

14790-1
Port Hardy Registry

In the Provincial Court of British Columbia
(BEFORE THE HONOURABLE JUDGE SAUNDERSON)

Port Hardy, B.C.
January 5, 2010

REGINA

v.

**M.V. ORCA WARRIOR and
MARINE HARVEST CANADA INC**

PROCEEDINGS
(Fix Date)

COPY

Crown Counsel:	C. Gibson (as Agent)
Counsel for Alexandra Morton:	J. Jones
Defence Counsel:	R. Opala

Proceedings

1
2 Port Hardy, B.C.
3 January 5, 2010
4
5 THE CLERK: Now calling 42 on the adult list, the
6 matter of Marine Harvest Canada.
7 MR. JONES: Yes, Your Honour. Jones, initial J. I
8 appear for the -- for the complainant, Ms. Morton.
9 This is a private prosecution and we do have a
10 proof of service of the summons.
11 MR. OPALA: Richard Opala for Marine Harvest.
12 THE COURT: Yes. I didn't get your name, sir. Would
13 you --
14 MR. OPALA: Richard Opala, O-p-a-l-a.
15 THE COURT: Thank you.
16 MR. GIBSON: Thank you, Your Honour. Chris Gibson
17 appearing on behalf of the Federal Crown. I'm
18 advised that Todd Gerhart, who's the senior
19 counsel with the Public Prosecution Service of
20 Canada has not yet made a decision whether to
21 intervene in the prosecution. I'm also advised by
22 Mr. Gerhart that the Attorney General of British
23 Columbia has confirmed that it will not be
24 appearing with respect to this matter.
25 THE COURT: When do you expect the federal government
26 to make a decision, Mr. Gibson?
27 MR. GIBSON: I anticipate -- or Mr. Gerhart anticipates
28 that would be done within a month, but for the
29 time being it's a private prosecution and the
30 federal Crown doesn't have a position. But we
31 anticipate we will make the determination well
32 before a trial date.
33 THE COURT: Well, it's going to have an impact on the
34 length and organization of the trial whether or
35 not the *federalés* are going to appear, Mr. Gibson,
36 very definitely. I don't expect this to be a
37 quick trial. Gentlemen, what is your collective
38 estimate?
39 MR. JONES: Your Honour, one thing that would help us
40 determine the length of trial, because my
41 instructions are is to proceed and my last
42 conversation with Mr. Gerhart was to Ms. Morton
43 and myself, we're on our own, the Crown is not
44 intervening at this point. So we're looking at
45 wanting to proceed with the trial. We had hoped
46 that DOJ would in fact assume conduct of it.
47 Having said that, the issue now is
disclosure. Your Honour, I have corresponded with

Proceedings

1 DFO following the incident in June twice. They
2 now have a full investigation and a file, they
3 will not provide us with a copy of it. Mr.
4 Gerhart on DOJ's behalf were -- was involved in
5 this starting in September and he sought two
6 separate adjournments of the process hearing in
7 order that he could do an investigation. He now
8 has a file, as well. So there's two files out
9 there. I requested files from Crown and from DFO
10 and neither has been produced, and in fact that
11 would significantly expedite Ms. Morton's ability
12 to proceed with the charges under the *Fisheries*
13 *Act* that, for whatever reason, DFO and DOJ
14 declined to do. Fairly straightforward case with
15 written admissions by the defendant, by the way.
16 And also I'm sure my friend here will be wanting
17 disclosure, as well. So if we could get --

18 THE COURT: You're friend on behalf of Marine Harvest.

19 MR. JONES: On Marine Harvest.

20 THE COURT: Yes.

21 MR. JONES: They are certainly entitled to disclosure
22 and there's two files out there, a DFO and a DOJ
23 file, and we're requesting respectfully, Your
24 Honour, to consider making an order that there be
25 disclosure in order that we can -- first of all,
26 Ms. Morton can have the benefit of the state's
27 investigations into this offence under the
28 *Fisheries Act*, and secondly they will provide the
29 defendant full answer and defence.

30 THE COURT: We're in the interesting situation of a
31 private prosecutor seeking disclosure from a
32 public prosecutor who hasn't come onto the record
33 yet.

34 MR. JONES: You're right, Your Honour, and that is a
35 concern. Now, when one looks at the -- the
36 written policy behind private prosecutions, that
37 is to guide DOJ, it is -- private prosecutions are
38 specifically stated that when there is government
39 inaction or inability to prosecute, proceed with
40 charges, DOJ is supposed to respond accordingly.
41 So Ms. Morton has done this, extended it, you
42 know, a very significant amount of work trying to
43 fill the shoes of the state when it appears that,
44 frankly, this industry -- fish farming industry,
45 is not -- is immune from prosecution. I mean,
46 that's the concern that we have raised repeatedly
47 and we haven't seen any evidence to the contrary

Proceedings

1 that this industry is immune from prosecution. So
2 this is a very significant concern.

3 THE COURT: That's a rather strong word you just used,
4 Mr. Jones.

5 MR. JONES: Well, that's our concern, Your Honour. It
6 may be unfounded.

7 THE COURT: I understand it. That's a political
8 concern.

9 MR. JONES: Well -- and that's why we're looking for
10 disclosure, as well. But I agree, Your Honour,
11 but that's our concern. We have raised it very
12 clearly with the Crown and DFO and they do have a
13 file. And it may well be that their file will
14 determine, you know, a different set of facts, but
15 it's very difficult to ask the citizen to enforce
16 the *Fisheries Act* when the agency and Department
17 of Justice -- the Crown -- both stand on the side
18 and not assist that citizen, when the very purpose
19 of a private prosecution is held to be a very
20 fundamental constitutional right in a democracy.

21 THE COURT: You're getting into an argument, I think,
22 which is a bit premature, Mr. Jones. We want to
23 know whether the federal government is going to
24 appear and you asked for a month, thereabouts.
25 That decision is going to be peremptory on
26 whatever date we set, Mr. Jones. The Crown is
27 going to have made a decision to prosecute or not
28 to prosecute by then. There will be no further
29 adjournments and then and only then will there be
30 an argument, if Mr. Jones chooses to bring it
31 forward, and indeed if Mr. Opala chooses to do so,
32 as well, with respect to disclosure. I expect
33 it's going to be somewhat of a novel argument,
34 depending on the position the Crown takes, but
35 there's going to have to be some case law produced
36 by each of you, if it exists, on that issue.

37 I will be sitting here in the first week of
38 February, because I'm told of the Olympics and the
39 demands on the police there's only one court
40 sitting in Port Hardy this month and only one next
41 month, rather than the two in each month. So this
42 matter will be brought back before me on the 2nd,
43 3rd, or 4th of February, which is the next
44 sitting. I'm in your hands, counsel, if you have
45 a preference as to a date, one of those three
46 days.

47 MR. JONES: February -- the Tuesday is certainly

Proceedings

1 convenient for me, Your Honour, but I mean, either
2 date that is available.

3 MR. GIBSON: Same with the federal Crown.

4 THE COURT: And Mr. Opala?

5 MR. OPALA: That's -- that's fine with me.

6 THE COURT: Very well. One Tuesday, the 2nd of
7 February, set for 9:30 in the morning. The Crown
8 will -- must inform the court whether or not it's
9 going to involve itself in this case and we will
10 -- I expect you can get your decision, Mr. Gibson
11 -- or more to the point, not your decision, but
12 the Crown's decision to counsel before February
13 2nd so they can prepare whatever arguments they
14 wish to make relating to disclosure.

15 MR. GIBSON: Thank you, Your Honour.

16 MR. JONES: Thank you, Your Honour.

17 THE COURT: And I suppose I should note, for the
18 record, it may or may not have any impact on
19 whether I continue with this case, that a few days
20 ago I saw a very high profile, hour-long,
21 effectively documentary on television involving
22 the complainant. Very well produced and very
23 interesting, I might add. That may or may not go
24 to disqualification. I leave that with you,
25 gentlemen. Judge's don't exist in vacuums, of
26 course.

27 MR. JONES: Thank you, Your Honour.

28 MR. GIBSON: Thank you, Your Honour.

29 MR. OPALA: Your Honour, we have retained counsel on
30 behalf of Marine Harvest, Christopher Harvey. I
31 have a counsel designation notice here, several
32 copies that I can distribute.

33 THE COURT: Very well. All right, gentlemen. And I
34 expect counsel to have some detailed discussions
35 relating to the time estimate factor. I'm
36 familiar with Mr. Harvey's work. He is very
37 thorough. This is not going to be a short trial,
38 gentlemen. It's going to be measured at least in
39 days, and it might go into weeks. We'll see.

40 MR. JONES: Thank you, Your Honour.

41 MR. GIBSON: Thank you, Your Honour.

42 MR. OPALA: Thank you.

43

44 (PROCEEDINGS ADJOURNED TO FEBRUARY 2, 2010,
45 AT 9:30 A.M.)

46

47