

Federal Court



Cour fédérale

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March 23, 2018

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Dear Counsel:

Re: T-430-18 *NAMGIS FIRST NATION v MINISTER OF FISHERIES, OCEANS ET AL*

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Enclosed you will find the following document:

- Order and Reasons

of The Honourable Mr. Justice Manson, rendered on March 23, 2018.

Yours truly,

Frank Fedorak  
Registry Officer

FF/mk  
Encl(s).

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Federal Court



Cour fédérale

Date: 20180323

Docket: T-430-18

Citation: 2018 FC 334

Vancouver, British Columbia, March 23, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**'NAMGIS FIRST NATION**

**Applicant**

and

**MINISTER OF FISHERIES, OCEANS AND  
THE CANADIAN COAST GUARD and  
MARINE HARVEST CANADA INC**

**Respondents**

**ORDER AND REASONS**

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## I. Introduction

[1] This is a motion pursuant to Rules 373 and 374 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*], in which the ‘Namgis First Nation (“Namgis”) seeks an interlocutory injunction against the Minister of Fisheries, Oceans and the Canadian Coast Guard (the “Minister”) and Marine Harvest Canada Inc. (“Marine Harvest”), as follows:

- As against the Minister:
  - a) an interlocutory injunction enjoining the Minister from issuing to Marine Harvest a licence under section 56 of the *Fishery (General) Regulations*, SOR/93-53 [*FGR*] authorizing the introduction, release or transfer into the marine environment of any fish (“Transfer Licence”) into open-water pens at Marine Harvest’s aquaculture facility located at Swanson Island, BC (the “Swanson Island Facility”) without first testing such fish for the Piscine orthoreovirus (“PRV”) or heart and skeletal muscle inflammation (“HSMI”); or
  - b) if any such Transfer Licence has previously been granted, an interlocutory injunction suspending the validity of the Transfer Licence; until the hearing and determination of the underlying application for judicial review;
- As against Marine Harvest:
  - a) an interlocutory injunction enjoining Marine Harvest:
    - i. from seeking, obtaining or acting upon any Transfer Licence in connection with the Swanson Island Facility; and/or

- ii. irrespective of whether a Transfer Licence has been sought or obtained, from introducing, releasing or transferring fish into the marine environment into open-water pens at the Swanson Island Facility;
- An order dispensing with the need for the Applicant to provide any undertaking as to damages.

[2] The injunction motion is part of the Applicant's broader application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 301 of the *Federal Courts Rules*, which relates to a Fisheries and Oceans Canada ("DFO") policy of not testing for PRV or HSMI in fish prior to issuing Transfer Licences (the "PRV Policy"). In its application for judicial review, the Applicant seeks:

- Declarations that:
  - the PRV Policy and any Transfer Licence issued pursuant to the PRV Policy for the Swanson Island Facility are unreasonable and/or unlawful;
  - Canada was required, but failed, to consult and accommodate the Applicant prior to adopting and implementing the PRV Policy, and prior to issuing any Transfer Licence for the Swanson Island Facility, and is required to do so in connection with any future such Transfer Licence;
  - in adopting the PRV Policy, and in issuing any Transfer Licences for the Swanson Island Facility pursuant to the PRV Policy, Canada failed to consider the role the decision could play for the Applicant in the ongoing process of reconciliation between the Applicant and Canada;
  - farmed Atlantic salmon must be tested for PRV prior to the issuance of a Transfer Licence by the Minister;
  - farmed Atlantic salmon that test positive for PRV must not be authorized for transfer;
- An order:
  - quashing the PRV Policy and any subsequent decision to issue a Transfer Licence for the Swanson Island Facility made pursuant to the PRV Policy;
  - requiring Canada to consult the Applicant in relation to the PRV Policy, and any Transfer Licence for the Swanson Island Facility;
  - directing that this Court shall retain jurisdiction to resolve issues that may arise in the course of Canada's consultation with the Applicant in connection with the PRV Policy and any Transfer Licence for the Swanson Island Facility; and
  - prohibiting the Minister from issuing any Transfer Licences for the Swanson Island Facility until such time as Canada has discharged its duty to consult and accommodate the Applicant in relation to the PRV Policy and any such Transfer Licences.

I. The Parties

A. *Namgis First Nation*

[3] The Applicant is a “band” under the *Indian Act*, RSC 1985, c I-5 and its members are “aboriginal peoples of Canada” within the meaning of section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11. Don Svanvik, the elected Chief Councillor of *Namgis*, provided an affidavit that describes *Namgis* history, culture and assertions of Aboriginal rights and title.

[4] The Applicant claims that its traditional territory includes the Nimpkish and Kokish River watersheds on northern Vancouver Island in their entirety, as well as adjacent marine areas in and around Malcolm Island, Cormorant Island, Swanson Island, Hanson Island, Foster Island and the Plumper and Pearse Island Groups (the “Asserted Territory”). It considers the Nimpkish River at the north-east end of Vancouver Island to be situated within the core of its territory and of tremendous importance to the community.

[5] The Applicant asserts Aboriginal rights and title throughout the Asserted Territory, including title to the lands, water, air, marine foreshore and seabed, as well as rights to fishing, hunting, gathering and stewardship. In particular, it asserts that Pacific salmon, including sockeye, chum, pink, chinook and coho, are an integral aspect of their oral history and traditions, way of life, economy, culture, ceremonies, food and trade.

[6] In 1998, the Applicant began negotiations with Canada and the Province of BC in the BC Treaty Commission Process. As part of that process, it submitted maps outlining the Asserted Territory as well as broader resource harvesting areas. The process is at Stage 4 and the draft Agreement in Principle identifies issues the parties have agreed to negotiate, including: fisheries and marine resources; water and water resources; title, jurisdiction, selection and access; governance; financial and fiscal arrangements; and environment.

[7] As well, in August 2004, the Applicant and Canada entered into a Comprehensive Fisheries Agreement under which Canada is providing the Applicant with funding to participate in the management of the fisheries in the Asserted Territory. In August 2015, the Applicant entered into the Aboriginal Fund for Species at Risk Contribution Agreement, in which Canada committed to include the Applicant in the protection and recovery of aquatic species at risk.

[8] As part of its stewardship efforts to protect and preserve the wild salmon populations in its Asserted Territory, and in response to significant declines in those populations, the Applicant has taken steps towards conservation and restoration, including:

- a voluntary moratorium on all fishing for all species of salmon in the Nimpkish River until such time as the populations recover to sustainable harvesting levels;
- establishment of a hatchery on the Nimpkish River for chum, sockeye, coho and chinook; and
- establishment of a land-based, closed-containment aquaculture facility as a pilot project to demonstrate that land-based fish farming using recirculating aquaculture system technology is economically viable and ecologically sustainable.

[9] Chief Svanvik stated that wild salmon populations in the Asserted Territory have declined significantly. In particular, since the 1950s the Applicant has compiled its own data about the populations of salmon returning to the Nimpkish River. That river was once among the

top salmon producing rivers in BC, but in recent times salmon populations have become severely depleted. The Applicant now believes that all species of Nimpkish River salmon are at critically low levels that cannot sustain additional stressors.

B. *Marine Harvest*

[10] Marine Harvest is a large, multinational corporation engaged in the business of fish farming. It is one of four main salmon farming companies operating in BC. As of November 2017, it held 56 of the 119 licences issued in BC that authorize the operation of an aquaculture facility (“Aquaculture Licence”). All of its facilities are licenced for Atlantic salmon.

[11] Marine Harvest owns and operates the Swanson Island Facility pursuant to an Aquaculture Licence. That licence was issued on July 10, 2016, and expires on June 30, 2022.

[12] The Swanson Island Facility comprises open-net pens located within the marine environment, approximately 19 km from the mouth of the Nimpkish River and 16 km from the Applicant’s main community. It has been stocked with farmed salmon since the early 1990s. Marine Harvest (and its predecessor company) has operated the facility ever since, keeping it stocked with fish with the exception of fallow periods of about two to six months between harvesting and restocking.

[13] The Swanson Island Facility is currently empty of fish, the last stock having been harvested in late 2017. On February 27, 2018, Marine Harvest applied for a Transfer Licence for

up to 1,000,000 Atlantic salmon smolts from its hatchery at Ocean Falls, BC, to the Swanson Island Facility.

C. *The Minister*

[14] The Minister has discretion to issue Aquaculture Licences pursuant to subsection 7(1) of the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*]:

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.

[15] An Aquaculture Licence may cover a period of several years, during which the aquaculture facility's stock will have to be replaced. A Transfer License must be obtained before this can occur, pursuant to subsection 55(1) of the *FGR*:

55 (1) Subject to subsection (2), no person shall, unless authorized to do so under a licence,

- (a) release live fish into any fish habitat; or
- (b) transfer any live fish to any fish rearing facility.

[16] Section 56 of the *FGR* establishes constraints on the Minister's discretion in respect of Transfer Licenses and requires certain pre-conditions to be met:

56 The Minister may 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.

II. *Morton v Canada (Fisheries and Oceans)*

[17] In *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 [*Morton*], this Court reviewed the Minister's issuance of an Aquaculture Licence to Marine Harvest for the Swanson Island Facility. Section 3.1 of that licence permitted the transfer of fish to the facility in certain circumstances, including where:

**3.1 [...]**

(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 [of eight specified diseases of concern]; 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.

[18] This Court made several preliminary observations. It noted that there was a body of credible scientific evidence establishing a causal relationship between PRV and HSMI and,

although there was a healthy debate between scientists on the issue, the Minister was not erring on the side of caution (*Morton* at paras 45 and 46). As well, subsection 56(b) of the *FGR* embodies the precautionary principle; it is designed to anticipate and prevent harm even in the absence of scientific certainty that such harm will occur (*Morton* at paras 97 and 99). Finally, the Minister's duty under subsection 56(b) of the *FGR* supports the conservation of the resource, which is the Minister's primary obligation under the *Fisheries Act* (*Morton* at para 56).

[19] This Court then found that conditions 3.1(b)(i) and (iii) were reasonably consistent with subsection 56(b) of the *FGR*. Condition 3.1(b)(i) established clear, objective criteria governing transfers that are demonstrably linked to subsection 56(b) of the *FGR* (*Morton* at para 61). Condition 3.1(b)(iii) precluded transfers where stock was known to have had a disease that could severely impact fisheries (*Morton* at para 69).

[20] However, conditions 3.1(b)(ii) and (iv) were inconsistent with subsection 56(b) of the *FGR*. Condition 3.1(b)(ii) maintained a lower standard by requiring fish to show no signs of clinical disease requiring treatment, rather than not having any disease or disease agent (*Morton* at para 63). Condition 3.1(b)(iv) allowed for a transfer of a diseased fish if the facility veterinarian considered the transfer to be "low risk", which circumvented subsection 56(b) of the *FGR* and provided for transfers through less rigorous conditions than required by law (*Morton* at para 71).

[21] Furthermore, the Minister improperly sub-delegated to the licensee the ultimate determination as to whether a transfer was permissible. Although a delegate may grant some part

of its authority to another, unlimited discretion cannot be conferred on a sub-delegate and supervisory control over the sub-delegate should be retained (*Morton* at para 83). Condition 3.1(b)(iv) did not provide any objective standards or criteria with respect to deeming a transfer as “low risk” and it allowed for a transfer of diseased fish without the knowledge, approval or supervision of the Minister (*Morton* at para 88).

[22] Finally, conditions 3.1(b)(ii) and (iv) were inconsistent with subsection 56(b) of the *FGR* in light of the precautionary principle. The phrase “may be harmful” does not require scientific certainty or that harm is a likely consequence of a transfer, and the phrase “any disease or disease agent” should not be interpreted as requiring scientific consensus that a disease agent (e.g., PRV) is the cause of the disease (e.g., HSMI). (*Morton* at para 97).

[23] Accordingly, this Court held that conditions 3.1(b)(ii) and (iv) were of no force and effect and were severed from the Aquaculture License issued to Marine Harvest (*Morton* at para 101).

[24] In June 2016, the Respondents filed a Notice of Appeal of this Court’s decision in *Morton*, but the appeal was discontinued in January 2017.

### III. The PRV Policy

[25] Andrew Thomson, Regional Director of the DFO Fisheries Management Branch, provided an affidavit outlining the DFO’s aquaculture management policies, and in particular, its current policy of not requiring testing for PRV or HSMI prior to issuing a Transfer Licence.

[26] Following this Court's decision in *Morton*, the Minister issued amended Aquaculture Licences stipulating that if the licence holder wants to transfer fish into their facility, they must now apply to DFO's Introductions and Transfers Committee ("ITC") for a Transfer Licence. The ITC includes representatives from the DFO's Science Branch and Aquaculture Management Division. It assesses the potential genetic, ecologic and fish health impacts of proposed transfers to fish and fish habitat.

[27] As part of this process, Aquaculture Licence holders are required to submit an Introduction and Transfer application as well as a Fish Health Attestation Form. The attestation form is executed by the source facility's veterinarian, fish health staff, or facility manager, attesting that, in their professional judgement:

- mortalities, excluding eggs, in any stock reared at the source facility have not exceeded 1% per day due to any infectious agents, for any four consecutive day period during the rearing period;
- the stock to be moved from the source facility shows no signs of clinical disease, with the exception of saprolegniasis; and
- no stock at the source facility is known to have any one of eight specified diseases of concern.

[28] As well, the DFO conducts hatchery inspections every three months to coincide with hatchery-to-marine Transfer Licence applications. If the DFO suspects that a Canadian Food Inspection Agency ("CFIA") reportable disease is present, the CFIA will be notified and further testing will be conducted. The DFO will not authorize the transfer until CFIA requirements have been implemented, and additional conditions may be added to the Transfer Licence. If the DFO has concerns related to a non-CFIA reportable disease, DFO veterinarians will assess whether mitigation is in place to address the disease of concern, and will recommend movement restrictions, the addition of conditions to the Transfer Licence or a denial of the transfer

application. DFO veterinarians will also consider the overall state of fish health within the Fish Health Surveillance Zone of the proposed transfer.

[29] After its assessment, ITC committee members provide its response to the application. If it recommends that the application should be allowed, or should be allowed with additional conditions, the DFO Regional Manager, Aquaculture Programs, considers the recommendation and decides whether to issue a Transfer Licence.

[30] The DFO does not require Aquaculture Licence holders to test for PRV or HSMI prior to being issued a Transfer Licence (the "PRV Policy").

[31] In January 2017, the DFO's Regional Director General – Pacific signed a memorandum recommending that DFO maintain its policy of not testing for PRV and HSMI prior to transfers of fish because PRV and HSMI are not of serious concern in BC (the "2017 Memorandum"). Materials attached to that memorandum included, among other things, a summary of the Minister's interpretation of section 56 of the *FGR* (the "Minister's Interpretation"), as well as a Canadian Science Advisory Secretariat Science Response (the "CSAS Science Response").

[32] The Minister's Interpretation noted that the phrase "protection and conservation of fish" in subsection 56(b) of the *FGR* was an important qualifier, because all disease agents may be harmful to some degree but not all disease agents may be so harmful as to threaten the protection and conservation of fish. In other words, subsection 56(b) of the *FGR* is aimed at a potential harm that is macro in nature: where the genetic diversity, species or ecosystem of a stock or

conservation unit may be harmed such that they cannot sustain biodiversity and the continuance of evolutionary and natural production processes.

[33] The CSAS Science Response, dated December 2015, assessed the potential impacts of PRV on the west coast of North America. It included the input of 16 contributors and three external reviewers, and cited 38 scientific references. It concluded that there was a low likelihood that the presence of PRV in any life stage of farmed Atlantic and Pacific salmon would have a significant impact on wild Pacific salmon populations.

[34] As well, the CSAS Science Response provided background information on HSMI. It was among the top four most common salmonid aquaculture diseases in Norway, and the number of outbreaks had more than doubled between 2004 and 2012. Clinical signs usually occurred 5-9 months after sea-transfer and included abnormal swimming behaviour, anorexia and up to 20% mortality. Diagnosis was confirmed by microscopic observation of lesions in cardiac and skeletal muscle. It is one of several diseases that affect the heart, and in moderate to severe cases the skeletal muscle, of Atlantic salmon.

[35] On March 9, 2018, the PRV Policy was reaffirmed by the DFO Director of Aquaculture Management (the "March 2018 Decision"). Materials relied upon to make that decision included, among other things, the 2017 Memorandum and a Rapid Science Response prepared by DFO Science (the "Rapid Science Response").

[36] The Rapid Science Response was completed on March 5, 2018. These reports are prepared when there is not enough time to complete a CSAS Science Response. The purpose of this Rapid Science Response was to ensure that the DFO's testing and fish management approach were informed by the latest scientific evidence.

[37] The Rapid Science Response found that recently published literature altered the scientific perspective on the role of PRV in the development disease, in four ways:

- evidence had been provided that PRV infection can directly cause HSMI in Atlantic salmon, but it remained unclear why in many instances infections do not lead to disease;
- the occurrence of HSMI-like lesions in BC-farmed Atlantic had now been formally linked to HSMI. Furthermore, the infection of farmed fish with PRV in this instance was via a marine reservoir since the fish were free of PRV upon entry into previously fallow pens. However, no elevation in mortalities was noted despite the occurrence of HSMI;
- PRV had been found in a broad host range and over enormous geographical expanses. It predominantly appears to infect salmonid hosts, but different species of salmon had different susceptibility. It had been detected in 20% of stocks tested and the prevalence within each stock ranged from 2-73%. Further research was required to demonstrate an association between salmon farming and the prevalence of infection in wild salmon; and
- recent findings supported the hypothesis that HSMI results from the recognition of virus by infected cells and the destruction of those cells by T-cells.

[38] The Rapid Science Response concluded that the sole detection of PRV remains insufficient as a disease determinant - high loads of PRV are commonly detected in apparently healthy fish without clinical disease. Furthermore, the recent studies corroborated and strengthened previous findings:

- in both Norway and BC, Atlantic salmon have acquired PRV infections through exposure to a marine source of virus;
- PRV is endemic in several species of Pacific salmon over the geographic range of Washington to Alaska;
- in BC, there have not been elevated mortality or production concerns associated with the sporadic occurrence of lesions diagnostic of HSMI in farmed Atlantic salmon;
- HSMI has only been described in farmed fish, globally; and
- PRV may contribute to the rare disease occurrence of Jaundice Syndrome in BC-farmed chinook but in most circumstances has low to no virulence with Pacific salmon species.

[39] As noted above, on March 9, 2018, the DFO Director of Aquaculture Management reviewed all of this information and confirmed that the DFO would continue its policy of not testing for PRV and HSMI prior to issuing Transfer Licences.

#### IV. Consultation

##### A. *The DFO*

[40] The DFO's current policy is to not consult with Aboriginal peoples with respect to Transfer Licences. In his affidavit, Mr. Thomson stated:

The Department does not currently consult or provide public notification on introduction and transfer licences as consultation with First Nations takes place around aquaculture licensing decisions. Aquaculture licences are issued under the assumption that fish will be transferred to and from the site as part of routine operations.

[41] This policy exists despite representatives from the Province of BC having acknowledged that the Applicant has a strong claim in respect of Aboriginal fishing rights. A letter from the BC Ministry of Natural Resources to the Applicant, dated February 4, 2011, regarding replacement of land tenures for the purpose of finfish aquaculture, stated:

The Ministry is proceeding on the basis of a preliminary assessment of the 'Namgis First Nation having a strong claim in respect to aboriginal fishing rights within its asserted traditional territory and a lower prima facie claim in respect to aboriginal title to the subject area of the tenures, these being submerged lands that are subject to overlapping First Nations' claims. In arriving at this preliminary assessment we have taken into consideration information the 'Namgis First Nation has provided as well as information reasonably available to us.



[42] Canada has received several letters from the Applicant between September 2017 and March 2018 regarding their opposition to net pen salmon aquaculture in the Asserted Territory, concerns related to the lack of consultation on ITC applications, and on concerns related to the PRV Policy. According to Mr. Thomson, the DFO has not formally responded to these letters and has told the Applicant that the DFO does not consult on ITC applications.

[43] On February 28, 2018, the DFO informed the Applicant that it had received an application to restock the Swanson Island Facility. Additional information related to the application process was provided on March 1, 2018, and March 9, 2018. The ITC coordinator also discussed the matter by phone with Chief Svanvik on March 12, 2018, explaining that the application was under review and although the DFO was reviewing its consultation policy, there were currently no planned changes. No information was provided with respect to PRV.

B. *Marine Harvest*

[44] Since May 2016, Marine Harvest has communicated with the Applicant in respect to the Swanson Island Facility, requesting meetings to share data and discuss production plans, stewardship, facility observations and collaborative research. The Applicant has previously told Marine Harvest that it is not interested in meeting unless it is to discuss the removal of open net fish farms. As well, the Applicant has noted that it is severely understaffed and unable to participate in collaborative studies or facility observations.

[45] On December 21, 2017, representatives from Marine Harvest informed the Applicant that Marine Harvest planned to restock the Swanson Island Facility in March or April of 2018. On

February 7, 2018, the Applicant received a letter from Marine Harvest advising that it was about to begin preparing the facility for the transfer of smolts. This letter did not provide materials the Applicant had requested, including:

- the Transfer Licence;
- the application for the Transfer Licence;
- any materials used in support of such an application;
- the results of any tests performed on the fish to be transferred regarding diseases or disease agents; and
- any risk evaluations used to determine if the fish transferred would have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.

[46] On February 13, 2018, the Applicant wrote to Marine Harvest re-iterating its objection to a transfer of smolts into the Swanson Island Facility and its concerns about the irreparable harm such a transfer would cause. The Applicant requested the following information:

- the date Marine Harvest intended to (or did) apply for a Transfer Licence;
- the application package that would be (or had been) submitted to the DFO; and
- the date Marine Harvest intended to begin transferring fish.

[47] On February 19, 2018, Marine Harvest replied and stated that the fish would be ready for transfer to the Swanson Island Facility during the second half of March. It also advised the Applicant that the “most recent fish health screenings of the smolts destined for the site have been confirmed healthy, and free of tested pathogens, including PRV.” No further information was provided regarding this testing.

[48] On February 20, 2018, the Applicant replied, objecting to the proposed transfer. The Applicant also requested details of the “recent fish health screening”. No reply was received. Marine Harvest now claims that it did not provide this information because it did not have a data sharing agreement with the Applicant such that the information would be kept confidential.

V. Expert Evidence

[49] Due to the urgent nature of this motion, cross-examinations were not conducted on any of the affidavits filed, including those summarized below.

A. *Applicant*

(1) Dr. Richard Routledge

[50] Dr. Routledge is a Professor Emeritus of the Department of Statistics and Actuarial Science, and Associate Member of the Department of Biological Sciences, at Simon Fraser University. He Holds a PhD in statistical ecology from Dalhousie University, a MSc in statistics from the University of Alberta and a BSc in mathematics from Queen's University. For the last 26 years, his work and research has focused on ecological statistics and Pacific salmon biology, including assessing the risks pathogens pose to biodiversity, fisheries and aquaculture operations in BC.

[51] Dr. Routledge provided an affidavit in which he concluded that PRV would likely be transferred from farmed Atlantic salmon in the Swanson Island Facility, if it is restocked, to both wild Pacific salmon as well as Pacific salmon that are released from the Applicant's hatchery.

[52] He noted that Marine Harvest has admitted that all but one of its hatcheries is infected with PRV. As well, a fish pathologist with the BC Ministry of Agriculture's Animal Health Centre has admitted that approximately 80% of farmed Atlantic salmon in BC are infected with

PRV. Moreover, he accepted the conclusions of Dr. Kibenge, described below, and that conditions leading to the rapid spread of PRV and more virulent strains of PRV would be present in the Swanson Island Facility when it is stocked.

[53] Dr. Routledge stated that the scientific literature establishes that proximity to open-net pen aquaculture facilities increases rates of PRV infection in wild Pacific salmon. One peer-reviewed article, of which he was a co-author, found that 95% of the farmed Atlantic salmon tested had PRV, and that detection rates of PRV in wild Pacific salmon in regions in close proximity to aquaculture facilities (in the passages between Vancouver Island and the BC mainland) were much higher (37-45%) than in wild Pacific salmon from regions that are further away from aquaculture facilities (5%).

[54] He noted that the following sites that are within 21 km of the Swanson Island Facility:

- the mouth of the Nimpkish River, which is the largest natural salmon spawning watershed in the Asserted Territory from which wild and hatchery juvenile Pacific salmon migrate out to sea;
- Alder Bay, which is the proposed release site for Pacific salmon raised in the Applicant's hatchery;
- the Applicant's salmon fishing sites; and
- sites known to be used by wild Pacific salmon from the Nimpkish, Fraser and Sakinaw watersheds.

[55] Dr. Routledge concluded that the conditions at the Swanson Island Facility, if it is stocked with salmon without first testing for PRV, would likely result in:

- the introduction of PRV-infected smolts into the open-net pens at the Swanson Island Facility;
- PRV spreading rapidly within the farmed salmon population in the Swanson Island Facility;
- the Swanson Island Facility shedding upwards of  $6.6 \times 10^{16}$  particles of PRV per hour;

- the PRV shed by the Swanson Island Facility travelling up to 30 km in the marine environment; and
- PRV being transferred from the farmed Atlantic salmon in the Swanson Island Facility to wild Pacific salmon as well as Pacific salmon the Applicant releases from its hatchery.

(2) Dr. Fred Kibenge

[56] Dr. Kibenge is a Professor of Virology, and the Chairman of the Department of Pathology and Microbiology, at the University of PEI. He holds a PhD in Animal Virology from Murdoch University in Australia, and a Bachelor of Veterinary Medicine from Makerere University in Uganda. He specializes in veterinary virology, has completed three post-doctoral fellowships in that field, has published extensively on the detection of fish viruses as well as the role those viruses play in aquaculture, and appeared as an expert witness before the Commission of Inquiry into the Decline of Salmon in the Fraser River (the "Cohen Commission").

[57] Dr. Kibenge was asked to assess the impacts of PRV to wild and hatchery-grown Pacific salmon caused by the restocking of the Swanson Island Facility without first testing those fish for PRV. He summarized his conclusions as follows:

- PRV occurs in farmed Atlantic salmon and wild Pacific salmon in BC. HSMI occurs in farmed Atlantic salmon, and it is reasonable to expect that PRV will cause HSMI or HSMI-like symptoms in wild Pacific salmon in BC;
- PRV can be transferred from farmed Atlantic salmon to wild and hatchery-raised Pacific salmon, and farmed salmon in open-net pens are the most significant source of PRV in the marine environment;
- the Swanson Island Facility will be a significant source of PRV that is near to key habitats for wild Pacific salmon and salmon released from the Applicant's hatchery;
- PRV causes adverse health effects in farmed Atlantic salmon, wild Pacific salmon and Pacific salmon released from hatcheries. For example, PRV is associated with adverse health effects in chinook salmon, such as jaundice, and is expected to cause similar adverse health effects in other species of wild Pacific salmon, but it is difficult to confirm this expectation because it is difficult to diagnose disease and adverse health effects in wild Pacific salmon – dead fish simply disappear and diseased fish are removed from the population by predators;

- stocking the Swanson Island Facility with farmed Atlantic salmon smolts will result in PRV being transferred from the smolts to wild Pacific salmon in the Asserted Territory and cause irreversible harm to individual fish; and
- the auditing and monitoring program of aquaculture facilities in BC conducted by the Fish Health Audit and Surveillance Program is likely inadequate to detect PRV and HSML.

[58] Dr. Kibenge stated that there is no doubt that HSML occurs in farmed Atlantic salmon in BC aquaculture facilities. As well, DFO's Fish Audit and Surveillance Program ("FASP") had previously failed to diagnose HSML at a facility because it used different diagnostic criteria than is described in the scientific literature. In fact, the FASP routinely misdiagnoses symptoms of HSML.

[59] He explained that PRV causes HSML in Atlantic salmon, but the degree to which HSML occurs (its severity and prevalence), or whether it occurs in wild Pacific salmon, is not clearly known. The latter is difficult to determine due to difficulties associated with diagnosing disease in wild fish populations. However, it is reasonable to expect that PRV infection in wild Pacific salmon can result in the same or similar diseases as seen in Atlantic salmon.

[60] Dr. Kibenge opined that stocking the Swanson Island Facility without first testing the fish for PRV would likely result in PRV being transferred from the farmed Atlantic salmon to wild Pacific salmon. PRV-infected fish shed virus into the marine environment at high rates. PRV is expected to remain infectious for a long time in the water column, accumulate in open-net pens and be transported by currents. In this way, aquaculture facilities amplify and spread disease and are likely amplifying the spread of PRV to wild Pacific salmon. He expects farmed salmon in open-net pens to be the most significant source of PRV in the marine environment in BC. As

well, he expects that PRV can travel up to 30 km in the water column, meaning that a large portion of the Asserted Territory and associated salmon populations are at risk of PRV spreading from the Swanson Island Facility.

[61] He explained that PRV causes adverse health effects in farmed Atlantic salmon and is likely to cause similar conditions in wild Pacific salmon:

- PRV targets the red blood cells of Atlantic salmon. The scientific community expects that it targets the same cells in Pacific salmon and this has been confirmed for coho;
- HSMI has been found to cause up to 20% mortality and 100% morbidity in farmed Atlantic salmon;
- Marine Harvest has consistently listed HSMI as one of top four causes of infectious mortality;
- PRV has been proven to cause or has been associated with anorexia, lethargy and abnormal swimming behaviour in salmon;
- the net effect of PRV/HSMI is that it damages the heart and reduces the delivery of oxygen to cells. As a result, PRV/HSMI infected fish have less athletic ability;
- PRV is also associated with jaundice, lethargy, poor growth, block spots, HSMI-like disease and other clinical conditions;
- stressful events induce adverse health effects associated with PRV. The DFO has concluded that sea lice make salmonids more susceptible to infection, and sea lice are a major problem in the Asserted Territory; and
- adverse health effects associated with PRV reduce ability to escape predation and spawn.

[62] Finally, Dr. Kibenge opined that FASP is inadequate to detect and prevent the spread of PRV and HSMI to populations of wild Pacific salmon. It has previously failed to detect HSMI, and a report by 11 experts, five of whom were DFO scientists at the time, expressly said that FASP was inadequate because it employs limited sampling and uses different diagnostic criteria than is established in the scientific literature. It has likely underreported the occurrence of HSMI in BC aquaculture facilities. Indeed, the DFO's criteria for "disease outbreaks" of HSMI contradict that of the World Organization of Animal Health. Undetected outbreaks increase the risk of the spread of HSMI and PRV.

[63] He concluded by stating that not testing for PRV before transferring fish into the marine environment will substantially increase the risk that wild fish will be infected with PRV and that wild Pacific salmon will incur the negative health consequences associated with PRV.

[64] In his reply affidavit of March 19, 2018, Dr. Kibenge challenged the Marine Harvest test results for PRV. While I allowed this evidence to be considered, I gave it limited weight in reaching my decision.

(3) Dr. Martin Krkosek

[65] Dr. Krkosek is an Assistant Professor and Canada Research Chair of Ecology and Evolutionary Biology in Population Ecology at the Department of Ecology and Evolutionary Biology at the University of Toronto. He is also an advisor to the Commissioner of the Environment and Sustainable Development in the Office of the Auditor General of Canada for its assessment of salmon aquaculture. Dr. Krkosek has a PhD in Biological Sciences from the University of Alberta and a BSc in Biology and Mathematics from the University of Victoria. He has been working in the field of population ecology of infectious diseases and marine fishes since 2003, including conducting fieldwork on wild Pacific salmon in the Asserted Territory as well as publishing articles on wild Pacific salmon populations and how they may be affected by marine aquaculture operations.

[66] Dr. Krkosek assessed the potential impact of not testing for PRV before restocking the Swanson Island Facility on 69 populations of pink, chum, sockeye, chinook and coho that spawn



in or migrate through the Asserted Territory (the "Assessed Populations"). He concluded that:

- the health and long-term viability of conservation units and populations of wild Pacific salmon that may use the Asserted Territory has been significantly depleted:
  - 41 distinct salmon populations or conservation units of species of the Assessed Populations are in a poor or imperilled condition as determined by the Committee for the Status of Endangered Wildlife in Canada ("COSEWIC") (17 populations), DFO (21 populations), or by him (4 populations) (the "Vulnerable Populations");
  - many of the Assessed Populations historically supported fisheries of high significance for commercial fishers and First Nations, but those fisheries are now closed or restricted;
- as a result of the low abundance and productivity of the Vulnerable Populations, there is little capacity for those populations to persist under currently unfavourable environmental and biological conditions, let alone to absorb new stressors;
- the restocking of the Swanson Island aquaculture facility with PRV-infected Atlantic salmon will result in the most important mechanism, or risk factor, by which an infectious disease can cause the extirpation of endangered populations - a reservoir host population (farmed salmon) that maintains a virus population from which the virus can spread into an imperilled wild host population (depleted wild Pacific salmon);
- the resulting spread of PRV to the Vulnerable Populations is very likely to cause the following serious impacts:
  - depleted health, survival, and reproductive success of individuals in the Vulnerable Populations, adding to existing sources of mortality or reproductive failure affecting these populations;
  - increased likelihood that Vulnerable Populations suffer extirpation owing to the additional mortality and/or reproductive failures caused by PRV infections;
  - declines in population size of genetically, behaviourally, and physiologically unique conservation units;
  - genetic diversity lost due to population decline or extirpation that is irreversible on the time scale of hundreds of years and may not be recoverable at all;
  - Vulnerable Populations already at risk of extirpation and slow, or no recovery, will have elevated risk of becoming locally extirpated; and
  - loss of genetic diversity owing to the loss or decline of a conservation unit will reduce standing biodiversity and therefore reduce the capacity for adaptation to other significant stressors, such as climate change, making populations more vulnerable to extirpation; and
  - the loss of crucial food resources for Northern Resident Killer Whales, which are listed as threatened, and Southern Resident Killer Whales, which are listed as endangered, under the *Species at Risk Act*, SC 2002, c 29.

[67] Dr. Krkosek explained that populations and conservation units of all five of the major species of Pacific salmon that occur in the Asserted Territory are at risk or in poor condition. This includes juvenile sockeye originating from the Nipkish, Fraser and Sakinaw watersheds that

are categorized as “endangered” or of “special concern” by COSEWIC or as “stocks of concern” by the DFO. Other populations of salmon that use the Asserted Territory include chinook from the Fraser River that are listed as “threatened” by COSEWIC and amber or amber/green by DFO, as well as chum and pink salmon that once had historically productive populations but are now subject to fishery closures and restrictions.

[68] Eight of the Vulnerable Populations are local to the Asserted Territory, meaning that the watershed they originate from is within or in close proximity to the Asserted Territory. In particular, the DFO has identified as “stocks of concern” two sockeye populations local to the Asserted Territory and has frequently applied restrictions or closures of those commercial fisheries, or the Aboriginal food, social and ceremonial fisheries, due to low abundance. As well, the Nimpkish River chum salmon population has collapsed relative to historical levels, and the DFO has imposed restrictions to protect and rebuild that population.

[69] Dr. Krkosek concluded that it is very likely that stocking the Swanson Island Facility with PRV-infected salmon will cause the following irreversible impacts to the health of individuals and the Vulnerable Populations:

- individuals lost due to PRV infection cannot be replaced;
- genetic diversity lost due to population decline or extirpation will be slow to recover if it recovers at all; and
- populations already at risk of extirpation and slow, or no recovery, will have elevated risk of becoming locally extirpated.

B. *Marine Harvest*

(1) Diane Morrison

[70] Diane Morrison is the Director of Fish Health and Food Safety for Marine Harvest. She has a BSc from the University of Guelph and a Doctor of Veterinary Medicine from the Ontario Veterinary College at the University of Guelph. She is licensed to practice veterinary medicine in BC.

[71] Ms. Morrison provided an affidavit outlining Marine Harvest's screening of fish for health concerns. The company has Standard Operating Procedures ("SOPs") for different types of sampling and testing, including for PRV. The SOP for testing for PRV was developed in collaboration with the BC Animal Health Centre and has been in place since 2013 when the litigation in Morton began. Since then, Marine Harvest has voluntarily monitored for PRV at its production facilities to increase knowledge of its occurrence, prevalence and significance.

[72] She explained that for PRV testing, fish are sampled one at a time. All tools are sterilized before collecting heart samples, which are placed into individually labelled whirlpaks, frozen and then sent to the BC Centre for Aquatic Health Sciences ("CAHS") for analysis. CAHS follows International Organization for Standardization ("ISO") and Good Laboratory Practice ("GLP") guidelines, and has CFIA Level II accreditation and US Fish and Wildlife Service ("USFWS") Title 50 accreditation. They use a Polymerase Chain Reaction ("PCR") based method to test for PRV.



the Swanson Island Facility is not available, all of the smolts will have to be stocked at the other prepared site. Such a high density of stocking goes against good aquaculture practices and will reduce growth and potentially increase mortality.

[77] If all 1.95 million smolts are stocked at the other facility, Mr. Erenst estimated a loss in production in the range of \$1.85 million. This is based on an estimated reduction in growth by 10-20% and an estimated increase in mortality by 5%, resulting in a loss of 284,000 kg of production at \$6.50 per kg. As well, if an injunction is granted, Marine Harvest would lose the capacity of the Swanson Island Facility.

[78] Furthermore, he stated that Marine Harvest has incurred approximately \$250,000 in costs to date to prepare the Swanson Island Facility for receipt of the smolts. It would cost an additional \$200,000 to remove the equipment if the site is not stocked.

#### VI. Preliminary Issues

[79] At the start of the hearing, the Applicant sought to introduce affidavits of Chief Svanvik and Dr. Kibenge in reply to the evidence filed by the Respondents on March 18, 2018. After hearing submissions by counsel on the admissibility of that evidence, I admitted the evidence of Dr. Kibenge in reply and denied the admissibility of Chief Svanvik's affidavit as not being proper reply evidence.

## VII. Issues

[80] The following issues arise for decision:

- A. Has the Applicant established a serious question to be tried?
- B. Has the Applicant established that it would suffer irreparable harm if the application is refused?
- C. Does the balance of convenience favour the granting of an injunction?
- D. If an injunction is to be granted, should the Applicant give an undertaking as to damages?

## VIII. Analysis

[81] The parties agree that the test for interlocutory relief was set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 [*RJR-MacDonald*] at 347-349, and comprises three elements:

- a) whether there is a serious question to be tried;
- b) whether the Applicant will suffer irreparable harm if the relief is refused; and
- c) whether the balance of convenience favours granting the relief sought.

[82] The test is conjunctive and all three criteria must be satisfied to obtain interlocutory relief. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25).

[83] Furthermore, Rule 373(2) of the *Federal Courts Rules* provides that unless the Court orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting of the injunction.

A. *Serious question to be tried*

[84] The parties all agree that there are serious issues to be tried. Those issues generally relate to the Minister's obligation to regulate fish transfers and duty to consult and accommodate the Applicant.

B. *Irreparable harm*

[85] As a preliminary objection, the Minister argues that this motion is an attempt to circumvent the underlying judicial review in this matter, by challenging the PRV Policy and the DFO's analysis of the science on which that policy is based, as well as by challenging the Minister's interpretation of subsection 56(b) of the *FGR*. Moreover, the Applicant's argument that there has not been adequate consultation is also an attempt to have the Court reach a final decision on an issue that should be left for the judicial review judge to decide based on a complete record.

[86] The Minister also takes the position that the expert evidence relied upon by the Applicant in this motion for interlocutory relief is in reality an attempt to rely upon extrinsic evidence in a judicial review application, and therefore that evidence is inadmissible and should be disregarded by the Court. I disagree.

[87] To the extent the Applicant seeks a determination of the reasonableness of the PRV Policy or decision to not consult with the Applicant, I will not and cannot decide those issues on this motion; it is for the Court in the underlying judicial review to decide.

[88] What I can and will decide is whether the evidence before me supports a finding of irreparable harm and a balance of convenience in favour of either the Applicant or the Respondents, such that an interlocutory injunction to prevent transfer of the impugned fish to the Swanson Island Facility is either granted or denied. That interlocutory relief is neither final nor usurping the role of the Court in determining the issues before it in the judicial review application.

[89] "Irreparable" refers to the nature of the harm suffered rather than its magnitude; it is harm that either cannot be quantified in monetary terms or cannot be cured (*RJR-MacDonald* at 341). The Applicant must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for interlocutory relief is denied (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 [*US Steel*] at para 7). It is not sufficient to demonstrate that irreparable harm is likely to be suffered, nor should the alleged harm be based on mere assertions (*US Steel* at para 7).

[90] However, Canadian appellate courts have also held that "clear proof of irreparable harm is not required" and have cautioned against requiring claimants to prove to a high degree of certainty that irreparable harm will conclusively result:

The purpose sought to be achieved by giving a judge the discretion to grant interlocutory relief will be "stultified," to use Lord



Diplock's term, if he or she could consider in the balance of convenience only such irreparable harm as is certain or highly likely to occur.

*Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017  
BCCA 395 at para 59.

[91] In considering the issue of irreparable harm, the Respondents argue:

- i. The Court should not consider the question of whether the Minister is acting consistent with the *Morton* decision, or whether the Minister erred in deciding to adopt the PRV Policy. I agree;
- ii. The Minister adopted the PRV Policy based on evaluation of available relevant science in January 2017, and again in March 2018, and found that PRV is not a disease agent that may be harmful to the conservation and protection of fish;
- iii. No irreparable harm has been established, given that Marine Harvest conducted tests on three samples of the impugned fish population and no PRV was detected;
- iv. Those tests were conducted by a qualified veterinarian and an independent, certified laboratory; and
- v. It is premature to determine that a lack of consultation can establish irreparable harm.

[92] However, the evidence before the Court establishes the following:

- i. The approach taken by the DFO in managing the transfer of Atlantic salmon smolts to aquaculture facilities involves no supervisory control or objective criteria with respect to testing for PRV or HSMI in the fish being transferred;
- ii. The wild salmon stocks in the Asserted Territory and wild salmon stocks migrating through that territory are at significant risk with severely declining stocks;
- iii. The salmon fishery is of fundamental importance to the asserted Aboriginal rights of the Applicant, yet the Minister has refused to consult with respect to the PRV Policy, Transfer Licences and the potential risk to wild salmon populations and the stewardship of the salmon fishery in the Asserted Territory;
- iv. The testing by Marine Harvest on three occasions of the impugned Atlantic salmon stock destined for Swanson Island is highly suspect, given that the sample size is extremely small and the DFO didn't know the test results or protocol used;
- v. Research has shown that PRV is directly linked to HSMI;
- vi. HSMI has been found to cause significant mortality and morbidity in farmed Atlantic salmon in Norway, and has recently been diagnosed in farmed Atlantic salmon in BC; and
- vii. The Applicant's experts concluded that PRV can be transferred from farmed Atlantic salmon to wild Pacific salmon, will likely cause HSMI in wild Pacific salmon, and that farmed salmon in open-net pens are the most significant source of PRV in the marine environment.







[104] However, the Court must consider what constitutes a just and equitable result in the context of each case. Here, the facts concerning the *status quo*, expected economic losses of Marine Harvest, and delay on the part of the Applicant, favours Marine Harvest.

[105] The *status quo* favours Marine Harvest – although the Swanson Island Facility is currently empty, it has been operating for many years with regular transfers of Atlantic salmon, including a harvest of fish from that facility as recently as December 2017. Marine Harvest has complied with the DFO requirements for transfers of fish during that period of time. Regardless of whether the DFO has acted reasonably with respect to its PRV Policy, a matter to be determined on the underlying judicial review, Marine Harvest has not acted outside its legal rights to proceed as it has.

[106] Moreover, as set out in the affidavit of Mr. Erenst, only one other site could possibly be used to receive the smolts currently awaiting transfer to the Swanson Island Facility. That alternative site is already planned to receive a substantial number of other smolts. If Marine Harvest is forced to transfer both smolt populations to the alternative site, the fish would be reared at an undesirably high density, which goes against good aquaculture practice and will reduce growth and potentially increase mortality. Marine Harvest estimates this would result in approximately \$2.1 million in damages, when costs associated with current preparations of the Swanson Island Facility are also taken into account.

[107] Marine Harvest claims that it would take several weeks to prepare a different site to receive the impugned smolts. This option is not available, given that the fish are ready for



[110] Given these circumstances, the balance of convenience weighs in favour of Marine Harvest and therefore the granting of an injunction would not be just and equitable in all of the circumstances.

[111] Finally, it is my opinion that the underlying application for judicial review should proceed as expeditiously as possible. The parties should therefore take immediate steps to seek orders or directions from the case management judge to fix a timetable for completion of steps leading to an expedited hearing of the application.

D. *Undertaking as to damages*

[112] Given that I find that the balance of convenience favours the Respondents in not granting interlocutory relief, I need not consider this issue.

IX. Conclusion

[113] The motion for interlocutory relief is dismissed. Costs in the cause.

**ORDER in T-430-18**

**THIS COURT'S ORDER is that:**

1. The motion is dismissed.
2. Costs in the cause.

**"Michael D. Manson"**  
\_\_\_\_\_  
Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-430-18

**STYLE OF CAUSE:** 'NAMGIS FIRST NATION v MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD AND MARINE HARVEST CANADA INC

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** MARCH 19-20, 2018

**ORDER AND REASONS:** MANSON J.

**DATED:** MARCH 23, 2018

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