IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Morton v. British Columbia (Agriculture and Lands),* 2010 BCSC 100

Date: 20100126
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

Supplementary Reasons for Judgment

Counsel for the Petitioners:	Gregory J. McDade, Q.C. Lisa C. Glowacki
Counsel for the Respondents Minister of Agriculture and Lands and the Attorney General of British Columbia:	Nancy E. Brown T. Timberg
Counsel for the Respondent Marine Harvest Canada Inc.:	Christopher Harvey, Q.C. Andrew Scarth (A/S)
Counsel for the Kwicksutaineuk Ah-Kwa-Ah-Mish First Nation, the Gwawaenuk Tribe, the Tsawataineuk First Nation and the Namgis First Nation:	Krista Robertson
Place and Date of Hearing:	Vancouver, B.C. December 21 and 23, 2009
Place and Date of Judgment:	Vancouver, B.C. January 26, 2010

[1] On February 9, 2009, I released Reasons for Judgment in this matter, indexed at 2009 BCSC 136 ("Reasons for Judgment"). At paragraphs 194, 196, and 197 of those Reasons for Judgment I held the following:

> a) Sections 13(5) and 14 of the ***Fisheries Act***, R.S.B.C. 1996, c. 149, are *intra vires* the provincial Crown;
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> b) s. 26(2)(a) of the B.C. ***Fisheries Act***, ss. 1(h) and 2(1) of the ***Farm Practices (Right to Farm) Act***, R.S.B.C. 1996, c. 131 and the ***Aquaculture Regulation***, B.C. Reg. 78/2002, are *ultra vires* the provincial Crown with respect to finfish and apply only to the cultivation of marine plants; and
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> c) The ***Finfish Aquaculture Waste Control Regulation***, B.C. Reg. 256/2002, is *ultra vires* the provincial Crown in its entirety and invalid.

[2] Despite these findings, I concluded at paragraph 198 that the absence of sufficient legislation to regulate fish farms in British Columbia could well be more harmful to the public than the perpetuation of the impugned legislation. I concluded that the federal government, who had not appeared before me despite being served with a Notice of Constitutional Question, should be given sufficient time to consider and implement new legislation to address the void created by my decision with respect to the Provincial legislation respecting aquaculture.

[3] At paragraph 200, I stated my view that it was preferable to maintain the status quo ante rather than to leave the entire matter of finfish farming in British Columbia unregulated (other than by the present federal legislation). In the result, I ordered that the present provincial regulatory scheme with respect to finfish farming in British Columbia was to continue for a further 12 months. At the end of the 12 months from the date of that 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*** would be read down to apply only to the cultivation of marine plants, and the ***Finfish Aquaculture Waste Control Regulation*** would cease to have any effect.

[4] I have been persuaded by the Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia that my ruling with respect to ss. 1(h) and 2(1) of the ***Farm Practices (Right to Farm) Act*** requires clarification. My ruling with respect to those subsections applies only to aquaculture activities, and not to other types of farming or agriculture.

[5] My decision was the subject of an appeal to the British Columbia Court of Appeal by the respondent Marine Harvest Canada Inc. That appeal was heard on October 21, 2009, and dismissed in a judgment handed down on November 3, 2009, indexed as 2009 BCCA 481.

[6] Marine Harvest Canada Inc. had appealed on the narrow ground that two particular provisions of the ***Farm Practices (Right to Farm) Act***, ss. 1(h) and 2(1), related solely to property and civil rights in the province. It argued that these provisions were essentially about regulating “tort law” and must be upheld as independent of the aquaculture regulatory scheme.

[7] Although the appeal was dismissed, Newbury J. A., for the Court, found the following at paragraphs 6 and 8:

> The respondents object that MHC's argument on appeal was not raised below and therefore not dealt with by the chambers judge. The question of provincial jurisdiction in respect of "tort" or the law of nuisance did not arise because all parties below agreed, or at least proceeded on the assumption, that the entire provincial "regulatory regime" with respect to aquaculture would stand or fall as one. The respondents say it was never suggested that the constitutional validity of these provisions turned on whether the fish themselves are private property or not, or whether the right to the fishery is a private or public right, or even a proprietary right at all and that the cases now relied upon by MHC on the issue of 'ownership' of fish produced by aquaculture were not before the court below. The respondents referred us to MHC's written submissions before Hinkson J. where this point did not appear.
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> ...
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> We advised counsel that we were all of the view the matter should be remitted to Mr. Justice Hinkson for determination. Whether the fish in an aquaculture facility are private property or not, the validity of ss. 1(h) and 2(1) of the Farm Practices Protection (Right to Farm) Act necessarily involves a consideration of the other legislation, and an understanding of the entire argument made below. The chambers judge has this understanding and is in a position to make any necessary findings of fact - something we are not best

> suited to do. Once the findings have been made, any rights of appeal can be properly exercised by recourse to this court in the usual way.

[8] The order entered in the British Columbia Court of Appeal as a result of the appeal included the following provision:

> ... the matter which Marine Harvest Canada Inc. has sought to raise on appeal to this court, namely that that (sic) fish farms are private fisheries and the fish in them are private property, and that ss. 1(h) and 2(1) of the *Farm Practices Protection (Right to Farm) Act* relate solely to property and civil rights in the Province be remitted to Mr. Justice Hinkson for consideration and for determination in such manner and to such extent as he may, in his discretion, deem appropriate.

[9] The parties thus made arrangements to appear before me to address those issues, but before doing so, I was asked to deal with two further motions: the first, by the Kwicksutaineuk Ah-Kwa-Ah-Mish First Nation, the Gwawaenuk Tribe, the Tsawataineuk First Nation, and the Namgis First Nation for leave to intervene on the second application of the Attorney General of Canada.

[10] The second application, by the Attorney General of Canada, was for an extension of the suspension of my declaration of invalidity of the legislation that I found to be *ultra vires* for a further 12 months until December 18, 2010. The respondents, the Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia, were prepared to consent to this application.

a) The Intervention Application

[11] The applicants for intervenor status are members of what they refer to as a political collective called the Musgamagw-Tsawataineuk Tribal Council (the "MMTC"). Chief Robert Chamberlin, the Chairman of the MTTC, deposed in an affidavit that the traditional territory of the MMTC Member Nations is the Broughton Archipelago, where the operation of the respondent Marine Harvest Canada Inc. and some of the operations of other aquaculture operations are located.

[12] Chief Chamberlin further deposed that the MMTC Member Nations have relied on the wild salmon that migrate through the Broughton Archipelago since time

immemorial and they assert aboriginal rights to fish the wild salmon in the Archipelago. As a result, Chief Chamberlin deposed that the MMTC Member Nations have concerns about the impact of aquaculture operations on the wild salmon and are being consulted by both the government of British Columbia and the federal government with respect to the aquaculture operations in the Archipelago.

[13] The concerns raised by Chief Chamberlin were echoed in the affidavit of Grand Chief Stewart Phillip, the President of the Union of B.C. Indian Chiefs, sworn in support of the application of the proposed intervenors.

[14] The test for obtaining intervenor standing was summarized by Rowles J. A. in ***EGALE Canada Inc. v. Canada (Attorney General)***, 2002 BCCA 396 at paragraph 7:

> Generally speaking, before an applicant will be allowed to intervene, the court should consider whether the applicant has a direct interest in the litigation or whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties. When an application for intervention is made on a public law issue, the application may be allowed even though the applicant does not have a direct interest in the appeal.

[15] I accept that the proposed intervenors have a direct interest in the Attorney General for Canada's application that differs from the petitioners and the respondents, and that they are able to put forward a perspective that differs from the other parties that may be of assistance to the court in considering the application. I therefore grant them leave to intervene limited to the Attorney General's application.

b) The Extension of the Suspension of My Declaration of Invalidity

[16] The affidavit of Trevor Swerdfager, the Director General of the Aquaculture Management Directorate of the Fisheries and Aquaculture Management Sector of the Department of Fisheries and Oceans Canada, was filed in support of the application of the Attorney General of Canada.

[17] In his affidavit, Mr. Swerdfager deposed to the steps taken by the federal government to comply with the terms of my judgment, and the role that the federal

government will have to assume in light of that judgment. While the petitioners argued that more and quicker steps could have been taken, with one possible exception that requires scrutiny, I am satisfied that the federal government has acted in good faith, and taken reasonable steps to react to my judgment.

[18] The one exception that requires scrutiny arises as a result of a statement published by the federal government in a Discussion Document prepared by Fisheries and Oceans Canada entitled "***Federal BC Aquaculture Regulation & Strategic Action Plan Initiative***" on a Fisheries and Oceans Canada website:

> The BCSC allowed DFO one year to develop and implement a federal aquaculture regulation for BC. In view of the scope of work involved, DFO has approached the Court to secure an extension to December 2010 and DFO is proceeding on the assumption that this extension will be granted. If the extension is not granted by the Court, DFO will establish and implement appropriate interim measures for the management of aquaculture in BC.

[19] The petitioners argued that the federal government, by this statement, has conceded that it can prepare the necessary legislation to address my judgment if no extension is granted, and that I should not, therefore, exercise my discretion to extend the declaration of invalidity beyond the year provided for in my Reasons for Judgment.

[20] Clearly a decision to suspend a declaration of invalidity is an extraordinary remedy, and if granted, its duration requires a weighing of its positive and negative effects (Kent Roach, ***Constitutional Remedies in Canada***, looseleaf (Aurora: Canada Law Book, 2007) at 14.1798).

[21] An extension of a suspension period of a declaration of statutory invalidity can be granted, in the discretion of the Court, where it is warranted. Following an initial suspension of its decision to strike down all of Manitoba's legislation because it was not bilingual in ***Reference re: Manitoba Language Rights***, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1, the Supreme Court of Canada granted two further extensions of time of the suspended legislation: ***Re Manitoba Language Rights Order***, [1990] 3 S.C.R. 1417 and ***Reference re: Manitoba Language Rights*** (1992), 88 D.L.R. (4th) 385 at 399.

[22] Later in 1992, the Supreme Court of Canada provided guidance as to when a court should impose a suspended declaration in ***Schachter v. Canada***, [1992] 2 S.C.R. 679 at 719 [***Schachter***]. Chief Justice Lamer for the majority held:

> Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:
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> A. striking down the legislation without enacting something in its place would pose a danger to the public;
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> B. striking down the legislation without enacting something in its place would threaten the rule of law; or,
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> C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.
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> I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.

[23] As I have indicated above, the Attorney General of Canada did not participate in the hearing of the petition that gave rise to my original Reasons for Judgment in this case. As a result, at that time I did not have submissions from the Attorney General respecting the time that would be needed for Parliament to consider and implement legislation and regulations to manage aquaculture operations.

[24] I now have submissions from the Attorney General of Canada as to the time needed for Parliament to consider and implement legislation and regulations to manage aquaculture operations, and the affidavit of Mr. Swerdfager asserts that the time needed is a further 12 months, until December 18, 2010. This is certainly within the range found in the authorities relied upon by the Attorney General of Canada.

[25] In ***Schafer v. Canada (Attorney General)*** (1997), 35 O.R. (3d) 1, 149 D.L.R. (4th) 705 (C.A.), the Ontario Court of Appeal, in applying the principles set out in ***Schachter***, suspended a declaration of unconstitutional discrimination under certain

sections of the ***Unemployment Insurance Act***, R.S.C. 1985, c. U-1 for two years "to provide Parliament with sufficient time to consider and implement other solutions that will not give rise to a *Charter* violation".

[26] Counsel for the Attorney General of Canada referred to other cases of suspended declarations: 18 months in the cases of ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 and ***Mounted Police Association of Ontario v. Canada (Attorney General)*** (2009), 96 O.R. (3d) 20 (S.C.J.) to an unspecified period in ***R. v. Feeney***, [1997] 3 S.C.R. 1008.

[27] Despite the concerns raised by Ms. Morton that the current management and regulatory regime for aquaculture operations in the Broughton Archipelago may reduce and even cause the extinction of the wild salmon runs in that area, I accepted in my Reasons for Judgment that despite my ruling that some of the impugned legislation was unconstitutional, and despite the public interest in constitutional governance, it was preferable to maintain the status quo ante rather than to leave the entire matter of finfish farming in British Columbia unregulated, other than by the present federal legislation.

[28] Notwithstanding the statement of Fisheries and Oceans Canada that "[i]f the extension is not granted by the Court, DFO will establish and implement appropriate interim measures for the management of aquaculture in B.C.", I am persuaded that interim measures will not satisfy the concerns that led me to my initial suspension of the declaration of invalidity, and that a further extension of the suspension of the declaration is warranted. I order that my suspension be extended, in part, for a further 12 months until December 18, 2010.

[29] Having accepted that there is a need for an extension of the suspension of the declaration of invalidity of the legislation that I found to be *ultra vires*, I am persuaded that the extended suspension need not be as general as the initial suspension.

[30] In the initial suspension I permitted the present provincial regulatory scheme with respect to finfish farming in British Columbia to continue for a further 12 months. I dismissed the petitioner's application for an order prohibiting the respondents, the Province and the 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.

[31] In so doing, in effect, I permitted the provincial government to grant new licences and extend the areas within which existing licences could operate. In his affidavit sworn in opposition to the unlimited extension of the suspension of the declaration of invalidity of those provisions that I found to be *ultra vires* the provincial legislature, Grand Chief Phillip deposed, in part, the following:

> ... UBCIC [Union of B.C. Indian Chiefs] member Nations have observed how the Province has increasingly licensed new fish farms, or allowed for the expansion of existing fish farms, without a full and proper consideration of the impacts on Indigenous Peoples or the Indigenous fishery. Unfortunately, our experience has shown that once third party interests (such as aquaculture licences) are granted or expanded they tend to be protected, even if the cost is natural biodiversity or the constitutionally protected rights of Indigenous Peoples."

[32] In response to this proposition, counsel for Marine Harvest Canada Inc. argued that some latitude is required for those holding provincial aquaculture licences, that does not require the expansion of the operations, in order to meet exigencies such as the movement of some fish and/or their cages.

[33] Chief Chamberlin deposed that the MMTC Member Nations are opposed to any further suspension of the declarations which the Attorney General for Canada seeks. He further argued that granting new licences or expanding existing licences may undermine the consultation process; instead, he argued for the maintenance of the status quo in respect to existing licences, as this would allow for good faith consultations to occur between the federal government and the MMTC Member Nations with respect to the management of aquaculture in the Broughton Archipelago and elsewhere.

[34] I conclude that Chief Chamberlin's proposal is a reasonable solution to problems that may occur through the unrestricted extension of the period of suspension of invalidity. Therefore, I find that a restriction should apply during the period that I will extend the suspension of my declaration of invalidity. During the period between February 9, 2010 and December 18, 2010, I order that the respondents, the Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia, issue no licences for new fish farms in British Columbia, and that they not extend the areas within which presently licensed fish farms or fish farms whose licenses are renewed between February 9, 2010 and December 18, 2010, are permitted to operate as of February 9, 2010.

[35] I make this restriction on my earlier suspension in an attempt to balance the interests of the existing fish farms in the province against the concerns expressed by Grand Chief Phillip and the petitioners. In the event that the restriction creates difficulties for the parties or the intervenors, I grant them liberty to propose consent orders to me for the efficient management of aquaculture activities within the province until December 18, 2010, or in the event that consent orders cannot be agreed to, to appear before me for any desired modifications of my extension order.

c) Whether ss. 1(h) and 2(1) of the *Farm Practices Protection (Right to Farm) Act* are *intra vires* the Provincial Crown in their Application to Private Causes of Action

[36] Marine Harvest Canada's argument that ss. 1(h) and 2(1) of the ***Farm Practices Protection (Right to Farm) Act*** are *intra vires* the provincial Crown is two-fold: first, it argues that the subject fish are private property and therefore can be regulated under the property and civil rights section of the ***Constitution Act ,1867*** (s. 92 (13)), and second that these provisions are in pith and substance designed to modify the application of the common law of nuisance to any farm that falls within that description as designed by the statute.

[37] The petitioners opposed a reconsideration of the two subsections declared *ultra vires* the provincial Crown with respect to finfish aquaculture activities. The Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia purported to take no position on the matters submitted for reconsideration by me, but nonetheless made submissions that the two subsections can and ought to be considered separate and apart from the other provisions of the ***Farm Practices Protection (Right to Farm) Act***.

i) Consideration of a New Argument

[38] I made no finding in my Reasons for Judgment as to ownership of the fish. I did not consider it necessary to resolve that matter in order to rule on the petition before me, as is clear from paragraph 160 of my Reasons for Judgment.

[39] Despite the assertion that submissions had been made before me on what Marine Harvest Canada Inc. has generally referred to as “the tort issue”, by the Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia, in their factum on the appeal of my decision counsel were unable to direct me to any such argument made prior to my Reasons for Judgment.

[40] The petitioners argued that Marine Harvest Canada Inc., having failed to persuade me that fish farms were not fisheries, is seeking to advance a new argument and should not be permitted to do so, relying on ***Sykes v. Sykes*** (1995), 6 B.C.L.R. (3d) 296 at para. 12 (C.A.), where Wood J.A., for the Court held:

> ... I conclude that, as counsel for the wife argued, the application to re-open was based not on any perceived error in the trial judge's approach to the evidence, but rather on the pragmatic decision to advance an alternative argument which could easily have been advanced at the time of the original trial. This is not a proper basis upon which to exercise the discretion to re-open.

[41] The parties agreed that I have the discretion to consider even a new argument in order to avoid an abuse of the court process, and I have, of course, been directed by the Court of Appeal to consider the issues referred to in

paragraphs 7 and 8 above. In the result, I will address the argument that Marine Harvest Canada Inc. now raises.

ii) Property Rights in Fish and Fisheries

[42] At this new hearing before me, counsel for Marine Harvest Canada Inc. argued that a determination of the ownership of aquafarm fish is necessary in order to determine the validity of ss. 1(h) and 2(1) of the ***Farm Practices Protection (Right to Farm) Act***. The petitioners and the respondents, the Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia, disagree.

[43] Marine Harvest Canada Inc. argued that it owns the caged fish at its facility at Watson Cove and that those fish constitute a fishery that is its "private property". It further argued that the authority of the federal Crown over fisheries cannot divest its private property rights, which it says the provincial Crown retains jurisdiction to regulate under its property and civil rights jurisdiction.

[44] Insofar as the validity of ss. 1(h) and 2(1) of the ***Farm Practices Protection (Right to Farm) Act*** is concerned, Marine Harvest Canada Inc. asserted that my Reasons for Judgment with respect to those two subsections were *per incuriam*, and that my order respecting the invalidity of the two subsections should be vacated and replaced by a new order declaring the two subsections *intra vires* the provincial Crown.

[45] It is only necessary to determine whether the subject fish are private property or otherwise if the validity of ss. 1(h) and 2(1) of the ***Farm Practices Protection (Right to Farm) Act*** depends upon such a determination. I will therefore consider those subsections before considering the nature and extent of the property in the fish in question.

[46] If the resolution of the validity of the two subsections does not require a decision as to the extent and nature of the property rights in the fish in question, I consider that such a decision should be left for another day when it can be reached

on a complete evidentiary record and a full argument on the issue: ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island***, [1997] 3 S.C.R. 3 at para. 301.

[47] Marine Harvest Canada Inc. argued that the federal fisheries power under s. 91(12) of the ***Constitution Act, 1867*** is regulatory in nature and operates without regard to property rights, which remain, in the result, with existing owners and under exclusive provincial authority. It asserts that non-tidal fisheries are owned by the provincial Crown as proprietorial fisheries arising from the provincial ownership of the solum of the non-tidal waters, but that fishery rights in tidal waters are not proprietorial or connected with the ownership of the solum. In my Reasons for Judgment I did not comment on the non-tidal fisheries, but at paragraph 159 referred to the ruling of Viscount Haldane in ***Attorney-General for British Columbia v. Attorney-General for Canada (No. 2)*** (1913), 15 D.L.R. 308 at 316, that only the federal government had the jurisdiction to grant private fishery rights in tidal waters. Marine Harvest Canada Inc. contends that this conclusion is *per incuriam*.

[48] In ***Water Law in Canada: The Atlantic Provinces*** (Ottawa: Department of Regional Economic Expansion, 1973) Gerard V. LaForest stated at page 199 that “it would seem to follow that to establish an exclusive fishery in waters over soil owned by the province or a private individual action would be required by both the federal and provincial legislatures”. An example of such a fishery is seen in the Oyster Fisheries Agreement of 1912. Whether legislation by the provincial Crown to establish a private fishery is necessary or not, the quotation from Gerard V. LaForest does not detract from the need for federal legislation to grant private fishery rights in specific tidal waters.

iii) Pith and Substance Analysis

[49] Marine Harvest Canada Inc. argued that the impugned sections of the ***Farm Practices Protection (Right to Farm) Act*** are, in pith and substance, designed to modify the application of the common law of nuisance to any farm that falls within that description as defined by the statute.

[50] It argued that the impugned provisions should be considered *intra vires* the province because the tort of nuisance is not about regulating the activity which causes harm, rather, the focus is on the harm caused. There is case law to support this argument: legislation relating to the recovery of damages for pollution was held to be within the provincial domain by the Supreme Court of Canada in ***Interprovincial Co-operators Ltd. et al v. The Queen***, [1976] 1 S.C.R. 477 at 520. Matters of civil liability in nuisance and immunity therefrom have been determined to lie within the legislative competence of the provincial Crown: ***Laboucane v. Brooks***, 2003 BCSC 1247 at para. 55.

[51] The Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia agreed and emphasized that ss. 1(h) and 2(1) can and ought to be read separate and apart from the other provisions of the ***Farm Practices Protection (Right to Farm) Act***. They further argued that according to ***Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)***, [2002] 2 S.C.R. 146 [***Kitkatla***], the correct approach to a pith and substance analysis is to consider first, the challenged provisions, and then only if those provisions intrude impermissibly into a core federal power should the analysis continue on to determine whether they are nonetheless sufficiently integrated within a valid provincial legislative scheme.

[52] The Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia argued that ss. 1(h) and 2(1) of the ***Farm Practices Protection (Right to Farm) Act*** do not impair the core of a federal head of power and therefore the pith and substance analysis should end at the first stage, as set out in ***Kitkatla***.

[53] These respondents submitted that the ability of the legislature of the Province of British Columbia to legislate in the area of civil rights cannot be restricted merely because such legislation “affects” a matter within federal legislative authority.

[54] As stated by Taylor J., as he then was, in ***Nelson v. Air West Airlines Ltd.***, [1982] 5 W.W.R. 180 at 183-184 (B.C.S.C.):

> Works, undertakings and businesses falling under the legislative authority of Parliament are, of course, subject to provincial legislation in numerous circumstances. It is where the application of provincial legislation impairs the ability of such enterprises to carry out their federal functions that they will be held to enjoy special immunity. Such immunity was found in *Commission du Salaire Minimum v. Bell Telephone Co.*; *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.* [1954] S.C.R. 207, [1954] 3 D.L.R. 481, *A.G. Ont. v. Winner*, (1954] A.C. 541... and *Forest Indust. Flying Tankers Ltd. v. Kellough,* [1980] 4 W.W.R. 13,18 B.C.L.R. 193...
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> It is well established that provincial legislation will not be rendered inoperative merely because it may "affect" a matter which falls under federal control: *Cardinal v. A.G. of Alta.*, [1974] S.C.R. 695 ...

[55] These respondents further argued that any challenge to the constitutionality of provincial legislation pursuant to the doctrine of paramountcy can only be made once the federal government enacts legislation as anticipated, but that until such legislation is enacted, an analysis of the application of the paramountcy doctrine would be premature at best, and utter speculation at worst. The petitioners did not dispute that the provincial Crown had the power to regulate in respect of civil actions and in so doing, to incidentally affect matters of federal jurisdiction. Such power is clearly identified in ***Ordon Estate v. Grail***, [1998] 3 S.C.R. 437 [***Ordon Estate]*** at para. 81.

[56] Although the Supreme Court of Canada in ***Kitkatla*** established that a pith and substance analysis involves a consideration of the challenged provisions before a consideration of the entire legislative scheme, in this case, the provisions cannot be read in isolation. As stated by Newbury J.A. when hearing the appeal of this case at paragraph 8, a determination of the validity of ss. 1(h) and 2(1) of the ***Farm Practices Protection (Right to Farm) Act*** “necessarily involves a consideration of the other legislation, and an understanding of the entire argument made below” (2009 BCCA 481). As a result, ss. 1(h) and 2(1) must be considered in their statutory context, including the ***Farm Practices Protection (Right to Farm) Act*** and other legislation respecting aquaculture “as a whole”.

[57] The two subsections of the ***Farm Practices Protection (Right to Farm) Act*** in issue provide:

> 1(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;
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> ...
>
> 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
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> (b) the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.

[58] Section 1(h) was added to the legislation effective April 1, 1997 as a part of the overall regulatory structure of aquaculture which existed at that time, much of which I found to be *ultra vires* the provincial Crown.

[59] The context of s. 2(1) includes subsection 2(2), which provides the following:

> (2) The requirements referred to in subsection (1) are that the farm operation must
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> (a) be conducted in accordance with normal farm practices,
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> (b) be conducted on, in or over land
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> (i) that is in an agricultural land reserve,
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> (ii) on which, under the Local Government Act, farm use is allowed,
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> (iii) as permitted by a valid and subsisting licence, issued to that person under the Fisheries Act, for aquaculture, or
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> (iv) that is Crown land designated as a farming area under subsection (2.1), and
>
> (c) not be conducted in contravention of the Public Health Act, Integrated Pest Management Act, Environmental Management Act, the regulations under those Acts or any land use regulation.

[60] An analysis of the impugned subsections in the larger statutory context indicates that they are inextricably linked to the province's purported regulatory regime for aquaculture. Subsection 2(2)(b)(iii) suggests that the tort law protection offered in s. 2(1) extends only to operations who have a valid licence under the provincial ***Fisheries Act*** for aquaculture. The process for issuing and obtaining a

licence is set out in the ***Aquaculture Regulation***. In my original Reasons for Judgment I found the ***Aquaculture Regulation*** to be *ultra vires* the province.

[61] In addition, wording in subsection 2(1) itself hints that this subsection includes matters relating specifically to the regulation of aquaculture. Subsection 2(1)(a) refers to an "other disturbance resulting from the farm operation as part of a farm business". While it is difficult to imagine how odour, noise or dust might arise from an aquafarm operation conducted as part of an aquafarm business, counsel for Marine Harvest Canada Inc. pointed to some of the activities that are required by an aquafarming enterprise which occur above the surface of the water that might conceivably generate odour, noise or dust. However, counsel for Marine Harvest Canada Inc. was unable to explain how the general description of an "other disturbance" could be read so as to exclude, for example, pollution of the wild fishery from effluent of any sort entering the tidal waters from its aquafarming operations. As a result, I conclude that the inclusion of the words "other disturbance" clearly includes matters relating to the regulation of aquaculture.

[62] The petitioners argued that because the ***Aquaculture Waste Control Regulation***, passed under the ***Environmental Management Act***, S.B.C. 2003, c. 53 was struck down by me, s. 2(2)(c) of the ***Farm Practices Protection (Right to Farm) Act*** has no meaning in relation to aquaculture and thus will not operate to limit the restrictions on liability under s. 2(1). If this is correct, it may create no restriction of liability in practice, but that does not, in my view, answer the question of whether or not the attempt by the provincial Crown to restrict liability with respect to aquaculture in the statute is *ultra vires*.

[63] Subsection 2(2)(c) indicates that the impugned subsections of the ***Farm Practices Protection (Right to Farm) Act*** are more than an attempt to regulate tort law as it applies to the aquaculture industry – they are about managing many aspects of the practice of that industry.

[64] I find that the impugned subsections, when read within the larger statutory context of the ***Farm Practices Protection (Right to Farm) Act***, are inextricably

linked to the province's purported regulatory regime for aquaculture, which is directed at the identification of appropriate and allowable standards of activity in aquaculture. As a result, the pith and substance of these subsections is the protection of fisheries practices. The general regulation of the fisheries, including their management and control, are under the exclusive authority of Parliament, pursuant to s. 91(12) of the ***Constitution Act, 1867***, as explained by Chief Justice McLachlin in ***Ward v. Canada (Attorney General)***, [2002] 1 S.C.R. 569 at para. 41.

[65] I agree with the Minister of Agriculture and Lands and the Attorney General of British Columbia that this is not a case where the issue of paramountcy takes effect to render these subsections invalid, as there is no existing federal legislation regulating aquaculture. I also agree that the province can legislate on matters, *within its jurisdiction*, that may incidentally "affect" a matter of federal jurisdiction. However, this is not a case where the province is legislating on a matter within its jurisdiction. Rather than fundamentally regulating property and civil rights in the province of British Columbia, these subsections specifically target the management and control of aquaculture; they are an attempt to legislate on a matter *outside* of the province's jurisdiction. As such, these subsections are an intrusion into the "unassailable core" of a federal power (***Ordon Estate*** at para. 85).

[66] I confirm my decision that ss. 1(h) and 2(1) of the ***Farm Practices (Right to Farm) Act***, R.S.B.C. 1996, c. 131 are *ultra vires* the provincial Crown with respect to finfish and apply only to the cultivation of marine plants.

[67] I find that the statutory scheme of the Province of British Columbia was intended to regulate aquaculture, which the province considered to be within its authority prior to my Reasons for Judgment. As ss. 1(h) and 2(1) of the ***Farm Practices Protection (Right to Farm) Act*** were clearly a part of that statutory scheme of regulation, I do not consider it appropriate or justified to attempt to parse out those subsections from that Act or read down portions of those subsections in case they might apply in some way without encroaching upon an area of federal authority. That is not to say that the Province of British Columbia can never pass

legislation to address property and civil rights respecting some aspects of aquaculture, as that is not before me to decide.

[68] Resolution of the validity of these two subsections does not require a decision as to the extent and nature of the property rights in the fish in question. The Supreme Court of Canada in ***The Ship Frederick Gerring Jr. v. The Queen*** (1896), 27 S.C.R. 271 at 284, considered whether or not a vessel was "fishing" in contravention of an international treaty and concluded:

> "It is not necessary to determine at what particular point of time...did the fish become property of the catchers. I may have exclusive right of fishery, a property right to the fish of a particular stream, but whether I am or am not "fishing" does not mean and cannot depend upon any question as to my ownership."

[69] In this case, a determination of whether or not the two subsections dealt with fisheries practices did not hinge upon a determination of property rights in the fish. As a result, it is unnecessary for me to decide whether the subject fish in the aquaculture facility of Marine Harvest Canada Inc. at Watson Cove, British Columbia are private property or otherwise, and I decline to do so.

Costs

[70] The respondents, the Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia, did not seek an order for any costs as a result of their participation in the matters I have dealt with in these Supplemental Reasons for Judgment and they asked that no costs be awarded against them. While I consider that their submissions went beyond merely ensuring that the appropriate legal framework was considered by me, the application of Marine Harvest Canada Inc. was the genesis of the submissions of the Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia, and I find that they should not bear any costs in the circumstances.

[71] In my judgment on the costs of the hearing of the petition, indexed as 2009 BCSC 660, I found that despite the fact that their funding for litigation was limited,

the discretion to award costs to even successful public interest litigants is limited to cases involving matters of public importance that are highly exceptional. I concluded that full indemnity as special costs must be the exception, rather than the norm.

[72] In the result, I found that full indemnity for the petitioner's costs was not warranted, and awarded the petitioners 75% of their reasonable fees and disbursements to be paid by the respondents, the Minister of Agriculture and Lands and the Attorney General of British Columbia on behalf of the Province of British Columbia.

[73] I am not satisfied that such a resolution of the matter of costs between the petitioners and Marine Harvest Canada Inc. is appropriate. If any of these parties wish to make submissions as to costs, the petitioners may do so, in writing within two weeks of the date of these reasons, with two weeks for Marine Harvest Canada Inc. to respond to those submissions, and one week thereafter for reply, if any, by the petitioners.

"Hinkson J."