to federal requirements for animal feeds.

[24] According to Mr. Caine, the DFO manages its involvement in aquaculture at the national level through the Aquaculture Management Directorate, and its regional involvement through Regional Aquaculture Coordination Offices.

[25] The DFO published a paper in 1986 entitled ***Policy for the Management of Fish Habitat***. At page 1 of this paper, the DFO asserted that:

> Under the federal *Fisheries Act*, "fish habitats" are defined as those parts of the environment "on which fish depend, directly or indirectly, in order to carry out their life processes". The *Act* also defines "fish" to include all the life stages of "fish, shellfish, crustaceans, marine animals and marine plants". Accordingly, pursuant to the *Act*, this policy will apply to all projects and activities, large and small, in or near the water, that could "alter, disrupt or destroy" fish habitats, by chemical, physical or biological means, thereby potentially undermining the economic, employment and other benefits that flow from Canada's fisheries resources.

[26] The DFO further asserted in this paper at page 2 that:

> Under the *Constitution Act (1982)*, the federal government has authority for all fisheries in Canada, and it remains direct management control of fisheries resources in the Atlantic Provinces of Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island; for the marine and anadromous salmon fisheries of British Columbia, for the marine fisheries of Quebec; and for the fisheries of the Yukon and Northwest Territories....

[27] In November 1986, the provincial Ministers of what were then the Ministries of Forests and Lands and of Agriculture and Fisheries, commissioned a public inquiry by Dr. David Gillespie into finfish aquaculture in British Columbia. The Commission report dated December 12, 1986, recommended the streamlining of jurisdictional issues relating to salmon farming between the federal and provincial governments.

[28] On September 6, 1988, the Government of Canada entered into an agreement (the "1988 Agreement") with the Government of British Columbia which stated in its preamble:

> WHEREAS Canada and British Columbia wish to establish a mutual agreement to advance the orderly growth and development of the aquaculture industry in British Columbia;
>
> AND WHEREAS both Canada and British Columbia have substantial interests in the prudent development of an economically sound aquaculture sector and the facilitation of investment therein;
>
> AND WHEREAS both Canada and British Columbia are interested in identifying and clarifying their respective roles in advancement of the aquaculture sector;
>
> THEREFORE without prejudice to their respective Constitutional powers, the parties hereby agree....
>
> [emphasis added].

[29] This agreement provided for a federal-provincial Management Committee which was to meet regularly to confer regarding regulation of aquaculture, but Ms. Morton asserts that the Committee has either ceased to exist or has become inactive. Mr. Caine swore that the Committee stopped meeting in 2005, when quarterly meetings between senior officials of the DFO and the MAL replaced the meetings of the Committee.

[30] The provincial Crown maintains that the federal government agreed to withdraw the requirement of the federal Aquaculture Enterprise License ("AEL") for salmon farming and that "on-farm" matters would be administered by the provincial government. These respondents argue that the DFO would continue to issue the AEL on behalf of the Province until the necessary statutory changes were made and implemented. The provincial Crown also contends that the September 6, 1988 agreement formalized the withdrawal of federal involvement in aquaculture regulation and licensing, in part, in response to the Gillespie Commission recommendations.

[31] Mr. Last swore that the resulting revision of provincial legislation provided a mechanism for the Province to issue aquaculture licences to replace the federal AEL, and to:

- add a definition of commercial aquaculture to include finfish, shellfish and aquatic plants in any water environment;
- prohibit a person from carrying on the business of aquaculture without a licence;
- prescribe a licence and licence fees for conducting the business of aquaculture in the province;
- give the minister or a person designated by him the power to grant a licence subject to terms specified; and
- give the Lieutenant Governor in Council the power to make regulations for safe and orderly aquaculture and distribution of fish and aquatic plants.

[32] By 1991, all commercial aquaculture facilities in British Columbia were licensed by the provincial government pursuant to B.C. Reg. No. 364/89 which had been proclaimed into force by the Lieutenant Governor in Council in the fall of 1989.

[33] In July 1996, the provincial Environmental Assessment Office was directed, apparently by the provincial government, to conduct a review and make recommendations regarding the Province's procedures to manage and regulate salmon farming. The Office reported extensively in August 1997, concluding that overall salmon aquaculture presented a low environmental risk.

[34] The Auditor-General of Canada published a report in 2000 entitled *The Effects of Salmon Farming in British Columbia on the Management of Wild Salmon Stocks*. The report determined that

> Fisheries and Oceans is managing the salmon farming industry on the basis that it poses an overall low risk to wild salmon and habitat. However, the Department is not fully meeting its legislative obligations under the *Fisheries Act* to protect wild Pacific salmon stocks and habitat from the effects of salmon farming....

[35] On February 15, 2002, the DFO published an *Interim Guide to the Application of Section 35 of the Fisheries Act to Marine Salmonid Cage Aquaculture*. At page 1 of this publication, the document states;

> The federal Minister of Fisheries and Oceans Canada (DFO) is responsible for the administration and enforcement of Section 35 of the *Fisheries Act*. When reviewing project proposals, regional

> Habitat Management staff determines what effects the project may have on fish habitat. This is done in accordance with the *Policy for the Management of Fish Habitat* (DFO, 1986) and with Subsection 35(1) of the *Fisheries Act* which states that "no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction (HADD) of fish habitat" except when authorized by the Minister, DFO, as contemplated in subsection 35(2) or through regulations under the ***Fisheries Act***.
>
> This document was developed in response to the rapid growth of the aquaculture industry to provide a practical and nationally consistent approach to the application of Section 35 to salmonid cage aquaculture developments. The determination by DFO Habitat Management assessors of whether a project has the potential to result in a HADD of fish habitat related to organic deposition is aided by the document, *Decision Framework for the Determination and Authorizations of Harmful Alteration, Disruption or Destruction of Fish Habitat* (DFO, 1998(a)). In the case of aquaculture, additional direction is required to assist assessors in determining whether an aquaculture project could cause a HADD of fish habitat.

[36] Sections 35 to 38 of the federal ***Fisheries Act*** are extensive. The full text of these sections can be found in the Appendix to this decision.

[37] Sections 35 and 36 deal with the pollution of fish habitat. Section 35(1) is a general prohibition of works and undertakings that harmfully alter, disrupt or destroy fish habitat. The exception to this rule is s. 35(2), which permits such works and undertakings if done "by any means or under any conditions" authorized by the Minister or by regulations under the federal ***Fisheries Act***.

[38] Parliament has assumed the authority to regulate the introduction of deleterious substances into the marine environment pursuant to s. 36 of the federal ***Fisheries Act***.

[39] Section 36 thus deals with prejudicial and deleterious substances both generally and specifically. Parliament prohibited the throwing overboard of any prejudicial or deleterious substance in water where fishing is carried on through s. 36(1)(a). The deposit of remains or offal of fish or other marine animals on land adjacent to water is prohibited by s. 36(1)(b), while s. 36(1)(c) prohibits leaving "decayed or decaying fish" in nets or other fishing apparatus. Pursuant to s. 36(3), "the deposit of a deleterious substance … in water frequented by fish" or in any place where it "may enter such water" is prohibited, though subsections (4) and (5) limit that prohibition by giving the Governor in Council the particular powers to create regulations permitting such actions. Subsection (6) requires that persons who deposit a substance under authorization pursuant to subsections (4) or (5) take various actions as required by the minister to prove that they are "depositing the deleterious substance in the manner authorized".

[40] Section 37 of the federal ***Fisheries Act*** empowers the minister to request plans and specifications for works and undertakings that might affect fish or fish habitat, and s. 38(1) grants the minister authority to appoint inspectors and analysts.

[41] Ms. Morton swears that the DFO generally does not exercise its powers under s. 35 of this legislation, with the result that only one of the farms in the Broughton Archipelago has been required to acquire a permit to harmfully alter fish habitat before commencing operations in the area.

[42] In September 2002, finfish aquaculture waste control regulations were introduced by the Province as the ***Finfish Aquaculture Waste Control Regulation***.

[43] The federal government also asserts jurisdiction over aspects of finfish aquaculture under s. 12(3) of the ***Canadian Environmental Assessment Act***. Ms. Morton alleges that it is standard practice for the DFO to decline to become a "Responsible Authority" under this legislation.

[44] In June 2005, The Honourable Geoff Regan, the Minister of Fisheries and Oceans of Canada published *Canada's Policy for Conservation of Wild Pacific Salmon*. In this report, Mr. Regan stated at page 1:

> Canadians on the West Coast have an enduring connection with Pacific salmon forged thousands of years ago with the arrival of the first peoples. Wild salmon serve as a vital source of food for First Nations and have a central place in their culture and spirituality; they provide jobs, income, and enjoyment for individuals, businesses, and coastal communities and they play a key role in natural ecosystems, nourishing a complex web of interconnected species. The ties of Pacific salmon with west coast communities, people, and ecology have been eloquently described in the writings of the late Roderick Haig-Brown, who observed:
>
> > *The salmon runs are a visible symbol of life, death and regeneration, plain for all to see and share…The salmon are a test of a healthy environment, a lesson in environmental*

> *needs. Their abundant presence on the spawning beds is a lesson of hope, of deep importance for the future of man.*

[45] In the same document, at page 2, Mr. Regan commented on the role of Parliament with respect to wild salmon:

> Section 91 of the *Constitution Act, 1867* assigns exclusive legislative authority over "Sea Coast and Inland Fisheries" to the federal government. The Minister of Fisheries and Oceans exercises this authority under the *Fisheries Act* and regulations. The Minister retains the authority and accountability for the protection and sustainable use of fisheries resources and their habitat. The Minister's authority includes the direction and powers necessary to regulate access to the resource, impose conditions on harvesting, and enforce regulations. Provincial, Territorial and municipal governments have important authorities with respect to land, water and waste disposal that need to compliment efforts to conserve fish and fish habitat.

[46] In this paper, Mr. Regan recognized that between 1950 and 1990, one-third of the spawning locations in south-western B.C. "had been lost or diminished to such low numbers that spawners were not consistently monitored at these sites". The Minister also recognized that "[t]o survive and prosper, wild salmon need appropriate freshwater and marine habitat; no habitat, no salmon".

[47] At page 31 of the paper, the Minister specifically addressed aquaculture, recognizing that salmon production from this industry had expanded threefold in the preceding 10 years, and that its value then exceeded that of the commercial salmon fishery.

[48] The federal government also published ***Canada's Oceans Action Plan For Present and Future Generations*** in 2005, reporting at page 6 that at that date, the country's oceans were generating more than $22 billion directly through ocean-related industries, and that the value of fish farm production had, by then, increased by more than 500%. This paper reported at page 7 that the aquaculture industry could grow from its annual value at that time of $600 million into a $2 billion per year industry.

[49] The government of British Columbia struck a Special Committee of Sustainable Aquaculture (the "Special Committee") which published its Final Report to the Legislative Assembly of the Province on May 16, 2007. In the executive summary of the report, at page iv, the report stated:

> BC's North Coast is currently free of fish farms and wild populations remain healthy, contributing significantly to the region's economy. The Committee strongly recommends no salmon farm development north of Cape Caution.
>
> Vancouver Island and BC's South Coast includes areas dense with salmon farms in the Broughton Archipelago, Discovery Islands and Clayoquot Sound. The Committee strongly recommends a transition to ocean-based closed containment technology to minimize impact on vulnerable wild stocks and ecosystems.

[50] The Special Committee also reported on the direct economic impacts of aquaculture in the Province, stating at page 11 that aquaculture production and processing activities accounted for $371 million in direct output and contributed $134 million to provincial GDP in 2005. The wild commercial salmon sector was reported to have accounted for $216 million in direct output and $67 million in GDP in the same time period. Salmon sport fishing was reported to account for $231 million in output and $116 million in GDP in that time period.

[51] In his affidavit of July 18, 2008, Mr. Last swore that the Province's fisheries and aquaculture sector, which includes the wild and farmed fish, contributes more than $1.9 billion in revenues to the provincial economy and accounts for more than $601 million in GDP annually, and that in 2005, the aquaculture segment generated a total GDP of $274 million, the sport fishery $240 million and the commercial fishery $103 million.

[52] The Special Committee quoted a Mr. Stockner of Hazelton at page 17 of their report:

> The wild salmon economy is much more than a commercial fishing fleet and fish processors based at the mouth of the river, as important as those components are. It is the rich and diverse web of people and communities and the activities they undertake related to wild salmon, which span the watershed from the mouth of the river to the headwaters and all the tributaries that make up the entire watershed. It is First Nations people on the inland fishery along the river. It is angling guides and lodges. It is sports fishers, motels, campgrounds and bed-and-breakfasts. It is ecotourism operators who view grizzly bears dependant on healthy stocks of wild salmon. It is guides and outfitters who depend on healthy populations of bears, for example, for hunting. And it is the many

levels of support and supply businesses – food, equipment, gas and other services – that support this economy. The wild salmon economy, however, would not exist without wild salmon ecology. You cannot have a healthy economy without healthy ecosystems.

[53] The Special Committee heard from a variety of witnesses, and received written submissions from a variety of authors. At page 20, it reported that "[w]hile there is no consensus amongst the scientific community about the potential harm incurred by open-net pen technology, the overwhelming majority of scientists, as well as a preponderance of evidence, suggests that from a public policy point of view we must act, and act immediately".

[54] At page 31 of its report, the Special Committee referred to the controversial issue of the alleged proliferation of sea lice from finfish farming, pointing out that the practice in the aquaculture industry to address sea lice outbreaks was the use of the chemical therapeutant Emamectin Benzoate (SLICE), administered through fish feed pellets.

[55] The fish farm in question is located on the west coast of British Columbia in the area known as the Broughton Archipelago. That Archipelago is located between Kingcome Inlet and Knight Inlet, at the southern extremity of Queen Charlotte Strait, on the south-central coast of British Columbia, and covers an area of approximately 5,000 square kilometres.

[56] The fish farm operated by MHC is apparently located in the direct pathway of juvenile salmon migrating from at least four of the major salmon producing rivers of the Broughton Archipelago and includes an area of back eddy in the strong tidal currents of Tribune Channel that is attractive to juvenile pink salmon.

[57] The petitioners say that the Broughton Archipelago is a rich marine environment supporting many species, and is an integral wild salmon habitat and a major natural production area for all native salmon species except sockeye. The petitioners assert that a number of important salmon spawning rivers and streams empty into the Broughton Archipelago, and that salmon run through and rely upon the marine habitat as part of their life cycle. The petitioners also assert that there is commercial and sport fishing in the Archipelago.

[58] The petitioners assert that aquaculture, the cultivation of marine plants and animals, and in particular finfish aquaculture began in British Columbia in the 1970's, and was first introduced in the Broughton Archipelago in 1987. They say that there are some 28 fish farms in the Broughton Archipelago, which primarily cultivate Atlantic salmon.

[59] Apparently, the fish farms, including that of the respondent MHC, are floating nets. They are secured to the sea floor in deep marine water by anchors and occupy the column of water above their anchors up to the surface of the water. The nets contain hundreds of thousands of fish which are raised from cultivated eggs in a hatchery and then moved to the nets where they remain until they are harvested, unless they escape or die.

[60] In the nets, the farmed fish are fed food pellets that apparently contain dye to color the flesh of the fish. Ms. Morton swears that large numbers of Atlantic salmon escape from the farms in the Broughton Archipelago and then compete with the wild salmon in the area for wild food. The farm fish also receive antibiotics and other drugs, and the petitioners assert that a typical farm will generate 1,500 to 3,000 kilograms of waste and floating material which leave the nets, and depending on the tides and currents can travel up to 10 kilometres.

[61] The fish farm which is the subject of tenure no. 1405180 and licence no. 000821 is located in Watson Cove, in the Broughton Archipelago. The tenure and licence have or will soon expire. The tenure is approximately 20 hectares, and the farm is licensed to hold approximately 600,000 Atlantic salmon.

[62] Some scientists, and the petitioner Ms. Morton, are of the view that aquaculture exacerbates the proliferation of sea lice, which threaten the wild salmon, and that the presence of fish farms interferes with the migratory routes of the wild salmon. These scientists are also of the view that the waste created by the large volume of farmed salmon, located in a discrete and fixed location, has a detrimental effect on the wild salmon when the waste leaves the net-pens.

[63] Ms. Morton also argues that the aquaculture operations are associated with increases in and the presence of diseases which affect the other marine life in nearby areas.

[64] The view of Ms. Morton and those scientists whose research she relies upon is that finfish farming has exacerbated the presence of sea lice in the Broughton Archipelago, resulting in a significant negative impact on the wild salmon who travel through the area. Mr. Last articulated the position respecting sea lice advanced by the provincial government respondents. He swore that the issue did not appear relevant to the legal questions raised in this case, and that on his review of the scientific literature and writing on the topic, "it is clear that the scientific community's views on the effect of sea lice from the aquaculture industry on wild finfish populations lack unanimity".

[65] Dr. Kenneth M. Brooks Sr., a biologist resident in the state of Washington, U.S.A., disagrees with Ms. Morton's views with respect to the effects of waste products and the proliferation of sea lice from aquaculture. Dr. Brooks has studied the environmental effects of intensive fish and shellfish aquaculture for over 20 years, and those effects in the state of Washington and the Province of British Columbia for a period in excess of 17 years.

[66] Ronald Genetz, an employee of the DFO, also disagrees with Ms. Morton's views. Mr. Genetz holds a Bachelor of Science (Hons) in Biology and Masters of Science in Zoology from the University of British Columbia. He has been employed by the DFO for some 37 years. He has been active in terms of aquaculture, serving as the Pacific Region Aquaculture Coordinator from 1987 to 2000, and was seconded to the B.C. Salmon Farmers Association from July 2001 until April 2004. He stated in the first of his two affidavits sworn in these proceedings that "there is no evidence to support the claim that farmed Atlantic salmon escapes into the coastal waters of BC will impact the Pacific wild salmon resource by taking over habitat and/or affecting the genetic makeup of Pacific salmon through interbreeding".

[67] It is not for this court to determine the merits or effectiveness of the provincial legislation respecting aquaculture in the Province of British Columbia. That is a matter for the elected government, if the legislation is within its jurisdiction. The question for the court is that of the jurisdiction of the provincial government to pass the impugned legislation. In order to address that question, it is first necessary to consider whether all or any of the petitioners have the necessary standing to institute proceedings to raise that question.

STANDING

[68] The provincial Crown argues that all of the petitioners lack standing to pursue the remedies they seek.

[69] Traditionally for a litigant to pursue declaratory or injunctive relief with respect to legislation in this Court, that litigant required either the consent of the Attorney General, as the Attorney General is the guardian of the public interest, or a direct interest arising from the impact of the legislation in question. That requirement has been relaxed to some extent as a result of a series of decisions by the Supreme Court of Canada: ***Thorson v. Attorney General of Canada***, [1975] 1 S.C.R. 138; ***Nova Scotia Board of Censors v. McNeil***, [1976] 2 S.C.R. 265; ***Minister of Justice (Can.) v. Borowski***, [1981] 2 S.C.R. 575 [***Borowski***]; and ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607 [***Finlay***].

[70] The distinction between the two types of standing was explained by LeDain J. for a unanimous Court in ***Finlay***. After canvassing a variety of authorities that address whether a litigant's personal interest in the legality of legislation is sufficient to afford him or her standing to challenge an exercise of statutory authority, he concluded at 622 that such standing required a certain "directness or causal relationship between the alleged prejudice or grievance and the challenged action". Having reached that conclusion, LeDain J. referred at 622-623 to an article by S.M. Thio, *Locus Standi and Judicial Review* (Singapore: Singapore University Press, 1971) at 5-6, where that author described the general requirement for standing in administrative law as being that of a "direct, personal interest". LeDain J. then went on to refer at 623 to the decision of the High Court of Australia in ***Australian Conservation Foundation Inc. v. Commonwealth of Australia*** (1980), 28 A.L.R. 257 at 270 [***Australian Conservation Foundation***]:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[71] LeDain J. concluded at 623-624 that while Mr. Finlay had a direct, personal interest in what he alleged was non-compliance with the terms and conditions of a federal government plan, the relationship between the alleged prejudice and the alleged non-compliance was too indirect, remote or speculative to create a sufficient causal relationship for standing under the general rule. LeDain J. thus went on to consider the scope and implications of the earlier decisions of the Supreme Court of Canada in ***Thorson***, ***McNeil*** and ***Borowski*** for public interest standing. At 631, he concluded that where the Attorney General refuses to assert a purely public interest in the limits of statutory authority by his own action, the court has a discretion to permit public interest standing in a private individual to institute proceedings.

[72] However, to paraphrase Martland J. in ***Borowski*** at 598, the court's discretion is to be exercised only in circumstances where:

1) The legal proceeding raises a serious legal question;

2) The private individual has a genuine interest in the resolution of the question; and

3) There is no other reasonable and effective manner for the legal question to be brought before the court.

[73] The five petitioners have similar interests in their desire to preserve and protect the wild salmon fishery in this Province, but differing interests and perspectives with respect to the impugned legislation that they consider inadequate to protect that fishery.

[74] The petitioner Ms. Morton is a registered marine biologist who has studied the marine environment in the Broughton Archipelago off the British Columbia shores, focussing her research on the effects of ocean aquaculture on the environment in that area. Ms. Morton has published her research in peer-reviewed journals. She is the Executive Director of the Raincoast Research Society, and a Director of both the Salmon Coast Field Station Society and the Pacific Coast Wild Salmon Society.

[75] The petitioner Pacific Coast Wild Salmon Society is an incorporated society comprised of individuals who live or work in and around the Broughton Archipelago, and have an interest in the protection of wild salmon and marine habitat.

[76] The petitioner Wilderness Tourism Association is an incorporated society representing "nature-based" tourism operators throughout British Columbia who are dependant on a healthy natural environment for their livelihoods. This Association's Mission Statement is:

> The Wilderness Tourism Association exists to ensure the ongoing viability of our industry by protecting the wilderness tourism land base. We are an organization of adventure tourism operators working to enhance the wilderness experience through advocacy and education and through involvement with government and public and private enterprise.

[77] Some of the members of the Wilderness Tourism Association operate sport fishing and wildlife viewing operations. The Association has concerns about the impact of aquaculture on the environment, and in particular, on the wild fish stocks in British Columbia.

[78] The petitioner Southern Area (E) Gillnetters Association is an incorporated society representing 180 fishermen and women who hold licences for the Area E commercial salmon gillnet fishery, also known as the Fraser River gillnet fishery. The members of this Association are dependant on healthy wild salmon stocks for their livelihoods.

[79] Mr. Robert G. McKamey is the Vice-President of the Association. In an affidavit sworn May 2, 2008, he deposed that the members of his Association are concerned that the aquaculture operations in British Columbia are located in salmon migration and habitat areas and affect wild salmon stocks. He swore that members of his association have caught Atlantic salmon that have escaped from finfish farms off the coast of British Columbia, and that the members are concerned about the impact of sea lice and diseases from fish farms on wild salmon stocks.

[80] The petitioner Fishing Vessel Owners' Association of British Columbia was incorporated as a society in 1938. It represents the registered owners of fishing vessels throughout British Columbia. The members of this Association harvest herring and halibut, but mainly Pacific salmon.

[81] The president of the Vessel Owners' Association, Robert P. Rezansoff, swore an affidavit dated May 2, 2008 in which he deposed that the members of his Association are dependant on healthy wild fish stocks and particularly wild salmon stocks for their livelihoods. This association has previously participated in litigation concerning the management of salmon fisheries in British Columbia due to its' members concerns over the biological impact of aquaculture in the British Columbia coastal waters.

[82] The members of the Vessel Owners' Association have caught Atlantic salmon that they believe originated in fish farms in British Columbia coastal waters, and are concerned about the impact of what they describe as "this invasive species" on the viability of native Pacific salmon.

[83] The provincial Crown argues that none of the petitioners has a direct, personal interest in the legality of legislation that is sufficient to afford them standing to challenge an exercise of statutory authority.

[84] The provincial Crown also contends that the impugned legislation was validly passed, and that these proceedings thus raise no serious legal question, but that if there is such a question, that none of the petitioners have a genuine interest in the resolution of the question, as that interest is recognized in the authorities. The provincial Crown argues that even if they do, there are other reasonable and effective means for the legal question to be brought before the court. The provincial Crown gave as examples a reference to the Court by the

Attorney General of Canada or the Attorney General of British Columbia, or an application by an unsuccessful applicant for a fish farm licence.

[85] While I do not doubt that Ms. Morton, the Pacific Coast Wild Salmon Society, or the Wilderness Tourism Association have a direct, personal interest in the subject of the impugned legislation, I am not persuaded that they have any greater direct, personal interest in that subject matter than did the applicant in ***Finlay*** in the issue raised in that case. Like Mr. Finlay, the relationship between the prejudices caused to these petitioners is too indirect, remote or speculative to be a sufficient causal relationship for standing under the general rule, or to meet the definition of interest found in the quotation above from the ***Australian Conservation Foundation***.

[86] I find, however, that the petitioners Southern Area (E) Gillnetters Association and the Fishing Vessel Owners' Association of British Columbia meet the definition in ***Australian Conservation Foundation***. Their members' livelihoods depend upon the health of the west coast salmon fishery. Thus they have a direct and personal interest in the appropriate management of that fishery by legislative and regulatory means. I find that these two petitioners have personal interest standing to pursue the remedies that they seek in their petition.

[87] In the event that I am incorrect in finding direct personal interest standing for the Southern Area (E) Gillnetters Association or the Fishing Vessel Owners' Association of British Columbia, and because of my finding that the other petitioners lack such standing, I will also consider the claim of all of the petitioners to public policy standing.

[88] I am unable to accept the submission of the provincial Crown that there is no serious legal question to be tried. Such a conclusion assumes that the legislation in question is *intra vires* the Province, which is the very issue raised by the petitioners. On the evidence before me, aquaculture in British Columbia is an industry that generates hundreds of millions of dollars, and whether Parliament or the Province of British Columbia has the jurisdiction to regulate it cannot be considered other than a serious legal question.

[89] While I have concluded that the petitioners Ms. Morton, the Pacific Coast Wild Salmon Society and the Wilderness Tourism Association lack sufficient direct personal interest in the impugned legislation, the interest required to meet the second factor articulated by LeDain J. in ***Finlay*** is more general; it is intended to separate the interests of mere "busybodies" from those with genuine interests.

[90] Each of the petitioners has a direct interest in the impugned legislation, albeit an insufficient interest to afford direct interest standing for the first three named petitioners. That said, Ms. Morton and the Pacific Coast Wild Salmon Society are informed and have participated in the public forums that have looked into and affected the development of aquaculture in British Columbia. The Wilderness Tourism Association has perhaps the most indirect interest of all of the petitioners, but as I have indicated above, their members are dependant upon a healthy natural environment for their livelihoods. While this interest is shared by many who would be unable to assert public interest standing, their concern over the impugned legislation is that it will not protect the environment upon which they depend, and that only by challenging the law will the federal government, the government that they maintain is responsible for the protection of that environment, be obliged to fulfill its constitutional obligations. As such, they are not simply interested, but stand to gain an advantage if the provincial legislation is declared *ultra vires*, or suffer a disadvantage if it is not. The Southern Area (E) Gillnetters Association and the Fishing Vessel Owners' Association of British Columbia have a sufficient interest as their members' livelihoods depend on healthy fish populations.

[91] I have concluded that all of the petitioners pass the screening set up by the second factor in ***Finlay***, and that affording them standing will not result in a wasting of scarce judicial resources or a failure to screen out busybodies.

[92] Will the challenge to the legislation come before the court if the petitioners are not given standing? It is not inconceivable that the legislation might be challenged by an unsuccessful applicant for a fish farm licence, but such an individual would not necessarily be affected by the impugned legislation in the way or to the extent that the petitioners may be. In ***Finlay*** at 633, LeDain J. commented that the Chief Justice in ***Borowski*** particularly emphasized the judicial concern that, in determining an issue, a court should have the benefit of the contending views of those persons most directly affected by the issue.

[93] The position taken by the Attorney General of British Columbia makes it clear that he would not consent to the institution of proceedings such as these. The Attorney General of Canada has declined the opportunity to make submissions in this case. I am, accordingly, of the view that the petitioners meet the requirement that there is no other reasonable and effective manner in which the issue of statutory authority raised by them may be brought before a court.

[94] I am therefore satisfied that I should exercise my discretion and grant all of the petitioners standing based upon public interest grounds.

JUSTICIABILITY

[95] To the extent that the petitioner's desire is for the disallowance of aquaculture in the Broughton Archipelago, or for some different regulation of aquaculture in that area, such issues are beyond the jurisdiction of this court, and belong to Parliament or the provincial legislature. While I understand that the petitioners may wish a different scheme to regulate aquaculture in the Province's coastal waters, the issues that they have placed before me do not engage those ends.

[96] In the event I were to grant the relief sought by the petitioners in these proceedings, whether or not those ends are achieved would then depend upon the will of Parliament. These are matters that are clearly beyond the competence of the courts: see ***Calgary Power Ltd. et al. v. Copithorne***, [1959] S.C.R. 24.

[97] That is not, however, a basis upon which to find a lack of competence in the court on the questions that the petitioners raise in their petition.

[98] The Notice of Constitutional Question ultimately settled upon by the petitioners was the constitutional validity of the following laws of British Columbia:

1) ***Fisheries Act***, RSBC 1996, c. 149, sections 13(5), 14 and 26(2)(a);
2) Aquaculture Regulation, B.C. Reg. 78/2002;
3) ***Farm Practices Protection (Right to Farm) Act***, RSBC 1996, c. 131, sections 1(h) and 2(1); and
4) Finfish Aquaculture Waste Control Regulation, B.C. Reg. 256/2002.

[99] The particulars of the constitutional challenge include:

- That the petitioners believed that finfish aquaculture in coastal waters was negatively impacting habitat and salmon stocks, and were not being properly regulated;
- That the Province had no constitutional ability to regulate aquaculture in coastal waters and in particular the facility of the respondent MHC;
- That the impugned legislation is, in pith and substance, about authorization, regulation and management of an ocean fishery and the creation of property rights in that fishery, and to specified areas of ocean waters, areas of exclusive federal jurisdiction un s. 91(12) of the ***Constitution Act, 1867***, and *ultra vires* the Province;
- That by leaving the regulation of aquaculture to the Province, the federal government has abdicated its responsibility to regulate the ocean fishery;
- That the federal government cannot constitutionally delegate its regulatory power over fisheries to the Province;
- That if the impugned legislation is, in pith and substance, a matter within provincial jurisdiction, it is nonetheless constitutionally inapplicable to finfish aquaculture in ocean waters pursuant to the doctrine of interjurisdictional immunity, as it impairs the core of the federal fisheries power; and
- That, if the impugned legislation is, in pith and substance, a matter within provincial jurisdiction, it is nonetheless constitutionally inoperative as regards finfish aquaculture in ocean waters pursuant to the doctrine of paramountcy, as it conflicts with the federal fisheries legislation.

[100] However salutary the efforts of the province with respect to finfish farming may be, it is necessary for the resolution of the issues raised by the petitioners to determine the purpose and legal effect of the impugned legislation.

[101] In ***Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources***, [1989] 2 S.C.R. 49, Chief Justice Dickson, for a unanimous court, discussed justiciability in the Canadian legal process at 91:

> The most basic notion of justiciability in the Canadian legal process is that referred to in *Pickin*, *supra*, and inherited from the English Westminster and unitary form of government, namely, that it is not the place of the courts to pass judgment on the validity of statutes. Of course, in the

> Canadian context, the constitutional role of the judiciary with regard to the validity of laws has been much modified by the federal division of powers as well as the entrenchment of substantive protection of certain constitutional values in the various *Constitution Acts*, most notably that of 1982. There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

[102] In my view, at least one of the questions posed by the petitioners is limited to the validity of provincial legislation, and as such is within the competence of the court and justiciable in these proceedings: see ***The Canadian Bar Association v. HMTQ et al.***, 2006 BCSC 1342, (*sub. nom* ***Canadian Bar Assn. v. British Columbia***) 59 B.C.L.R. (4th) 38 at para. 91; aff'd (*sub. nom* ***Canadian Bar Assn. v. British Columbia***) 2008 BCCA 92, (*sub. nom* ***Canadian Bar Assn. v. British Columbia***) 290 D.L.R. (4th) 617; leave to appeal ref'd (*sub. nom* ***Canadian Bar Assn. v. British Columbia***) [2008] S.C.C.A. No. 185.

GENERAL CONSTITUTIONAL PRINCIPLES

[103] I accept the submission of the provincial Crown that the following constitutional principles are relevant to the questions raised by the petitioners, and must guide my analysis of the issues to be determined:

a. The presumption of constitutionality

b. The onus of proof of unconstitutionality

c. The interpretation that favours validity is to be preferred.

[104] Laws passed by Parliament and the Legislatures are presumed to be within their respective spheres of constitutional jurisdiction. Courts should approach questions as to the validity of legislation based upon the assumption that the legislation was validly enacted: see ***Nova Scotia Board of Censors v. McNeil***, [1978] 2 S.C.R. 662 at 687-688.

[105] A party who challenges legislation must show that the legislation does not fall within the jurisdiction pursuant to which it was passed: see ***Reference re Firearms Act (Can.)***, 2000 SCC 31, [2000] 1 S.C.R. 783 at para. 25 [***Firearms Reference***].

[106] Where a challenged law is open to more than one interpretation, the court should prefer the interpretation that favours the validity of the legislation: see Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., vol. 1 (Scarborough, ON: Thompson Canada Limited, 2007) at 15-23 [Hogg vol. 1].

DIVISION OF POWERS

[107] The respective powers of Parliament and the provincial legislatures are set out in ss. 91 and 92 of the ***Constitution Act, 1867***. Neither Parliament nor a provincial legislature can expand its jurisdiction over the classes of subjects in ss. 91 or 92 by passing legislation which purports to do so.

[108] In ***Canadian Western Bank v. Alberta***, 2007 SCC 22, [2007] 2 S.C.R. 3 [***Canadian Western Bank***], the majority referred to co-operative federalism, also described as flexible federalism, at para. 42-43:

> ...A broad application [of the interjurisdictional immunity doctrine] also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. See F. Gélinas, "La doctrine des immunités interjuridictionnelles dans le partage des compétences: éléments de systematization", in *Mélanges Jean Beetz* (1995), at p. 471, and Hogg, at para. 15.8(c). It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.
>
> Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope – difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a "core" is not

compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time: *Citizens Insurance*, at p. 109; *John Deere Plow*, at p. 339. For example, while the courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to "trade and commerce" would have led to an altogether different and more rigid and centralized form of federalism. It was by proceeding with caution on a case-by-case basis that the courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions.

[109] The interplay of these doctrines and principles to be applied to constitutional analysis was discussed at para. 22-24. Binnie and LeBel JJ., for the majority explained:

> ... federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.
>
> To attain these objectives, a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential. For this reason, the powers of each of these levels of government were enumerated in ss. 91 and 92 of the *Constitution Act, 1867* or provided for elsewhere in that Act. As is true of any other part of our Constitution – this "living tree" as it is described in the famous image from *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136 – the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society. It is also important to note that the fundamental principles of our constitutional order, which include federalism, continue to guide the definition and application of the powers as well as their interplay. Thus, the very functioning of Canada's federal system must continually be reassessed in light of the fundamental values it was designed to serve.
>
> As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism" [citations omitted]....

[110] The doctrines and principles include the pith and substance doctrine, the double aspect doctrine, the necessarily incidental or ancillary doctrine, the interjurisdictional immunity doctrine, the doctrine of paramountcy, and the doctrine of subsidiarity.

CONSITUTIONAL DOCTRINES AND PRINCIPLES

a. Pith and Substance

[111] It is upon this doctrine that the petitioners principally rely. The doctrine characterizes and classifies the challenged legislation in order to determine its dominant purpose. It requires a consideration of the essential character of the legislation that is impugned.

[112] In ***Canadian Western Bank***, Binnie and LeBel JJ. recognized that a constitutional analysis must begin with an analysis of the "pith and substance" of the impugned legislation, and at para. 26 to 27 commented:

> This initial analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates. As Rand J. put it in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 333:
>
> > ... the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism... . [Emphasis in original.]
>
> If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers.
>
> To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law (*Reference re Firearms Act*, at para. 16). To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose (*Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337). Equally, the courts may take into account the effects of the legislation. For example, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 ("*Alberta Banks*"), the Privy Council held a provincial statute levying a tax on banks to be invalid on the basis that its effects on banks were so great that its true purpose could not be (as the province argued) the raising of money by levying a tax (in which case it would have been *intra vires*), but was rather the regulation of banking (which rendered it *ultra vires*, and thus invalid).

[113] The decision in ***Canadian Western Bank*** must of course be read in the light of the earlier decision of ***Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)***, 2002 SCC 31, [2002] 2 S.C.R. 146 [***Kitkatla***].

[114] In ***Kitkatla***, LeBel J. for the Court stated at para. 54 that in looking at the impugned legislation's effect, "the Court may consider both its legal effect and its practical effect".

[115] In addition, at para. 55 of ***Kitkatla***, LeBel J. addressed "the appropriate approach to the pith and substance analysis where what is challenged is not the act as a whole but simply one part of it". He held at para. 56-58 that the proper approach is to consider first the challenged provisions and then the legislation as a whole. If the impugned provisions are in pith and substance outside of the enacting level of government's jurisdiction, then mere placement in an otherwise valid act or regulatory scheme will not save them.

[116] The constitutional validity of the whole of the B.C. ***Fisheries Act*** and the ***Farm Practices Protection (Right to Farm) Act*** is not at issue in this case. The petitioners challenge only portions of those Acts. Consequently, I will consider only the challenged provisions in my analysis below.

b. Double Aspect Doctrine

[117] Gonthier J. for the Court discussed this doctrine in ***Law Society of British Columbia v. Mangat***, 2001 SCC 67, [2001] 3 S.C.R. 113 at para. 48-50, and described it as first enunciated by the Privy Council in ***Hodge v. The Queen*** (1883), 9 App. Cas. 117 at 130 [***Hodge***] where Lord Fitzgerald stated that "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91".

[118] Gonthier J. then referred to the decision of Dickson J., as he then was, in ***Multiple Access Ltd. v. McCutcheon***, [1982] 2 S.C.R. 161 at pp. 180-82 [***Multiple Access***]:

> Because "[t]he language of [ss. 91 and 92] and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme" ..., a statute may fall under several heads of either s. 91 or s. 92. For example, a

provincial statute will often fall under both s. 92(13), property and civil rights and s. 92(16), a purely local matter, given the broad generality of the language. There is, of course, no constitutional difficulty in this. The constitutional difficulty arises, however, when a statute may be characterized, as often happens, as coming within a federal as well as a provincial head of power. "To put the same point in another way, our community life--social, economic, political, and cultural--is very complex and will not fit neatly into any scheme of categories or classes without considerable overlap and ambiguity occurring. There are inevitable difficulties arising from this that we must live with so long as we have a federal constitution"....

...

> But if the contrast between the relative importance of the two features is not so sharp, what then? Here we come upon the double-aspect theory of interpretation, which constitutes the second way in which the courts have dealt with inevitably overlapping categories. When the court considers that the federal and provincial features of the challenged rule are of roughly equivalent importance so that neither should be ignored respecting the division of legislative powers, the decision is made that the challenged rule could be enacted by either the federal Parliament or provincial legislature. In the language of the Privy Council, "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91".

[Citations omitted.]

[119] In ***114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)***, 2001 SCC 40, [2001] 2 S.C.R. 241 [***Spraytech***], the Supreme Court of Canada again considered the double aspect doctrine, and L'Heureux-Dubé J. for the majority referred with approval to the decision of the British Columbia Court of Appeal in ***British Columbia Lottery Corp. v. Vancouver (City)*** (1999), 169 D.L.R. (4th) 141, 61 B.C.L.R. (3d) 207. L'Heureux-Dubé J. stated at para. 39 that:

> As a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter. As stated by the Quebec Court of Appeal in an informative environmental decision, *St-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), at pp. 888-91:
>
> > [TRANSLATION] According to proponents of the unitary theory, although the provincial legislature has not said so clearly, it has nonetheless established a provincial scheme for managing waste disposal sites. It has therefore reserved exclusive jurisdiction in this matter for itself, and taken the right to pass by-laws concerning local waste management away from municipalities. The *Environment Quality Act* therefore operated to remove those powers from municipal authorities.
> >
> > According to proponents of the pluralist theory, the provincial legislature very definitely did not intend to abolish the municipality's power to regulate; rather, it intended merely to better circumscribe that power, to ensure complementarity with the municipal management scheme... .
> >
> > ...
> >
> > The pluralist theory accordingly concedes that the intention is to give priority to provincial statutory and regulatory provisions. However, it does not believe that it can be deduced from this that any complementary municipal provision in relation to planning and development that affects the quality of the environment is automatically invalid.
> >
> > ...
> >
> > A thorough analysis of the provisions cited *supra* and a review of the environmental policy as a whole as it was apparently intended by the legislature leads to the conclusion that it is indeed the pluralist theory, or at least a pluralist theory, that the legislature seems to have taken as the basis for the statutory scheme.

c. Doctrines Requiring Validity of the Impugned Legislation

[120] The necessarily incidental, interjurisdictional immunity and paramountcy doctrines all apply only where the impugned legislation is valid. However, the other criteria for each of these doctrines and their effects differ.

i) Necessarily Incidental or Ancillary Doctrine

[121] This doctrine permits valid provincial legislation to encroach on the federal sphere of competence. In ***Canadian Western Bank***, Binnie and LeBel JJ. explained the doctrine at para. 28:

> ... legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage of the analysis of constitutionality, the "dominant purpose" of the legislation is still decisive. Its secondary objectives and effects have no impact on its constitutionality: "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law" (*Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 23). By "incidental" is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature: see: *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 , 2005 SCC 49, at para. 28. Such incidental intrusions into matters subject to the other level of government's authority are proper and to be expected: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 670. In *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, by way of further example, and in contrast to the *Alberta Banks* case already mentioned, the Privy Council upheld the validity of legislation levying a tax on banks, holding that the pith and substance of the legislation was indeed to generate revenue for the province, and its essential purpose was therefore in relation to direct taxation, not banks or banking. See P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at para. 15.5(a).

[122] This doctrine therefore recognizes that so long as the impact of provincial legislation on matters within federal jurisdiction is secondary or incidental to the law's most important aspect, the secondary or incidental impact is permissible. If this doctrine applies, then the effect of the doctrine is to confirm the validity of the provincial legislation.

ii) Interjurisdictional Immunity Doctrine

[123] This is an interpretive doctrine that confines provincial legislation to the Province's jurisdiction. It applies where the provincial law is valid with respect to most applications of the law, as set out in Hogg vol. 1 at 15-28, but in some applications impairs a vital or essential part of a federal undertaking, person, or thing: ***Canadian Western Bank*** at para. 42 and 48-49. Where interjurisdictional immunity applies, the result is that the impugned law is not held to be invalid, but simply inapplicable to the federal undertaking, person or thing, and is limited in application to matters within the jurisdiction of the Province by reading down the legislation: Hogg vol. 1 at 15-28.

[124] In ***Canadian Western Bank*** the majority commented at para. 35-47 that the dominant tide of constitutional interpretation does not favour interjurisdictional immunity. Thus, although the doctrine has a proper part to play in appropriate circumstances, the Court neither encouraged an intensive reliance on the doctrine, nor accepted it as a doctrine of first recourse in a division of powers dispute.

iii) Doctrine of Paramountcy

[125] Paramountcy ensures that valid provincial legislation does not encroach too far into the federal sphere. It applies where there are two valid laws, one federal and one provincial, that are inconsistent with each other: Hogg vol. 1. at 16-2 to 16-3. The application of this doctrine was explained by Binnie and LeBel JJ. for the majority in ***Canadian Western Bank*** at para. 75:

> ... To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.

[126] If the doctrine is triggered, then the federal law prevails over the provincial law. The provincial law becomes inoperative and is held in abeyance unless and until Parliament repeals the federal law. The provincial law remains both valid and applicable, but does not operate while the federal law does: Hogg vol. 1 at 16-19 to 16-20.

d. Subsidiarity

[127] This is the recognition of the principle that decisions are often best made by the level of government that is closest to the citizens affected: ***Spraytech*** at para. 3.

ANALYSIS

a. Pith and Substance

[128] Section 91(12) of the ***Constitution Act, 1867*** assigned exclusive jurisdiction over the "Sea Coast and Inland Fisheries" to Parliament. Chief Justice Sir W.J. Ritchie considered the grant of fishing rights in the Miramichi, and commented on the competing federal and provincial powers with respect thereto, in ***The Queen v. Robertson*** (1882), 6 S.C.R. 52. At 120-124 the Chief Justice explained those powers:

> … the legislation in regard to "Inland and Sea Fisheries" contemplated by the British North America Act was not in reference to "property and civil rights" — that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding [of] fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof….
>
> I reiterate what I on a former occasion intimated, that at the time of the union the entire control, management and disposition of the crown lands, and the proceeds of the public domain, were confided to the executive administration of the provincial governments as representing the crown for the benefit of the provinces respectively, and to the legislative actions of the provincial legislatures, so that the crown lands, though standing in the name of the Queen, were, with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate; and this property, the Imperial Act, by clear unambiguous language, has, as we have seen, declared shall after confederation continue to be the property of the provinces; and I cannot discover any intention to take from provincial legislatures all legislative power over property and civil rights in fisheries, such as we are now dealing with, and so give to the parliament of *Canada* the right to deprive the province or individuals of their right of property therein, and to transfer the same or the enjoyment thereof to others, as the license in question affects to do.
>
> To all general laws passed by the Dominion of *Canada* regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being

considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

[129] Sixteen years later, in ***Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia***, [1898] A.C. 700 at 712-713 [***Reference re: British North America Act, 1867, s. 108 (Can.)***], the Privy Council affirmed that the ***Constitution Act, 1867*** did not convey any proprietary rights in relation to the fisheries to the federal government, but observed that:

> ... At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected....

[130] The petitioners assert that the pith and substance of the impugned legislation is the management of an ocean fishery, through licensing and regulation that controls all important aspects of the interaction between and impact of the farm fish and the wild ocean species and habitat including:

1) the number of ocean fish farms,
2) the location of the fish farms,
3) the size of the fish farms both in area and in the number of fish allowed in each facility,
4) the species of fish allowed, and
5) the management and operation of the fish farms.

[131] The petitioners also argue that the Province's regulatory scheme grants property rights in the ocean fisheries and interferes with and restricts the public right to fish in the ocean.

[132] In ***Attorney-General for British Columbia v. Attorney-General for Canada (No. 2)*** (1913), 15 D.L.R. 308 at 314-318, [1914] A.C. 153 [***B.C. Fisheries Reference***], the Privy Council determined that the Province of British Columbia had no competence to grant a right to fish in navigable, tidal and marine waters, and no power to alter or restrict the public right to fish.

[133] For those areas of ocean on the coast of British Columbia where the fish farm cages are located, the rights to fish of those other than the holders of the fish farm licenses are restricted by the presence of the cages.

[134] The granting of fish farm licenses by the provincial Crown purports to permit those to whom such licenses are granted to introduce fish into significant areas of B.C.'s coastal waters, up to several hectares in size, which would otherwise be frequented by wild fish. This disruption is directly contrary to s. 35 of the federal ***Fisheries Act***.

[135] In addition, the fish introduced in this way leave waste matter in the water. The definition of "offal" in Catherine Soanes and Angus Stevenson, eds., *Concise Oxford English Dictionary*, 11th ed. (Oxford and New York: Oxford University Press, 2004) [*Concise OED*], includes "decaying or waste matter" along with "the entrails and internal organs of an animal used as food". Leaving this waste matter is thus directly contrary to s. 36(1)(b) of the federal ***Fisheries Act***.

i) Definition of a Fishery

[136] The respondents do not argue that the Province has the jurisdiction to regulate fisheries. Instead, they both argue that MHC's operation is not a fishery. MHC argues further that if their operation is a fishery, it is a private fishery and thus beyond federal jurisdiction.

[137] However, if the respondents are wrong and a fish farm is to be viewed as a fishery, then in effect the provincial legislation is regulating a fishery.

[138] James Barclay, in *A Complete and Universal English Dictionary* (London: Thomas Kelly, 1833) defined "fishery" as "the action of taking fish" or "the place where fish abound, and are generally sought for".

[139] An American dictionary from 1858 similarly defines fishery in terms of location, as "a place for catching fish": Noah Webster, *An American Dictionary of the English Language* (Springfield, Mass.: George and Charles Merriam, 1858). Webster adds that a fishery is "the business of catching fish".

[140] The *Oxford English Dictionary Online* (2nd ed., Oxford University Press: 1989 and 2008) [*OED*], though current, also include usages that date back to the 17th century, demonstrating that the words set out in the *OED* have been used in the manner defined since at least those dates.

[141] The *OED* includes six definitions of "fishery", four of which are relevant to the petition in this case. The first definition is "the business, occupation, or industry of catching fish, or of taking other products of the sea or rivers from the water", with citations from 1677, 1769, and 1890. The *OED*'s second definition for "fishery" is "a place or district where fish are caught; fishing-ground" and lists usages in 1699, 1792, and 1823. The *OED* gives a third definition, with citations from 1710, 1788, and 1885: "a fishing establishment" or "those who are engaged in fishing in a particular place". The fourth definition is the legal definition: "the right of fishing in certain waters".

[142] Angus Stevenson, ed., *Shorter Oxford English Dictionary on Historical Principles*, 6th ed. (Oxford and New York: Oxford University Press, 2007), vol. 1 [*Shorter OED*], sets out three of the definitions from the *OED*:

1. The business, occupation, or industry of catching fish ....
2. (An establishment in) a place or district where fish are caught...[and]
3. ...The right of fishing in certain waters....

[143] The *OED* and the *Shorter OED* thus include definitions which deal with the location, action, business and right of fishing, but do not include a reference to the rearing of fish.

[144] Other current dictionary definitions of "fishery", however, include "rearing" fish. The *Concise OED* defines "fishery" as "a place where fish are reared, or caught in numbers" and "the occupation or industry of catching or rearing fish". These definitions explicitly apply to fish farms, as the farms are both a place where fish are reared and an industry of rearing fish.

[145] The definition of "fishery" in Katherine Barber, *The Canadian Oxford Dictionary* (Toronto, Oxford, and New York: Oxford University Press, 1998) [*Canadian OED*] also clearly applies to fish farms. The *Canadian OED* defines "fishery" in three ways:

1. a fish hatchery or place where fish are reared.
2. a fishing ground or area where fish are caught.
3. the occupation and industry of catching or rearing fish.

[146] I consider that the average Canadian's understanding of the term "fishery" is also relevant, given the living tree aspect of Canadian constitutional interpretation and the recognition in the jurisprudence that the perceptions of "[t]he man on the Macdonald bus" are important: See ***Landry v. Cadeau***, [1985] B.C.J. No. 1396 at para. 30 (S.C.) *per* Southin J., as she then was. In my view, the "man on the Macdonald bus" would conclude that a fish farm is a fishery.

[147] Parliament defined the term in s. 2 of the federal ***Fisheries Act*** as follows:

> "fishery" includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith; ...

[148] The definition of "fisheries" within the federal jurisdiction was recently addressed by the Supreme Court of Canada in ***Ward v. Canada (Attorney General)***, 2002 SCC 17, [2002] 1 S.C.R. 569 [***Ward***].

[149] In ***Ward***, McLachlin C.J. stated at para. 17 that:

> The first task in the pith and substance analysis is to determine the pith and substance or essential character of the law. What is the true meaning or dominant feature of the impugned legislation?

This is resolved by looking at the purpose and the legal effect of the regulation or law: see *Reference re Firearms Act*, *supra*, at para. 16. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was regulating the fishery, or venturing into the provincial area of property and civil rights. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law: see *Reference re Firearms Act*, *supra*, at paras. 17-18; *Morgentaler*, *supra*, at pp. 482-83. The effects can also reveal whether a law is "colourable", i.e. does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction?: see *Morgentaler*, *supra*, at p. 496.

[150] After confirming the continuing authority of ***Robertson*** at para. 34, McLachlin C.J. referred with approval at para. 35 to the definitions of "fishery" cited by Newcombe J. in ***Reference re Certain Sections of the Fisheries Act, 1914***, [1928] S.C.R. 457, aff'd [1930] A.C. 111 (P.C.), from *Patterson on the Fishery Laws* (1863), at p. 1, as "the right of catching fish in the sea, or in a particular stream of water"; and to what Newcombe J. described as the "'leading definition' from J. A. H. Murray's *A New English Dictionary* (1888), defining fishery in terms of the 'business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water'".

[151] Chief Justice McLachlin also referred at para. 36 to the "theme that the fisheries power refers to the resource". She cited Laskin C.J. (dissenting, but not on this point) in ***Interprovincial Co-Operatives Ltd. v. The Queen***, [1976] 1 S.C.R. 477 at 495, who held that "the federal fisheries power 'is concerned with the protection and preservation of fisheries as a public resource,' extending even to the 'suppression of an owner's right of utilization'".

[152] At para. 40-41 of ***Ward***, the Chief Justice pointed out:

Moreover, the courts have rejected the view that the federal power extends only to management of fisheries in their natural state and terminates prior to the point of sale. In *British Columbia Packers Ltd. v. Canada Labour Relations Board*, [1976] 1 F.C. 375 (C.A.) (appeal to S.C.C. dismissed on other grounds, [1978] 2 S.C.R. 97), Jackett C.J. remarked that the fisheries power does not extend to the "making of laws in relation to things reasonably incidental to carrying on a fishing business, such as labour relations and disposition of the products of the business, when such things do not in themselves fall within the concept of 'fisheries'" (p. 385 (emphasis deleted)). However, it is clear that aspects of sale that are necessarily incidental to the exercise of the fisheries power fall within federal jurisdiction: see *R. v. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158 (C.A.); *R. v. Saul* (1984), 10 D.L.R. (4th) 736 (B.C.S.C.); *R. v. Twin* (1985), 23 C.C.C. (3d) 33 (Alta. C.A.). The rationale is that the federal government may limit sales in order to prevent injurious exploitation of the resource. It therefore appears that no bright line can be drawn at the point of sale for the purposes of defining the scope of the federal fisheries power.

These cases put beyond doubt that the fisheries power includes not only conservation and protection, but also the general "regulation" of the fisheries, including their management and control. They recognize that "fisheries" under s. 91(12) of the *Constitution Act, 1867* refers to the fisheries as a resource; "a source of national or provincial wealth" (*Robertson*, *supra*, at p. 121); a "common property resource" to be managed for the good of all Canadians (*Comeau's Sea Foods*, *supra*, at para. 37). The fisheries resource includes the animals that inhabit the seas. But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation.

[153] At para. 42-43, Chief Justice McLachlin cautioned that:

Although broad, the fisheries power is not unlimited. The same cases that establish its broad parameters also hold that the fisheries power must be construed to respect the provinces' power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. This too is a broad, multi-faceted power, difficult to summarize concisely. For our purposes, it suffices to note that the regulation of trade and industry within the province generally (with certain exceptions) falls within the province's jurisdiction over property and civil rights: see *Citizens Insurance*, *supra*; see also *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 (P.C.).

Thus we have before us two broad powers, one federal, one provincial. In such cases, bright jurisdictional lines are elusive. Whether a matter best conforms to a subject within federal jurisdiction on the one hand, or provincial jurisdiction on the other, can only be determined by examining the activity at stake. Measures that in pith and substance go to the maintenance and

preservation of fisheries fall under federal power. By contrast, measures that in pith and substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights.

ii) What is Finfish Aquaculture?

[154] I am unable to conclude, as the respondents argue, that the activity of finfish aquaculture is an activity other than a fishery. The activity of fish farming involves the rearing of fish as the fish must reside in provincial waters until such time as they reach a sufficient age and size to be of commercial value. The farms vary in size, but on the evidence before me the cages containing the farm fish can occupy several hectares and hold several hundreds of thousands of fish. The farm fish are reared in areas previously frequented by "wild" fish. But for the finfish farms, the areas would still be frequented by "wild" fish, but the "wild" fish are prevented from doing so due to the presence of the cages in which the farm fish are reared.

[155] While the ultimate harvesting of the fish is from within the cages where they are raised, the fish are nonetheless taken as "products of the sea". It is also possible for fish to escape from these cages. The caged fish must ultimately be "caught", in some manner in order to be harvested and sold, and caught in the areas previously available to the "wild" fish.

[156] I conclude that the fish which are reared in finfish farms on the coast of British Columbia are either a part of the overall British Columbia Fishery or are a fishery unto themselves. In either case they fall under the jurisdiction of Parliament under s. 91(12) of the ***Constitution Act, 1867***.

[157] I am also unable to accept the provincial Crown's argument that the activity of finfish farming is at first instance within provincial jurisdiction. The management and preservation of the fisheries has been clearly held to be within the exclusive jurisdiction of Parliament. As stated by Martland J. in ***Northwest Falling Contractors Ltd. v. the Queen***, [1980] 2 S.C.R. 292 at 301:

> The definition of a deleterious substance is related to the substance being deleterious to fish. In essence, the subsection seeks to protect fisheries by preventing substances deleterious to fish entering into waters frequented by fish. This is a proper concern of legislation under the heading of "Sea Coast and Inland Fisheries".

See also ***R. v. Crown Zellerbach Canad, Ltd.***, [1988] 1 S.C.R. 401 at 422, and s. 43 of the federal ***Fisheries Act*** where Parliament has chosen to enact legislation for the management and control of the fisheries, and the conservation and protection of fish.

[158] During the time that they are being reared, farm fish are fed largely, if not exclusively, with feed that the "wild" salmon do not compete for. The feeding of the farm fish requires the introduction of chemicals, and results in the introduction of the waste produced by the farm fish into the waters shared with the "wild" fish. Whether these chemicals and waste products have a deleterious affect on the "wild" fish habitat, and if so, how that should be managed, I need not decide. Yet the reality of the presence of the fish farms is that they introduce into the areas where they are located materials that would not otherwise be there, and the jurisdiction to preserve at least the wild fishery is given exclusively to the Parliament under the ***Constitution Act, 1867***.

[159] I am further unable to accept the petitioner MHC's argument that the fish farms constitute a private fishery beyond federal jurisdiction. In the ***B.C. Fisheries Reference*** at D.L.R. 318, Viscount Haldane, the Lord Chancellor, held for the court that the fishery in tidal waters is a public fishery and that the federal government had the exclusive right to regulate it. He also held at 316 that "no public right of fishing … can be taken away without competent legislation". Consequently, he held that only the federal government had the jurisdiction to grant private fishery rights in tidal waters.

[160] Given this decision, finfish farms cannot constitute a private fishery, even if the fish in the pens are private property, unless the federal government grants such a private fishery to the fish farms or, as I will discuss in more detail below, validly delegates that power to the provincial government.

[161] The inclusion of fisheries in s. 91(12) of the ***Constitution Act, 1867*** was a recognition that fisheries, as a national resource, require uniformity of the legislation which affects and protects that national resource. Accepting that the management and preservation of the fisheries, including farmed fisheries, is within the jurisdiction of Parliament, the question then becomes whether the respondents can rely on ss. 92(5), 92(13), 92(16) or 95 of the ***Constitution Act, 1867*** to justify the impugned legislation.

b. Double Aspect Doctrine

[162] I have concluded that the activity of fish farming falls under the jurisdiction of Parliament, pursuant to s. 91(12) of the ***Constitution Act, 1867***. Yet the Province of British Columbia may enact legislation that affects the fisheries, so long as that legislation falls within a head which the ***Constitution Act, 1867*** has assigned to the jurisdiction of the Province.

[163] The provincial Crown has asserted that it is entitled to legislate with respect to farm fishing based upon the legislative authority given to it pursuant to ss. 92(5) (management of lands), 92(13) (property and civil rights), 92(16) (matters of local or private nature in the Province), and 95 (agriculture) of the ***Constitution Act, 1867***.

[164] As stated above, pursuant to para. 25 of the ***Firearms Reference*** a party who challenges legislation must show that the legislation does not fall within the jurisdiction pursuant to which it was passed.

[165] The provincial Crown has chosen to refer to fish farming under the rubric of "aquaculture". Ms. Morton says that "aquaculture" is the cultivation of marine plants and animals, or the natural produce of the marine environment. I accept Ms. Morton's definition of the term.

[166] The aspect of aquaculture defined as the cultivation of marine plants is not in issue in these proceedings, so I do not propose to consider whether the impugned legislation is within provincial jurisdiction insofar as it relates to marine plants.

i) Management of Lands

[167] I recognize that the land beneath the fish farms is the property of the provincial government: see ***B.C. Fisheries Reference*** at D.L.R. 317-318. The fish farms are thus anchored to provincial land, but I am unable to accept that the jurisdiction of the Province over the management of land is sufficient to permit it to legislate the fish farming activities taking place above provincial land that it purports to have regulated. To conclude otherwise would be contrary to ***British Columbia (Attorney General) v. Lafarge***, 2007 SCC 23, [2007] 2 S.C.R. 86 [***Lafarge***].

[168] In ***Lafarge***, the court held that British Columbia could validly regulate land within a Province, even if the activities taking place on the land were subject to federal jurisdiction. In this case, that gives the Province the jurisdiction to grant land tenures pursuant to the ***Land Act***. The petitioners have not challenged that jurisdiction. What is challenged is the Province's regulation of the activities taking place above that land.

[169] In short, the ability of the provincial Crown to legislate with respect to management of land is not a jurisdiction that overlaps with the federal jurisdiction respecting fisheries, and it does not, in my view, entitle the provincial Crown to enact the impugned legislation.

ii) Property & Civil Rights

[170] The provincial jurisdiction over property and civil rights has been carefully identified as separate from the federal jurisdiction over the fisheries themselves, allowing the Provinces to regulate the "business of fishing" including fish processing and labour relations applicable to the fishing industry and the sale or disposition of fish once caught: see, for example ***Re United Fisherman & Allied Workers Union and British Columbia Packers Ltd. et al.*** (1975), 64 D.L.R. (3d) 522 at 529 (F.C.A.), aff'd (*sub nom.* ***B.C. Prov. Council, U.F. & A.W. Union, etc.***) [1978] 2 S.C.R. 97; and ***Mark Fishing Co. Ltd. et al. v. United Fisherman & Allied Workers Union et al.*** (1972), 24 D.L.R.(3d) 585, [1972] 3 W.W.R. 641 (B.C.C.A.), aff'd (1973), 38 D.L.R. (3d) 316, [1973] 3 W.W.R. 13 (S.C.C.). The power does not, however, extend so far as to permit a Province the "right to pass any laws interfering with the regulation and protection of the fisheries": ***Robertson*** at 123.

[171] Nor does the provincial power extend to the catching and handling of fish, as those matters are "undoubtedly within the jurisdiction of the Parliament of Canada under s. 91(12) of the *British North America Act*": Ritchie J., for the court in ***Moore v. Johnson et al.***, [1982] 1 S.C.R. 115 at 122.

[172] The provincial Crown does, of course, retain the ability to raise revenue by the taxation of activities within the Province, the granting of land tenures, and the licensing of the business of fishing through the provincial jurisdiction over property and civil rights. However, as held by Viscount Haldane at D.L.R. 319 of the ***B.C. Fisheries Reference***, the Province does not have jurisdiction to license private fisheries. Nonetheless, I find that ss. 13(5) and 14 of the B.C. ***Fisheries Act*** are within the jurisdiction of the provincial Crown as their dominant purpose is to produce revenue based on the licensing of the business of fishing: see ***Canada Western Bank*** at para. 28.

[173] The remainder of the challenged legislation concerns the management of a Fishery and cannot be enacted by both the federal Parliament and the provincial Legislature. It is not a subject which, to paraphrase ***Hodge***, in one aspect and for one purpose falls within s. 92, and in another aspect and for another purpose falls within s. 91. The management of fisheries, as I have already said, is a matter of exclusive federal jurisdiction.

iii) Matters of a Local and Private Nature

[174] I am also unable to accept that the jurisdiction of the provincial Crown over matters of a local or private nature in the Province could entitle the Province to legislate under the double aspect doctrine with respect to a matter that was singled out as a national resource to be managed and preserved by Parliament. The inclusion of the fisheries in s. 91(12) of the ***Constitution Act, 1867*** is simply inconsistent with the proposition that a portion of such a resource could be viewed as a matter of a local or private nature.

iv) Agriculture

[175] What then of the provincial Crown's jurisdiction over agriculture? In ***Water Law in Canada – The Atlantic Provinces*** by Gerard V. La Forest., Q.C., *et al.* (Ottawa: Department of Regional Economic Expansion, 1973) at 40, the authors state:

> It is obvious nonetheless, that in most cases, at least, development of provincially owned fisheries will require the co-operation of the federal and provincial authorities. For example, where fishing, such as lobster fishing, requires use of subsoil belonging to the province, provincial permission will be required even though a Dominion licence has been granted. Only in the case of ordinary fishing in tidal waters may the Dominion completely ignore provincial ownership of fisheries. That is because there has from immemorial antiquity been a right in the public to fish in tidal waters that overrides the usual exclusive common law right of the landowner to fish on his land. This right being a public, not a proprietary, right comes within the federal power to legislate respecting fisheries, and since the public right overrides the private right, there is nothing left for the provinces to legislate upon. It would require a federal statute to give an exclusive right or fishery in tidal waters. The public right of fishing, it should be repeated, is limited to ordinary fishing. It does not include fishing by weirs or other methods involving the use of the soil.
>
> [Footnotes omitted.]

[176] The Oyster Fisheries Agreement from 1912 provided that the Province was, subject to the Fishery Regulations of Canada, authorized by the agreement to:

> ...grant leases from time to time of such areas of the sea coast, bays, inlets, harbours, creeks, rivers and estuaries of said Province as the Government of the said Province may consider suitable for the <u>cultivation and production</u> of oysters and the lessees of said Province shall, subject, however, to the Fishery Regulations of Canada, have the exclusive right to the oysters produced or found on the beds within the limits of their respective leases.
>
> Provided, however, that in respect of Public Harbours, this agreement shall not prejudice the right or title of the Dominion of Canada to enjoy and use the same for any purpose other than the cultivation and production of oysters.
>
> [Emphasis added.]

[177] Implicit in the Oyster Fisheries Agreement is the assumption that "cultivation and production of oysters" is distinct from agriculture. The passage from *Water Law in Canada – The Atlantic Provinces* implies a similar assumption with respect to lobster rearing. If so, then the rearing of fish in coastal waters cannot, in my view, be considered to be agriculture for jurisdictional purposes.

[178] To conclude that the provincial jurisdiction over agriculture extends to what the provincial Crown itself has chosen to call aquaculture is to ignore the very distinction drawn by the provincial Crown in its description of the activity, and to permit what the Supreme Court of Canada ruled could not be permitted in ***Reference re Upper Churchill Water Rights Reversion Act (1980)***, [1984] 1 S.C.R. 297. At p. 332 of that decision, McIntyre J., for the court said:

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*. A colourable attempt to preserve the appearance of constitutionality in order to conceal an unconstitutional objective will not save the legislation. I refer to the words of Lord Atkin quoted above that "a colourable device will not avail".

[179] Referring to aquaculture as agriculture cannot conceal the purpose and legal effect of the impugned legislation, nor render *intra vires* what is otherwise *ultra vires* the provincial Crown. I find that the purpose and legal effect of the impugned legislation other than ss. 13(5) and 14 of the B.C. ***Fisheries Act***, except as it relates to marine plants, is the management and regulation of a fishery.

[180] As I have already indicated, the impugned legislation, other than ss. 13(5) and 14 of the B.C. ***Fisheries Act***, insofar as it relates to marine plants is not in issue in these proceedings. As far as marine animals and fish are concerned, the far closer marine analogy to agriculture is the oyster fishery, which appears to have been considered as a fishery by both levels of government, requiring the exception by agreement between the federal and provincial governments, and by legislation by the federal government.

v) Delegation or Transfer of Legislative Authority

[181] I have not ignored the fact that the federal government chose not to participate in these proceedings nor the efforts of both levels of government in attempting to address finfish farming in their 1988 Memoranda of Agreement and Understanding.

[182] As stated by Dickson C.J. in ***OPSEU v. Ontario (Attorney General)***, [1987] 2 S.C.R. 2 at 19, "in my opinion the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity". The choice of the federal government not to take a position with respect to the impugned legislation is to be afforded weight, and perhaps significant weight, but at the end of the matter, that choice is not determinative of the issue.

[183] The efforts of the two levels of government by way of their documentation of 1988 amount to more than administrative delegation. If permitted they would result in the transfer or delegation from the federal government to the B.C. provincial government of law-making powers divided by the ***Constitution Act, 1867***. Such a transfer or delegation is prohibited. This prohibition was discussed by Chief Justice Rinfret in ***Attorney-General of Nova Scotia et al. v. Attorney-General of Canada et al.***, [1950] 4 D.L.R. 369 at 371-372:

> The Parliament of Canada and the Legislatures of the several Provinces are sovereign within their sphere defined by the *B.N.A. Act*, but none of them has the unlimited capacity of an individual. They can exercise only the legislative powers respectively given to them by ss. 91 and 92 of the Act, and these powers must be found in either of these sections.
>
> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject-matters referred to it by s. 91 and that each Province can legislate exclusively on the subject-matters referred to it by s. 92. The country is entitled to insist that legislation adopted under s. 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in s. 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.
>
> No power of delegation is expressed either in s. 91 or in s. 92, nor, indeed, is there to be found the power of accepting delegation from one body to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language. Under the scheme of the *B.N.A. Act* there were to be, in the words of Lord Atkin in *Reference re: Weekly Rest in Industrial Undertakings Act*, [1937], 1 D.L.R. 673, A.C. 326, "water-tight compartments which are an essential part of the original structure."
>
> Neither legislative bodies, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word "exclusively" used both in s. 91 and in s. 92 indicates a settled line of demarcation and it does not

belong to either Parliament, or the Legislatures, to confer powers upon the other: *St. Catharine's Mllg. & Lbr. Co. v. The Queen*, (1887) 13 S.C.R. 577 at p. 637, by Strong J.; *C.P.R. v. Notre Dame de Bonsecours* [1899] A.C. 367, by Lord Watson.

[184] Even if the federal power over the fisheries was unexercised, "[t]he abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the [*Constitution Act, 1867*]": ***Union Colliery Company of British Columbia v. Bryden***, [1899] A.C. 580 at 588 (P.C.), cited with approval by Binnie and LeBel JJ. in ***Canadian Western Bank*** at para. 34.

[185] The provincial Crown agrees that the federal government cannot delegate via the 1988 Agreement, but submits that it does not constitute delegation but merely a recognition of the Province's ability to legislate in this area. Given that I have found that fish farming is a fishery and that the Province does not have the ability to legislate regarding it, I do not accept this submission.

[186] I accept the petitioners' submission that absent an agreement similar to the Oyster Fisheries Agreement under the authority of an Order in Council delegating authority from Parliament to the Province of British Columbia to grant fish farm licences, the only jurisdiction to do so remains in Parliament.

c. Doctrines Assuming Validity of the Impugned Legislation

[187] If I am wrong that the challenged provincial legislation, other than ss. 13(5) and 14(1) of the B.C. ***Fisheries Act***, is *ultra vires* the Province, then does it meet the requirements of the necessarily incidental doctrine? For the reasons set out below, I find that it does not.

i) Necessarily Incidental/Ancillary Doctrine

[188] I find that dominant purpose of the impugned provincial legislation, other than ss. 13(5) and 14(1) of the B.C. ***Fisheries Act***, is to regulate aquaculture. Consequently its effects on the federal fisheries power are not incidental, and the scheme is constitutionally invalid.

ii) Interjurisdictional Immunity Doctrine

[189] As indicated above, this is not a doctrine of first recourse in a division of powers dispute, and the Supreme Court of Canada discouraged intensive reliance on this doctrine in ***Canadian Western Bank***.

[190] I find that the impugned legislation other than ss. 13(5) and 14 of the B.C. ***Fisheries Act*** involves the provincial Crown in the management and regulation of fisheries, and thus constitutes an interference with the core of a matter within the exclusive jurisdiction of Parliament: the management and regulation of fisheries.

[191] As the jurisdiction of Parliament in issue is the management and preservation of the fisheries, confining the provincial legislation other than ss. 13(5) and 14 of the B.C. ***Fisheries Act*** to non-fisheries matters by reading it down leaves essentially only that part of the legislation that applies to marine plants. To conclude otherwise would be inconsistent with the broad federal jurisdiction pursuant to s. 91(12) of the ***Constitution Act, 1867*** as it has been interpreted by the courts.

iii) Doctrine of Paramountcy

[192] I have concluded above that the provincial Crown's attempt to save the legislation based on the double aspect doctrine fails and that the jurisdiction to regulate fish farms is exclusively federal. I therefore find that the doctrine of paramountcy does not apply because there can be no valid inconsistent provincial legislation where the jurisdiction is exclusively federal.

d. Subsidiarity

[193] I see no basis for the application of this doctrine in this case. Given the specific enumeration of the management and protection of the fisheries in s. 91(12) of the ***Constitution Act, 1867***, the national resource of

the fisheries in not a matter that should or can be left to a level of government other than Parliament.

RELIEF

[194] Sections 13(5) and 14 of the B.C. ***Fisheries Act*** are *intra vires* the provincial Crown.

[195] Throughout my reasons, I have considered the constitutionality of the impugned legislation only with respect to fish farms. However, the B.C. ***Fisheries Act*** definition of "aquaculture" includes cultivation of marine plants as well as animals. The ***Farm Practices (Right to Farm) Act*** explicitly refers to that definition, and the ***Aquaculture Regulation*** implicitly does. I have excluded consideration of the constitutionality of that legislation with respect to cultivation of marine plants. Consequently, s. 26(2)(a) of the B.C. ***Fisheries Act***, ss. 1(h) and 2(1) of the ***Farm Practices (Right to Farm) Act***, and the ***Aquaculture Regulation*** may all be constitutionally valid with respect to cultivation of marine plants.

[196] Where the legislative scheme at issue is, or may be, valid with respect to some matters but invalid regarding others, the appropriate remedy is to read down the legislation: Hogg vol. 1 at 15-28. Therefore I will read down s. 26(2)(a) of the B.C. ***Fisheries Act***, ss. 1(h) and 2(1) of the ***Farm Practices (Right to Farm) Act***, and the ***Aquaculture Regulation*** to apply only to the cultivation of marine plants.

[197] The ***Finfish Aquaculture Waste Control Regulation*** applies only to finfish aquaculture. Therefore I find it *ultra vires* the provincial Crown in its entirety and invalid.

[198] The absence of sufficient legislation to regulate fish farms could well be more harmful to the public than the perpetuation of the impugned legislation, until the federal government has an opportunity to consider additional legislation of its own.

[199] In ***Schachter v. Canada***, [1992] 2 S.C.R. 679 at 715-717, Lamer C.J., for the unanimous court on this issue, held that delaying declarations of invalidity is appropriate where there is a potential danger to the public, a threat to the rule of law, or other practical difficulties from the immediate effectiveness of the declaration. I consider that the same reasoning applies to reading down legislation.

[200] In my view it is preferable to maintain the *status quo ante* than to leave the entire matter of finfish farming in British Columbia unregulated by other than the present federal legislation. In the result, I order that the present provincial regulatory scheme with respect to finfish farming in British Columbia is to continue for a further 12 months. At the end of the 12 months from the date of this judgment, s. 26(2)(a) of the B.C. ***Fisheries Act***, ss. 1(h) and 2(1) of the ***Farm Practices (Right to Farm) Act***, and the ***Aquaculture Regulation*** will be read down to apply only to the cultivation of marine plants and the ***Finfish Aquaculture Waste Control Regulation*** will cease to have any effect.

[201] In the circumstances, I dismiss the petitioner's applications for declarations that the pending decisions of the respondent Minister of Agriculture and Lands concerning tenure no. 1405180, and of the respondent Province and the respondent Minister of Agriculture and Lands to renew aquaculture licence no. 000821, would be *ultra vires* and invalid.

[202] I also dismiss the petitioner's application for an order prohibiting the respondent Province and Minister of Agriculture and Lands from deciding to renew tenure no. 1405180 and licence no. 000821 or exercising any powers pursuant to the regulatory regime relating to ocean finfish aquaculture.

[203] I did not receive submissions from the parties with respect to costs, and so I make no orders regarding costs. In the event that the petitioners wish to make submissions on costs, they must do so in writing within two weeks of the release of this decision. The respondents must submit their written submissions within two weeks of the petitioners' submissions. The petitioner will have one further week after submission of the respondents' materials to submit written reply submissions.

"Hinkson J."

March 19, 2009 – ***Revised Judgment***

Please be advised that the attached Reasons for Judgment of Mr. Justice C. Hinkson dated February 9, 2009 have been edited.

- *The case name on the front page and in the header on subsequent pages has been amended to Morton v. British Columbia (Agriculture and Lands).*

APPENDIX

B.C. ***Fisheries Act***

...

13(5) A person must not carry on the business of aquaculture at any location or facility in British Columbia or its coastal waters unless the person holds a licence issued for that purpose under this Part and has paid the fee prescribed by the Lieutenant Governor in Council.

...

14(1) An application for a licence under section 13 must be made in writing to the minister, on a form to be supplied by the minister.

(2) On receipt of the application the minister may issue a licence.

...

26(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations the Lieutenant Governor in Council considers necessary or advisable

(a) for safe and orderly aquaculture;...

...

Farm Practices Protection (Right to Farm) Act

1 In this Act:

...

"farm operation" means any of the following activities involved in carrying on a farm business:

...

(h) aquaculture as defined in the *Fisheries Act* if carried on by a person licensed, under Part 3 of that Act, to carry on the business of aquaculture;

...

2(1) If each of the requirements of subsection (2) is fulfilled in relation to a farm operation conducted as part of a farm business,

(a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation, and

(b) the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.

...

Federal ***Fisheries Act***

35(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

36(1) No one shall

(*a*) throw overboard ballast, coal ashes, stones or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on;

(*b*) leave or deposit or cause to be thrown, left or deposited, on the shore, beach or bank of any water or on the beach between high and low water mark, remains or offal of fish or of marine animals; or

(*c*) leave decayed or decaying fish in any net or other fishing apparatus.

(2) Remains or offal described in subsection (1) may be buried ashore, above high water mark.

(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

(4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of

(a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or

(b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5).

(5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing

(a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);

(b) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;

(c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;

(d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;

(e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and

(f) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.

(6) A person authorized to deposit a deleterious substance by or under regulations made pursuant to subsection (5) shall, when directed in writing by the Minister, notwithstanding any regulations made pursuant to paragraph (5)(*e*) or any conditions set out in an authorization made pursuant to paragraph (5)(*f*), conduct such sampling, analyses, tests, measurements or monitoring, install or operate such equipment or comply with such procedures, and report such information, as may be required by the Minister in order to determine whether the person is depositing the deleterious substance in the manner authorized.

37(1) Where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish or in any place under any conditions where that deleterious substance or any other deleterious substance that results from the deposit of that deleterious substance may enter any such waters, the person shall, on the request of the Minister or without request in the manner and circumstances prescribed by regulations made under paragraph (3)(*a*), provide the Minister with such plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work or undertaking and with such analyses, samples, evaluations, studies or other information relating to the water, place or

fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine

(*a*) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof; or

(*b*) whether there is or is likely to be a deposit of a deleterious substance by reason of the work or undertaking that constitutes or would constitute an offence under subsection 40(2) and what measures, if any, would prevent that deposit or mitigate the effects thereof.

(2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(*b*), or, if there are no such regulations in force, with the approval of the Governor in Council,

(*a*) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or

(*b*) restrict the operation of the work or undertaking,

and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances.

(3) The Governor in Council may make regulations

(*a*) prescribing the manner and circumstances in which any information or material shall be provided to the Minister without request under subsection (1); and

(*b*) prescribing the manner and circumstances in which the Minister or a person designated by the Minister may make orders under subsection (2) and the terms of the orders.

(4) Where the Minister or a person designated by the Minister proposes to make an order pursuant to subsection (2), he shall offer to consult with the governments of any provinces that he considers to be interested in the proposed order and with any departments or agencies of the Government of Canada that he considers appropriate.

(5) Nothing in subsection (4) prevents the Minister or a person designated by the Minister from making an interim order pursuant to subsection (2) without the offer of consultation referred to in subsection (4) where he considers that immediate action is necessary.

38(1) For the purposes of this section, the Minister may designate as an inspector or analyst any person who, in the opinion of the Minister, is qualified to be so designated.

(2) The Minister shall furnish every inspector with a certificate of his designation and on entering any place, premises, vehicle or vessel referred to in subsection (3) an inspector shall, if so required, produce the certificate to the person in charge thereof.

(3) An inspector may, at any reasonable time, enter any place, premises, vehicle or vessel, other than a private dwelling-place or any part of any place, premises, vehicle or vessel used as a permanent or temporary private dwelling-place, where the inspector believes on reasonable grounds that any work or undertaking resulting or likely to result in the deposit of a deleterious substance in water frequented by fish or in any place under any conditions referred to in subsection 37(1) is being, has been or is likely to be carried on, and the inspector may, for any purpose related to the enforcement of this section, conduct inspections, including examining any substance or product found therein, taking samples thereof and conducting tests and measurements.

(3.1) An inspector with a warrant issued under subsection (3.2) may at any reasonable time enter any place, premises, vehicle or vessel, other than a private dwelling-place or any part of any

place, premises, vehicle or vessel used as a permanent or temporary private dwelling-place, where the inspector believes on reasonable grounds that an offence under subsection 40(2) is being or has been committed and search that place, premises, vehicle or vessel for evidence of the offence.

(3.2) Where on ex parte application a justice of the peace is satisfied by information on oath that there are reasonable grounds to believe that there is in any place, premises, vehicle or vessel referred to in subsection (3.1)

(*a*) anything on or in respect of which an offence under subsection 40(2) is being or has been committed, or

(*b*) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence under subsection 40(2), the justice of the peace may issue a warrant under his hand authorizing the inspector named therein to enter and search the place, premises, vehicle or vessel for any such thing subject to such conditions as may be specified in the warrant.

(3.3) In executing a warrant issued under subsection (3.2), the inspector named therein shall not use force unless the inspector is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

(3.4) An inspector may exercise the powers of entry and search referred to in subsection (3.1) without a warrant issued under subsection (3.2) if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

(3.5) For the purposes of subsection (3.4), exigent circumstances include circumstances in which the delay necessary to obtain a warrant would result in danger to human life or safety or the loss or destruction of evidence.

(4) Where, out of the normal course of events, there occurs a deposit of a deleterious substance in water frequented by fish or a serious and imminent danger thereof by reason of any condition, and where any damage or danger to fish habitat or fish or the use by man of fish results or may reasonably be expected to result therefrom, any person who at any material time

(*a*) owns the deleterious substance or has the charge, management or control thereof, or

(*b*) causes or contributes to the causation of the deposit or danger thereof, shall, in accordance with any regulations applicable thereto, report such occurrence to an inspector or such other person or authority as is prescribed by the regulations.

(5) Every person referred to in paragraph (4)(*a*) or (*b*) shall, as soon as possible in the circumstances, take all reasonable measures consistent with safety and with the conservation of fish and fish habitat to prevent any occurrence referred to in subsection (4) or to counteract, mitigate or remedy any adverse effects that result or may reasonably be expected to result therefrom.

(6) Where an inspector, whether or not a report has been made under subsection (4), is satisfied on reasonable grounds that there is an occurrence referred to in subsection (4) and that immediate action is necessary in order to carry out any reasonable measures referred to in subsection (5), he may, subject to subsection (7) and the regulations, take any such measures or direct that they be taken by any person referred to in paragraph (4)(*a*) or (*b*).

(7) Any requirement or direction of an inspector under this section that is inconsistent with any direction of a marine safety inspector under the *Canada Shipping Act, 2001* is void to the extent of the inconsistency.

(8) For the purposes of subsections (4) to (6), any inspector or other person may enter and have access through any place, premises, vehicle or vessel and may take all reasonable action in order to comply with those subsections or any of them, but nothing in this subsection relieves any person from liability at law for his illegal or negligent acts or omissions or for loss or damage caused to others by such entry, access or action.

(9) The Governor in Council may make regulations prescribing

(*a*) the person or authority to whom or which a report is to be made under subsection (4), the manner in which the report is to be made, the information to be

contained therein and the circumstances in which no report is required to be made;

(*b*) the manner in which inspectors may take any measures or give any directions under subsection (6) and the conditions to which such measures or directions are subject;

(*c*) the manner and circumstances in which any measures taken or directions given under subsection (6) may be reviewed, rescinded or varied; and

(*d*) any other matters necessary for or incidental to carrying out the purposes and provisions of this section.

(10) The owner or person in charge of any place, premises, vehicle or vessel entered by an inspector pursuant to subsection (3) and every person found therein shall give the inspector all reasonable assistance to enable the inspector to carry out his duties and functions under this section and shall furnish the inspector with such information with respect to the administration of this section as he may reasonably require.

(11) Subject to subsections (12) and (13), a certificate purporting to be signed by an analyst stating that he has analyzed or tested a substance or product and stating the result of his analysis or test is admissible in evidence in any prosecution for an offence under subsection 40(2) or (3) without proof of the signature or official character of the person appearing to have signed the certificate and, in the absence of any evidence to the contrary, is proof of the statements contained in the certificate.

(12) The party against whom there is produced any certificate pursuant to subsection (11) may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

(13) No certificate shall be admitted in evidence pursuant to subsection (11) unless the party intending to produce it has given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate in question.

Vancouver File No. T-1710-16

FEDERAL COURT

BETWEEN:

ALEXANDRA MORTON

Applicant

and

MINISTER OF FISHERIES AND OCEANS

Respondent

NOTICE OF APPLICATION

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*, RSC 1985, C F-7

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: October 12, 2016
Issued by: _____

ORIGINAL SIGNED BY
FRANK FEDORAK
A SIGNÉ L'ORIGINAL

Address of Local office:
Federal Court
Pacific Centre
PO Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO: **Minister of Fisheries and Oceans**
c/o Department of Justice Canada
Vancouver Regional Office
900 – 840 Howe Street,
Vancouver, BC V6Z 2S9

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____ day of OCT 12 2016 A.D. 20____

Dated this _____ day of OCT 12 2016 20____

APPLICATION

Alexandra Morton challenges the Minister of Fisheries and Oceans' (the "**Minister**") ongoing policy or practice of issuing fish-transfer licences without first considering whether *Piscine reovirus* and Heart and Skeletal Muscle Inflammation ("**HSMI**") are present in the fish proposed for transfer (the "**Illegal Policy**"). The Illegal Policy is contrary to s. 56 of *Fishery (General) Regulations* (the "***Regulations***") and therefore unlawful. Section 56(b) requires that fish to be transferred do not have any disease or disease agent that may be harmful to the conservation and protection of fish.

The Illegal Policy was confirmed by the Minister's delegate on September 29, 2016.

The applicant makes application for:

1. An order declaring that:

   a) the Illegal Policy of not testing for *Piscine reovirus* and HSMI when issuing transfer licences is unlawful; and

   b) the Minister lacks the jurisdiction to licence the transfer of fish carrying diseases or disease agents that may be harmful to the conservation and protection of fish.

2. An order that the applicant shall not be required to pay costs to the respondent in the event that this application is dismissed.

3. Costs.

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

The grounds for the application are:

The Parties

1. Alexandra Morton is the applicant. Ms. Morton is a public interest litigant with no personal, proprietary, or pecuniary interest in the outcome of this application. Ms. Morton has a demonstrated record of protecting the marine environment from the impacts of salmon aquaculture.

2. The Minister is the respondent. The Minister is responsible for issuing fish transfer licences under s. 56 of the *Regulations*. The Minister has delegated

responsibility for issuing fish transfer licences to the Introductions and Transfers Committee (the "Committee").

The Illegal Policy

3. On July 22, 2016, the Committee informed Ms. Morton that they do not require testing for *Piscine reovirus* or HSMI and do not gather information about the presence of *Piscine reovirus* or HSMI in relation to salmon transfers – this is the Illegal Policy at issue in this proceeding.

4. *Piscine reovirus* is the virus that is thought to cause the disease HSMI. HSMI causes high morbidity and mortality in fish.

5. The Illegal Policy is unlawful because it is contrary to s. 56 of the *Regulations.*

Section 56 of the Regulations Requires Testing for Piscine Reovirus and HSMI

6. Transferring live fish to a fish rearing facility is governed by Part VIII of the *Regulations.* Part VIII consists of ss. 54 to 57.

7. Pursuant to s. 54, for the purposes of Part VIII, "licence" means a licence to release live fish into fish habitat or to transfer live fish to a fish rearing facility.

8. Section 55 prohibits transferring fish to rearing facilities except under the authority of a transfer licence.

9. Under s. 56, the Minister can only issue a transfer licence if three regulatory preconditions are met:

(a) the transfer "would be in keeping with the proper management and control of the fisheries";

(b) the fish to be transferred "do not have any disease or disease agent that may be harmful to the protection and conservation of fish"; and

(c) the transfer "will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks".

10. Pursuant to s. 56(b), the Minister cannot issue a fish-transfer licence if the fish "have any disease or disease agent that may be harmful to the protection and conservation of fish" [Emphasis added].

11. Thus, the Minister must ensure that the fish sought to be transferred do not have any potentially harmful diseases or disease agents prior to issuing transfer licences.

12. In practical terms, this means the Minister must test for known diseases and disease agents prior to issuing transfer licences, and refuse to transfer fish carrying potentially harmful diseases or disease agents.

Piscine reovirus is a disease agent that may cause the harmful disease HSMI

13. HSMI was first identified in Norway, following significant outbreaks of the disease in fish farms.

14. HSMI causes high morbidity (inability to eat and swim normally, likely preventing fish from migrating up rivers) and mortality in infected fish.

15. In 2010, *Piscine reovirus* was identified as the disease agent likely causing HSMI.

16. Subsequent research has confirmed the association.

17. No other causal agent has been identified.

18. Piscine reovirus has been found on fish farms in British Columbia.

19. Piscine reovirus is contagious and can spread to wild fish.

20. HSMI has now been diagnosed in British Columbia and Chile, among other countries.

21. In May 2016 the Department of Fisheries and Oceans announced that it had preliminary diagnoses of HSMI on an Atlantic salmon farm in BC.

22. In June 2016 Ms. Morton wrote to the Committee to confirm the Committee was testing for Piscine reovirus as part of the transfer licence application process.

23. In July 2016, the Committee informed Ms. Morton that its policy was to not consider PRV or HSMI.

24. The Committee confirmed their position on September 29, 2016.

25. *Piscine reovirus* is a contagious disease agent that may be harmful to the protection and conservation of fish because it is associated with, and thought to cause, the heart and muscle damage characteristic of HSMI.

26. HSMI is a disease that is harmful to the protection and conservation of fish because HSMI can cause high morbidity as well as mortality in fish.

27. The Minister is able to test for both *Piscine reovirus* and HSMI.

28. The Illegal Policy to not test for, or gather any information about, *Piscine reovirus* and HSMI when issuing fish transfer licences is contrary to s. 56 of the *Regulations*.

29. The Illegal Policy is inconsistent with the precautionary approach required by the *Regulations*, and further, inconsistent with the precautionary principle.

30. In addition, the Applicant relies generally on the *Federal Courts Rules*, and such further additional grounds as counsel may identify and this Court may consider.

Jurisdiction:

31. Pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the Federal Court has jurisdiction to hear this judicial review application and to grant the relief sought.

[Continued on next page]

This Application will be supported by the following material:

1. Affidavit of Alexandra Morton, to be served.

2. Such further and additional materials as counsel may advise and this Court may allow.

Date: 10/12/2016

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Vancouver File No.: T-1710-16

FEDERAL COURT

BETWEEN:

ALEXANDRA MORTON

Applicant

AND:

MINISTER OF FISHERIES AND OCEANS

Respondent

WRITTEN REPRESENTATIONS OF THE PARTY APPLICANT

1. For the reasons outlined below the party applicant Marine Harvest Canada Inc. ("Marine Harvest") applies for the following orders:

(a) that Marine Harvest be added as a party respondent to this judicial review application;

(b) that directions be given to amend the style of cause; and

(c) costs.

2. This is the third chapter in a series of legal challenges Ms. Morton has brought to the salmon farming business:

(a) Chapter 1 was an action concerning the jurisdiction of the Province of British Columbia to regulate finfish aquaculture. Ms. Morton rooted her case as a challenge to the renewal of a Marine Harvest licence. In response to that challenge, fish farming became federally regulated. Marine Harvest was named as a respondent in that proceeding, without issue. (*Morton v. British Columbia (Agriculture and Lands) et al*, 2009 BCSC 136).

(b) Chapter 2 was a judicial review concerning the Minister's authority or jurisdiction respecting the transfer of fish. Ms. Morton rooted her case as a challenge to the transfer conditions in Marine Harvest's Shelter Bay licence. In response to that challenge, the BC Introductions and Transfers Committee (the "ITC") must now approve each and every transfer of fish to and between farms. Marine Harvest was named a respondent in that proceeding, again without issue. (*Morton v. Minister of Fisheries and Oceans et al*, 2015 FC 575)

(c) Chapter 3 is this application for judicial review. This application is a direct challenge to the ITC's decision or policy to not test for piscine reovirus ("PRV") and to permit fish with PRV to be transferred. Ms. Morton has not named Marine Harvest as a party in this application.

3. Rule 303(1)(a) of the *Federal Court Rules* provides that an applicant shall name as a respondent every person directly affected by the order sought in the application. *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236 sets out the test to be met on such a motion:

> [20] A party has a "direct interest" under subsection 18.1(1) of the *Federal Courts Act* when its legal rights are affected, legal obligations are imposed on it, or it is prejudicially affected in some direct way : *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307 at paragraphs 57-58; *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (C.A.); *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116.
>
> [21] Translating this to Rule 303(1)(*a*), the question is whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way. If so, the party should be added as a respondent. If that party was not added as a respondent when the notice of application was issued, then, upon motion under Rule 104(1)(*b*), it should be added as a respondent.
>
> [emphasis added]

4. Marine Harvest is a company engaged in the business of salmon farming on the west coast of British Columbia. It is licensed to operate 6 hatcheries and 56 marine-based farms (though not all are stocked and operational at the same time). In total, it produces between 40,000 and 45,000 tonnes of Atlantic salmon each year. Marine Harvest is the largest salmon farming producer in British Columbia.

5. Transferring fish from land-based freshwater hatcheries to net cages in the marine environment is an integral part of the salmon farming process. It is a critical part of an aquaculture licence. Farmed salmon are initially hatched and cultivated in a Marine Harvest hatchery, where they are grown for at least 12 months until they reach smoltification stage. The fish are then transferred to a Marine Harvest marine (salt water) site.

6. Farmed salmon are also transferred between marine sites. The primary reasons to move fish between marine sites are: (a) abiotic environmental conditions; (b) license conditions; and (c) parasite infection avoidance. These reasons are explained below.

(a) Abiotic environmental conditions: Abiotic (non – living) environmental conditions (i.e. water salinity and current speed) dictate the tolerance levels and optimal living conditions for each stage of the life cycle of the fish. Juvenile salmon (smolts) that are ponded from freshwater hatcheries to sea are vulnerable at high current facilities. Smolts ponded to facilities with lower current speeds are able to maximize energies for growth and hence perform better in the early stages of sea water rearing. Once fish reach a size where faster currents are not debilitating but are beneficial (i.e. additional dissolved oxygen availability) the fish are transferred to higher energy sites. It is also preferred to stock smolts into facilities with lower water salinity to ease the transition from fresh water to salt water.

(b) Licence conditions: License conditions stipulate the permitted maximum biomass of fish that can be present at each facility. As each site is unique in location and

ecological diversity, each site license reflects a specific allowable biomass. Licensed biomass levels range from several hundred to several thousand tonnes of production. Smaller sites are used for smolt rearing. The practice of using sites specifically for smolt rearing and on-growing enables longer fallow periods at both operations. Longer fallow periods support sustainable use and best management practices.

(c) Parasite infection avoidance: Certain areas on the coast are prone to higher parasite loads than others. One parasite in particular, Kudoa (Kudoa thrysites), has been noted to infect fish at an early stage (post smolt transfer to sea). Smolts ponded to areas with lower Kudoa parasite prevalence have shown lesser infection rates than smolts ponded into areas with higher prevalence. Manifestation of infection rarely occurs in fish with low infection levels. Hence, utilizing a staged process of ponding smolts to an area of lesser Kudoa prevalence followed by a transfer once fish are less susceptible to infection, supports both effective fish health management and good quality product.

7. Marine Harvest's licences deal with, among other things, the transfer of fish to the marine sites. Condition 2.3 of the licence requires that all fish transfers to the site must be authorized by the BC Introductions and Transfers Committee (the "ITC"). To obtain a transfer licence from the ITC, Marine Harvest must provide a fish health attestation that the criteria in Condition 2.1 are satisfied and an application to transfer the fish to DFO. For transfers from hatcheries to marine sites, a DFO representative will usually at the site to review records and conduct an inspection.

8. Currently, the ITC does not require Marine Harvest to test samples of fish for PRV. The ITC currently permits fish with PRV to be transferred to marine sites, and between marine sites.

9. Marine Harvest has, since 2010, conducted extensive testing of its fish for PRV and HSMI. PRV has been found in all but one of Marine Harvest's hatcheries. None of Marine Harvest's fish have tested positive for HSMI.

10. The Applicant in this judicial review proceeding seeks an order declaring the ITC's decision or policy of not testing for PRV, and of authorizing the transfer of fish with PRV, to be unlawful.

11. If the relief sought is granted it would severely impact Marine Harvest. If the ITC's decision or policy to allow fish with PRV to be transferred is successfully challenged, Marine Harvest will be directly and prejudicially affected; its legal right to transfer fish with PRV to its marine sites and between its marine sites will be undermined.

12. Marine Harvest has sought the consent of the parties to this proceeding for Marine Harvest to be added as a party respondent. The Respondent Minister has consented. The Applicant Ms. Morton has not consented.

Date: January 19, 2017

Counsel for the Party Applicant
Chris Watson

Federal Court of Appeal Cour d'appel fédérale

Date: 20131004

Docket: A-273-13

Citation: 2013 FCA 236

Present: **STRATAS J.A.**

BETWEEN:

FOREST ETHICS ADVOCACY ASSOCIATION AND DONNA SINCLAIR

Applicants

and

THE NATIONAL ENERGY BOARD AND THE ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 4, 2013.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal Cour d'appel fédérale

Date: 20131004

Docket: A-273-13

Citation: 2013 FCA 236

Present: **STRATAS J.A.**

BETWEEN:

FOREST ETHICS ADVOCACY ASSOCIATION AND DONNA SINCLAIR

Applicants

and

THE NATIONAL ENERGY BOARD AND THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] Enbridge Pipelines Inc. and Valero Energy Inc. each move for an order adding it as a party respondent in this application for judicial review. In the alternative, they each move for an order adding it as an intervener.

A. The nature of the application for judicial review

[2] The application for judicial review comes to this Court under paragraph 28(1)(*f*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. It arises from proceedings before the National Energy Board.

[3] The proceedings before the National Energy Board concern Enbridge's application to the Board for approval to expand the capacity of a pipeline and to reverse a segment of that pipeline. Also included in Enbridge's application is a request to allow the pipeline to transport bitumen, the petroleum product derived from the Alberta oil sands. The Board's proceedings are ongoing.

[4] The application for judicial review targets a section recently added to the *National Energy Board Act*, R.S.C. 1985, c. N-7, and the Board's interpretation and application of that section.

[5] The section, section 55.2, affects who may make representations to the Board. Section 55.2 reads as follows:

55.2. On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.	**55.2.** Si une demande de certificat est présentée, l'Office étudie les observations de toute personne qu'il estime directement touchée par la délivrance du certificat ou le rejet de la demande et peut étudier les observations de toute personne qui, selon lui, possède des renseignements pertinents ou une expertise appropriée. La décision de l'Office d'étudier ou non une observation est définitive.

[6] In their notice of application in this Court, the applicants say that the Board interpreted its power under this section "to create a rigorous application process for those individuals and groups who seek to participate in [the Board's] proceedings." Among other things, the Board required those intending to participate to complete a detailed form.

[7] The applicants, Forest Ethics Advocacy Association and Donna Sinclair, are, respectively, an environmental organization and an individual. The Board denied Donna Sinclair the right to submit a letter of comment on Enbridge's application for approval. The applicants seek a declaration that section 55.2 violates the guarantee of freedom of expression in subsection 2(*b*) of the Charter and, thus, is invalid. They also seek an order setting aside the Board's decision to issue the form and require that it be completed, and an injunction preventing the Board from acting until the judicial review has been decided. Finally, they seek an order requiring the Board to accept all letters of comment from those wanting to participate in the proceedings.

[8] Enbridge, the applicant for approval before the Board, is the proponent of the pipeline project under scrutiny. Valero is an intervener in the Board's proceedings, supporting Enbridge's application for approval. Valero stands to benefit from a Board approval of Enbridge's application. Approval would permit Valero to receive western Canadian crude oil, oil that is cheaper than that from offshore sources. To that end, Valero has entered into a transportation services agreement with Enbridge, contingent upon the approval of Enbridge's project. Valero plans to invest between $110 million and $200 million to upgrade its facilities in order to handle the anticipated supply of western Canadian crude oil.

B. The provisions of the *Federal Courts Rules* that govern these motions

[9] Three provisions in the *Federal Courts Rules*, SOR/98-106, govern the motions before me: Rule 104(1)(*b*) (adding a party); Rule 109(1) and (2) (intervening in proceedings); and Rule 303(1)(*a*) (who must be named as a respondent to an application for judicial review).

[10] These Rules read as follows:

104. (1) At any time, the Court may	**104.** (1) La Cour peut, à tout moment, ordonner :
...	...
(*b*) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.	*b*) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.
109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109.** (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person

(*a*) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; ...

303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;...

C. Should Enbridge and Valero be added as respondents?

[11] Under Rule 104(1)(*b*), parties may be added as respondents where

(1) they should have been respondents in the first place; or

(2) their presence before the Court is necessary.

Satisfaction of either of these requirements is sufficient. Enbridge and Valero say they satisfy both requirements.

(1) Should Enbridge and Valero have been respondents in the first place?

[12] Whether Enbridge and Valero should have been respondents in the first place is determined by Rule 303(1)(*a*). Under that rule, those who are "directly affected" by the order sought in the application for judicial review must be named as respondents.

[13] What is the meaning of "directly affected" in Rule 303(1)(*a*)? There are very few authorities on point.

[14] All parties cite the order made by this Court in *Sweetgrass First Nation v. National Energy Board*, file 08-A-30 (May 30, 2008) but that order does not shed light on the meaning of "directly affected" in Rule 303(1)(*a*).

[15] All parties cite *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2008 FC 735. However, that case is of limited usefulness. In *Brokenhead*, the Federal Court did not examine in any detail the words "directly affected."

[16] Further, most of the cases placed before the Federal Court in *Brokenhead* were decided under Rule 1602(3) of the old *Federal Court Rules*, C.R.C. 1978, c. 663 (now repealed) or relied upon cases interpreting old Rule 1602(3). But old Rule 1602(3) is quite different from today's Rule 303(1)(*a*).

[17] Old Rule 1602(3) required that an "interested person who [was] adverse in interest to the applicant" before the tribunal being reviewed be named as a respondent. Rule 303(1)(*a*) is narrower, requiring that a party be "directly affected" by the order sought in the application for judicial review. Accordingly, cases based on old Rule 1602(3) should be regarded with caution.

[18] The words "directly affected" in Rule 303(1)(*a*) mirror those in subsection 18.1(1) of the *Federal Courts Act*. Under that subsection, only the Attorney General or "anyone directly affected by the matter in respect of which relief is sought" may bring an application for judicial review. Rule 303(1)(*a*) restricts the category of parties who must be added as respondents to those who, if the tribunal's decision were different, could have brought an application for judicial review themselves.

[19] Accordingly, guidance on the meaning of "direct interest" in Rule 303(1)(*a*) can be found in the case law concerning the meaning of "direct interest" in subsection 18.1(1) of the *Federal Courts Act*. This was the approach of the Federal Court in *Reddy-Cheminor, Inc. v. Canada*, 2001 FCT 1065, 212 F.T.R. 129, aff'd 2002 FCA 179, 291 F.T.R. 193 and seems to have been the approach implicitly adopted by the Federal Court in *Cami International Poultry Inc. v. Canada (Attorney General)*, 2013 FC 583 at paragraphs 33-34.

[20] A party has a "direct interest" under subsection 18.1(1) of the *Federal Courts Act* when its legal rights are affected, legal obligations are imposed upon it, or it is prejudicially affected in some direct way: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307 at

paragraphs 57-58; *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (C.A.); *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116.

[21] Translating this to Rule 303(1)(*a*), the question is whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way. If so, the party should be added as a respondent. If that party was not added as a respondent when the notice of application was issued, then, upon motion under Rule 104(1)(*b*), it should be added as a respondent.

[22] The relief sought in the judicial review is described in paragraph 7, above. The interests of Enbridge and Valero are described in paragraph 8, above.

[23] I accept that the relief sought in the judicial review, if granted, would cause real, tangible prejudice to Enbridge and Valero within the meaning of the *Odynsky* test, not just general inconvenience or general impact on their businesses as a result of detrimental or unhelpful jurisprudence. But Enbridge and Valero must go further under the *Odynsky* test and show that they will be prejudiced in a direct way.

[24] In Enbridge's case, the prejudice is direct. The Board's proceeding is about whether Enbridge's project should be approved. If the relief sought in the judicial review is granted, the proceedings before the Board will have to be rerun to some extent, delaying Enbridge's project. Further, if the relief sought is granted, potentially many persons and organizations from different perspectives will have rights of participation where, before, they did not. The Board might accept

some of the new participants' arguments, leading to the rejection of Enbridge's application for approval of its project. The risk of that happening directly affects Enbridge, the proponent of the project.

[25] Valero, however, stands in a different position. It is in a commercial relationship with Enbridge, the proponent of the project. The success of that relationship depends upon the approval of the project. But it is not itself the proponent of the project.

[26] Those in a commercial relationship with the proponent of a project who stand to gain from the approval of the project of course will suffer financially if the project is not approved. But that financial interest is merely consequential or indirect.

[27] Valero stands in the same position as any suppliers of materials for the project and any workers involved in the construction of the project. The project will provide them with income and work. But if it is not approved, it will not go forward, and the income and work will be lost. Their interests, no doubt significant, are consequential or indirect, contingent on the proponent of the project getting its approval.

[28] One way to test this result is to consider a hypothetical situation and the concept of "direct interest" under subsection 18.1(1) of the *Federal Courts Act*. Suppose that the Board rules against Enbridge's application for approval. Suppose that Enbridge decides not to bring an application for judicial review. In those circumstances, could Valero maintain that since it stood to benefit economically from the approval it has a "direct interest" and, thus, has standing to bring an

application for judicial review? Could all others who also stood to benefit economically in some way from the pipeline approval – construction companies and their employees, suppliers and transporters of construction materials, potential buyers of refined petroleum products – say the same thing? I think not.

[29] I do not doubt that Valero's interest is most significant: see Exhibit "A" to the Affidavit of Louis Bergeron. However, Rule 303(1)(*a*) refers to a "direct interest," not a "significant interest." Valero does not have a "direct interest" and so it could not have been named as a respondent in the first place.

(2) Is Valero's presence in the judicial review necessary?

[30] Valero also submits that it should now be a respondent in the judicial review because it falls under the second branch of under Rule 104(1)(*b*): its presence before the Court is "necessary to ensure that all matters in dispute in the application for judicial review may be effectually and completely determined."

[31] To succeed in this submission, Valero must satisfy the demanding test of necessity set out in cases such as *Shubenacadie Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 509, 236 F.T.R. 160 and *Laboratoires Servier v. Apotex Inc.*, 2007 FC 1210.

[32] In my view, Valero has not satisfied that test. It has not pointed to "a question in the [application for judicial review] which cannot be effectually and completely settled unless [it] is a party": *Shubenacadie Indian Band*, *supra* at paragraph 8, citing *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357 at page 380.

[33] Therefore, Valero's motion to be added as a respondent must fail.

D. Should Valero be permitted to intervene?

[34] As we have seen, not all parties before an administrative tribunal will be parties with a "direct interest" or necessary for the judicial review – in other words, not all parties will be entitled to be respondents in the application for judicial review. But many may be able to satisfy the test for intervention and become interveners in the judicial review. Their level of participation as interveners varies depending on the circumstances. Where warranted, their level of participation can approach that of respondents. The grand prize of being a respondent is one thing. But the consolation prize of being an intervener is often not bad.

[35] Mindful of this, Valero seeks an order permitting it to intervene in the judicial review. However, Valero has failed to discharge the legal burden of proof upon it.

[36] Under Rule 109(2)(*b*), Valero must describe "how [its] participation will assist the determination of a factual or legal issue related to the proceeding." This requires not just an

assertion that its participation will assist, but a *demonstration* of *how* it will assist. Valero has not done this.

[37] In its notice of motion, Valero submits that "there is a justiciable issue and a veritable public interest that could benefit from Valero's participation in this proceeding." This does not discharge the burden of proof imposed upon it by Rule 109(2)(*b*).

[38] In the affidavit offered in support of its motion, Valero asserts that it "has a perspective which is unique and distinct from that of Enbridge" as "a refiner which proposes to access western crude" through the pipeline. Valero does not explain how a refiner's perspective differs from that of a pipeline builder and how that difference will assist in determining the administrative law and constitutional law issues before the Court.

[39] Finally, in its written submissions, Valero asserts – without explanation – that the "interests of justice would be served" and the Court "would [be] assist[ed]…in coming to a fair and just conclusion" by allowing it to intervene. It says nothing more. The Court is left to speculate as to what role Valero would play as an intervener and whether that role would be of any assistance at all.

E. Disposition of the motions

[40] Enbridge Pipelines Inc. shall be added as a party respondent and the style of cause shall be amended to reflect that fact. It shall receive its costs of the motion in any event of the cause. The motion of Valero Energy Inc. shall be dismissed with costs in any event of the cause.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-273-13
STYLE OF CAUSE:	FOREST ETHICS ADVOCACY ASSOCIATION AND DONNA SINCLAIR v. THE NATIONAL ENERGY BOARD AND THE ATTORNEY GENERAL OF CANADA

MOTIONS DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: OCTOBER 4, 2013

WRITTEN REPRESENTATIONS BY:

Joshua A. Jantzi	FOR THE PROPOSED RESPONDENTS, Enbridge Pipelines Inc.
Paul Edwards	FOR THE PROPOSED RESPONDENTS, Valero Energy Inc.
Clayton Ruby Nader R. Hasan	FOR THE APPLICANTS

SOLICITORS OF RECORD:

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William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA
The National Energy Board Calgary, Alberta	FOR THE RESPONDENT, NATIONAL ENERGY BOARD