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Date: 20190204

Dockets: T-1710-16
T-430-18
T-744-18

Citation: 2019 FC 143

Ottawa, Ontario, February 4, 2019

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ALEXANDRA MORTON

Applicant

And

MINISTER OF FISHERIES & OCEANS,
MARINE HARVEST CANADA INC. AND
CERMAQ CANADA LTD.

Respondents

Docket T-430-18

AND BETWEEN:

'NAMGIS FIRST NATION

Applicant

And

MINISTER OF FISHERIES, OCEANS AND
THE CANADIAN COAST GUARD, MARINE HARVEST CANADA INC. AND
CERMAQ CANADA LTD.

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Respondents

JUDGMENT AND REASONS

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I. INTRODUCTION

[1] The *Fishery (General) Regulations*, SOR/93-53 ("FGRs"), made pursuant to the *Fisheries Act*, RSC 1985, c14 ("*Fisheries Act*" or "Act"), form part of Canada's fisheries management regime. The FGRs require the Minister of Fisheries ("Minister") to issue a licence before live fish can be transferred into any fish habitat or fish rearing facility. The Minister may only issue such a licence if the conditions set out in s 56 of the FGRs are met. These three applications for judicial review all concern challenges to the Minister's policy of issuing licences for transfers of live salmon into the marine environment without requiring screening for certain disease causing pathogens and diseases that affect salmon. Specifically, the Department of Fisheries and Oceans ("DFO") has a policy of not testing for Piscine Orthoreovirus ("PRV") or Heart and Skeletal Muscle Inflammation ("HSMI") disease prior to issuing licences for the transfer of juvenile salmon from land based hatcheries into marine open-net pens as part of aquaculture operations, or as releases made as part of wild salmon enhancement programs ("PRV Policy" or "Policy"). DFO has reconsidered, but maintained, the PRV Policy on several occasions. The most recent reconsideration on July 28, 2018 is the decision under review in these matters ("PRV Policy Decision").

[2] Alexandra Morton ("Ms. Morton"), the Applicant in T-1710-16, and 'Namgis First Nation ("'Namgis"), the Applicant in T-430-18, both challenge the reasonableness of the PRV Policy Decision. 'Namgis additionally claims that the Minister breached the duty to consult with 'Namgis concerning the Policy. 'Namgis has also brought a second application for judicial review, T-744-18, in which it seeks to quash a specific transfer licence issued by DFO to a

salmon farm operator, Marine Harvest Canada Inc. ("Marine Harvest"), on the basis that the licence was issued in contravention of s 56 of the FGRs, the decision to issue it was unreasonable, the Minister breached the duty to consult with 'Namgis prior to issuance of that licence, and that the Minister breached the duty of procedural fairness owed to 'Namgis.

[3] The three applications for judicial review were heard consecutively over five days in Vancouver, British Columbia (or "BC"). In addition, there were ten motions filed in the within applications that the Case Management Judge Prothonotary Aylen determined were to be dealt with by the Applications Judge.

[4] Given the overlap of the facts and issues, I have addressed the three applications together in these reasons and have dealt with the various motions in the context of the application and subject matter within which each arises.

II. THE PARTIES

A. Ms. Morton

[5] Ms. Morton is a biologist who, since 1984, has lived and worked in the Broughton Archipelago, which is located in the Queen Charlotte Strait between Vancouver Island and the mainland of British Columbia. This area has a high density of open-net aquaculture sites, or fish farms. Ms. Morton holds a long-standing concern with the potential impact of salmon farming on the marine ecosystem of coastal British Columbia, in particular, with the effect of aquaculture on the health of wild salmon. Ms. Morton is an advocate in this regard. She has previously been granted public interest standing in *Morton v British Columbia (Agriculture and Lands)*, 2009

BCSC 136 (“*Morton 2009*”), which included a successful challenge of the provincial regulation of salmon farming in British Columbia. She was also granted standing, jointly with the Raincoast Research Society and the Pacific Wild Coast Salmon Society, in the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, the results of which are published in Canada, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, *The Uncertain Future of Fraser River Sockeye* (Ottawa: Public Works and Government Services Canada, 2012) (“Cohen Commission”), on the basis of a substantial and direct interest in the question of whether aquaculture is a cause of the decline of the Fraser River sockeye salmon, and the policies and procedures of DFO as they relate to aquaculture.

[6] Additionally, Ms. Morton was the applicant in *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 (“*Morton 2015*”). While that decision is highly relevant to the current applications, it is sufficient to note here that Ms. Morton successfully challenged certain conditions of an aquaculture licence granted to Marine Harvest concerning the transfer of farmed fish. In *Morton 2015*, Justice Rennie noted that Ms. Morton brought that proceeding in the public interest and that her standing was not contested. Similarly, Ms. Morton’s standing is not contested in her application for judicial review brought in T-1710-16.

B. ‘N<u>a</u>m<u>g</u>is

[7] ‘N<u>a</u>m<u>g</u>is is a band under the *Indian Act*, RSC 1985, c I-5, and its members are “aboriginal People of Canada” within the meaning of s 35 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 (“*Constitution Act, 1982*”).

[8] Don Svanvik, the elected Chief Councillor of ‘Namgis (“Chief Svanvik”), provided an affidavit affirmed on March 7, 2018 (“Svanvik Affidavit”), which was filed in both T-430-18 and T-744-18. The Svanvik Affidavit describes, amongst other things, ‘Namgis’ history, culture and assertions of its Aboriginal rights and title.

[9] ‘Namgis 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 Plumber and Pearce Island Groups, its asserted territory. It considers the Nimpkish River on Vancouver Island to be situated within the core of its territory and to be of tremendous importance to the community.

[10] ‘Namgis asserts Aboriginal rights and title throughout its 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 wild Pacific salmon, including sockeye, chum, pink, Chinook and coho, are an integral aspect of ‘Namgis’ oral history and traditions, way of life, economy, culture, ceremonies, food and trade. Further, that wild Pacific salmon populations have significantly declined in ‘Namgis’ asserted territory.

C. Minister

[11] The Minister is responsible for the administration of the *Fisheries Act*. And, pursuant to that Act, the Minister has broad discretion to authorize and issue fishing licences, including aquaculture licences and fish transfer licences.

D. Marine Harvest Canada Inc.

[12] Marine Harvest is engaged in the business of fish farming. It is one of four main salmon farming companies in British Columbia. As of November, 2017, it held 56 of the 119 aquaculture licences issued by DFO authorizing the operation of an aquaculture facility in that province. All of Marine Harvest's facilities are licenced to raise Atlantic salmon. Marine Harvest has twelve fish farms in the Broughton Archipelago area, including the site known as the Swanson Island facility.

E. Cermaq Canada Inc.

[13] Cermaq describes itself as the second largest salmon aquaculture producer in British Columbia, making up approximately 25% of the salmon aquaculture industry. It has 28 fish-farming sites in British Columbia and approximately 20 operating fish farms. Each site holds a marine finfish aquaculture licence issued by DFO and permitting Cermaq to carry out aquaculture activities. Cermaq, together with Marine Harvest, make up approximately 82% of the British Columbia salmon aquaculture industry.

III. BACKGROUND

A. Legislation

i) *Fisheries Act*

[14] The *Fisheries Act* governs fisheries in Canada. Section 7 of the *Fisheries Act* gives the Minister broad discretion to issue fishing licences, including aquaculture licences:

> 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.

ii) ***Fishery (General) Regulations***

[15] The FGRs establish a general operational framework for fisheries management. This includes the implementation of any licence conditions necessary for the proper management and control of fisheries, and the conservation and protection of fish, that are not inconsistent with the FRGs or other specified regulations, as set out in s 22(1) of the FGRs.

[16] Part VIII of the FGRs governs the release of live fish into fish habitats or fish rearing facilities. Such transfers are prohibited without a licence:

> 54 In this part, ***licence*** means a licence to release live fish into fish habitat or to transfer live fish to a fish rearing facility.
>
> 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.
>
> (2) Subsection (1) does not apply in respect of fish that is immediately returned to the waters in which it was caught.

[17] Pursuant to s 56, the Minister may issue a licence if three specified conditions are 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.

[18] Central to the applications before me is the question of whether the Minister's interpretation of s 56 is reasonable.

iii) ***Pacific Aquaculture Regulations***

[19] Pursuant to s 3(1) of the *Pacific Aquaculture Regulations*, SOR/2010-270 ("PARs"), the Minister may issue an aquaculture licence authorizing a person to engage in aquaculture and other prescribed activities. Such activities are prohibited unless authorized by licence. And, for the proper management and control of fisheries and the conservation and protection of fish, the Minister, in addition to the conditions respecting the matters set out in s 22(1) of the FGRs, may specify conditions in an aquaculture licence as set out in s 4 of the PARs.

B. ***Morton 2009***

[20] In *Morton 2009*, the British Columbia Supreme Court held that fish farming in British Columbia is a fishery that falls under exclusive federal jurisdiction pursuant to s 91(12) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. As a

result of that decision, and as discussed further below, in 2010 DFO assumed regulatory control over the management of aquaculture.

C. Fish Farm Production Cycle

[21] Farmed salmon start life in hatcheries. Eggs and milt are collected from adult broodstock salmon. The fertilized eggs are incubated for 7 to 8 weeks in freshwater land-based hatcheries. Upon hatching, the fish are called alevin. Once their yolk sacs are absorbed, they are referred to as fry and, for the next year, they are raised in tanks within the hatchery. Once the young salmon are ready to enter salt water, they are referred to as smolts.

[22] Prior to transferring smolts from a freshwater hatchery to a marine (ocean) fish-farm site, the holder of the relevant aquaculture licence must apply for and be granted a transfer licence issued in accordance with s 56 of the FGRs. The most common type of fish farms in British Columbia are open-net farms in which the fish are contained in a net or cage suspended in the ocean and through which ocean water passes freely.

[23] The smolts remain in the marine fish farms until they are ready to be harvested, approximately 2 years for Atlantic salmon and 18 months for Chinook salmon.

[24] The number of salmon grown at such a farm during a typical production cycle can range from 200,000 to 650,000 fish. There are currently 116 licenced marine finfish farms in British Columbia, of which 80 are active, meaning that at any given time there are between 16 and 52 million farmed fish in BC waters. There are four main salmon farming companies including

Marine Harvest and Cermaq. Atlantic salmon is the main species of farmed salmon produced in BC, with a smaller number of farm-grown Chinook salmon. There are currently 28 land-based licenced hatcheries.

[25] The transfer of smolts occurs not only in aquaculture, but also in the context of salmon enhancement. In salmon enhancement, fish are raised in land-based hatcheries until the smolt stage and are then released into the natural marine environment to mature, at which point they become part of the wild salmon population.

[26] The Salmon Enhancement Program ("SEP") is licensed by DFO. There are currently 132 SEP licences to grow Pacific salmon for release, 18 are DFO operated hatcheries, 99 are community hatcheries and 15 are classroom facilities.

D. PRV and HSMI

[27] As will be discussed below, PRV and HSMI are very topical issues that are the subject of a growing body of rapidly evolving scientific inquiry. What is not controversial is that PRV is a highly infectious virus. It was first recognized in Norway in 2010 and is now known to be present in Norway, the United Kingdom, Ireland, Chile, the United States and Canada. It was first detected on the west coast of North America in farmed Atlantic salmon through audit samples that were conducted in 2010. While some scientists believe that PRV in British Columbia first diverged from the Norwegian strain of PRV ("Norweigan-PRV") in about 2007, DFO's current view is that recent testing of tissue samples archived from 1987 to 1994 indicates that a North Pacific variant of PRV ("BC-PRV") has been present in salmonids on the Pacific

coast of North America for a much longer time. PRV is now found in both farmed and wild salmon in British Columbia as well as other species of fish.

[28] HSMI is an infectious disease. According to DFO, it was described for the first time in farmed Atlantic salmon in 1999 in Norway, where it has emerged as a production concern for Norwegian salmon aquaculture. In Norway, HSMI is currently among the top four most common salmonid aquaculture diseases, the number of outbreaks occurring each year increasing from 54 to 142 between 2004 and 2012.

[29] In Norway, HSMI is characterized by mortality that ranges from negligible up to 20% and morbidity as high as 100% within affected populations. In Norwegian fish farms, clinical signs of HSMI usually occur 5–9 months after sea transfer and include abnormal swimming behaviour, loss of appetite or anorexia, and loss of condition. HSMI has now been reported in farmed Atlantic salmon in Scotland, Chile and Norway. In 2017, it was also confirmed in one Atlantic salmon farm in British Columbia by a study of tissue samples that were collected in 2013–2014.

[30] More controversial is the link between PRV, HSMI, and other diseases. In 2017, a Norwegian study found PRV to be the cause of HSMI in Atlantic salmon. However, in Canada, a PRV challenge study conducted in 2016 concluded that the BC-PRV strain, while transmissible or infectious, was of low pathogenicity to Chinook, sockeye and Atlantic salmon. That is, while experimentally infected fish may carry large BC-PRV virus loads, the virus does not cause disease or mortality in those species. No other disease agent has been identified as the cause of

HSMI in British Columbia. PRV has also been associated with other diseases, including jaundice.

[31] The heart of Ms. Morton's and 'Namgis' applications are that the DFO's policy of not testing for PRV puts wild Pacific salmon at risk.

E. *Morton 2015*

[32] Ms. Morton, in *Morton 2015*, raised the question of whether certain licence conditions contained in an aquaculture licence granted to Marine Harvest for its operations at Shelter Bay, British Columbia, met, or were consistent with, s 56 of the FGRs.

[33] Condition 3.1 of the subject licence concerned the transfer of fish:

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

> (iii) no stock at the source facility is known to have had any diseases listed in Appendix IV; or
>
> (iv) where conditions 3.1(b)(i) and/or 3.1(b)(iii) cannot be met transfer may still occur if the facility veterinarian has conducted a risk assessment of facility fish health records, review of diagnostic reports, evaluation of stock compartmentalization, and related biosecurity measures and deemed the transfer to be low risk.

[34] Justice Rennie, then of this Court, found that condition 3.1 of the licence authorizing the transfer of fish was derived from Part VIII of the FGRs and that the terms of the licence were required to comply with s 56 of those regulations.

[35] Further, that the question of whether the licence satisfied its governing regulatory provisions could be resolved by analogy to the first principles of statutory interpretation. That is, just as a regulation that is inconsistent with the enabling substantive statutory provisions cannot carry out the purposes of the act, nor can any condition of a licence that conflicts with substantive regulatory provisions carry out the purposes of the regulatory scheme. In that regard, s 22(1) of the FGRs stipulated that a licence condition could not conflict with the FGRs or grant that which the FGRs excluded. Justice Rennie concluded that:

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

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

[36] Justice Rennie then found that conditions 3.1(b)(i) and (iii) were reasonably consistent with s 56(b) of the FGRs. Condition 3.1(b)(i) established clear, objective criteria governing transfers that were demonstrably linked to subsection 56(b) of the FGRs. Condition 3.1(b)(iii) precluded transfers where stock was known to have had a listed disease that could severely impact fisheries. That is, condition 3.1(b)(iii) was a reasonable articulation of the s 56(b) requirement that a fish transfer occur only where the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish.

[37] However, conditions 3.1(b)(ii) and (iv) were inconsistent with s 56(b) of the FGRs. Condition 3.1(b)(ii), by allowing a licence holder to transfer fish if the stock "shows no signs of clinical disease requiring treatment", maintained a lower standard than prescribed by, and contradicted the plain wording of s 56(b), which stipulates that no transfer can take place if the fish have "any disease or disease agent" that may be harmful. Justice Rennie held that showing no sign of disease was a lower threshold than the regulatory scheme demanded, being that the

fish "do not have any disease or disease agent." Further, the FGRs are directed to the health of the resource generally, and not the health of the farmed product or stock. As drafted, condition 3.1(b)(iii) was unclear as to whether or how Marine Harvest's staff were to determine if the fish had any disease or disease agent. Justice Rennie found that there was no nexus or scientific linkage between the regulatory requirement (directed to the protection of the resource) and the licence condition (directed to the stock).

[38] As to condition 3.1(b)(iv), this allowed the licence holder to override conditions 3.1(b)(i) and 3.1(b)(iii) if the facility veterinarian conducted a risk assessment and considered the transfer to be "low risk." Justice Rennie found that this circumvented s 56(b) of the FGRs and the regulatory requirement imposed on the Minister to allow transfers only where fish "do not have any disease or disease agent that may be harmful to the protection and conservation of fish." Effectively, the condition circumvented the s 56(b) regulatory requirements and licensed Marine Harvest to transfer through less rigorous conditions than required by law. Further, the Minister improperly sub-delegated to Marine Harvest, the licensee, the ultimate determination as to whether a transfer was permissible.

[39] Additionally, conditions 3.1(b)(ii) and (iv) were inconsistent with subsection 56(b) of the FGRs in light of the precautionary principle. Justice Rennie found that s 56(b), properly construed, embodied the precautionary principle:

> [97] In my view, subsection 56(b) of the *FGRs*, properly construed, embodies the precautionary principle. First, subsection 56(b) prohibits the Minister from issuing a transfer licence if disease or disease agents are present that "may be harmful to the protection and conservation of fish." The phrase "may be harmful" does not require scientific certainty, and indeed does not require

> that harm even be the likely consequence of the transfer. Similarly, the scope of "any disease or disease agent" in subsection 56(b) should not be interpreted as requiring a unanimous scientific consensus that a disease agent (e.g., PRV) is the cause of the disease (e.g., HSMI).
>
> [98] The consequence of interpreting subsection 56(b) consistently with the precautionary principle is that the licence conditions must also reflect the precautionary principle. As the licence conditions cannot derogate from or be inconsistent with subsection 56(b), they therefore cannot derogate from the precautionary principle. As noted earlier, the Minister did not attempt to justify that licence condition 3.1(b)(iv) was consistent with the precautionary principle, but confined his argument in this respect to licence conditions 3.1(b)(i), (ii) and (iii).
>
> [99] In my view, the Minister's argument cannot stand. For the reasons given, conditions 3.1(b)(ii) and (iv) are inconsistent with section 56(b) and thus with the precautionary principle. The conditions dilute the requirements of subsection 56(b), a regulation designed to anticipate and prevent harm even in the absence of scientific certainty that such harm will in fact occur.

[40] Accordingly, conditions 3.1(b)(ii) and (iv) were found to be of no force and effect and were severed from the aquaculture licence issued to Marine Harvest.

[41] In June 2016, the Minister filed a Notice of Appeal of Justice Rennie's decision in *Morton 2015*. The appeal was discontinued in January 2017.

F. Transfer licensing post-*Morton 2015*

[42] Justice Rennie suspended his judgment for four months from the date of its issuance. On September 8, 2015, in conjunction with the end of that period, the Minister issued amended aquaculture licences. These included condition 3.3:

> 3.3 From September 8, 2015 until further notice, the licence holder may not carry out transfers pursuant to section 3.1 herein. During that period the licence holder must apply to the BC Introductions and Transfers Committee to obtain an authorization to transfer fish.

[43] DFO's evidence is that condition 3.3 is still in place and that DFO intends to continue the requirement that marine finfish aquaculture licence holders obtain a separate authorization through the BC Introductions and Transfers Committee ("ITC") to move fish into and between farm sites, and plans to make this requirement a standard licence condition when aquaculture licences are renewed in 2022 and beyond.

[44] Currently, for every transfer between land based hatcheries and marine salmon farm sites, and between marine salmon farm sites, aquaculture operators are required to submit an Introduction and Transfer Licence Application, as well as a Fish Health Attestation Form executed by the source facility's veterinarian, fish health staff or facility manager, which, together with other information, are assessed by the ITC. The ITC then makes a recommendation to the DFO Regional Manager, Aquaculture Programs, that the application be allowed or allowed with additional licence conditions. The DFO Regional Manager, as the Minister's Delegate, then considers the recommendation and decides whether to issue a transfer licence on behalf of the Minister, under the authority of the FGRs.

IV. THE PRV POLICY

[45] As noted above, the Minister has effected a PRV Policy that allows transfer licences to be issued under s 56 of the FGRs without testing the fish to be transferred for PRV and HSMI. The

Policy appears to be unwritten, and it is unclear from the record when the PRV Policy first came into effect. However, the record does indicate that the Minister, through his Delegate, has made six decisions to continue the PRV Policy between June or July 2015 and the most recent decision made on June 28, 2018.

A. Previous Decisions

[46] It is useful to summarize the previous PRV Policy decisions and the materials upon which they are based on as contained in the certified tribunal records ("CTR"), specifically the Further Further Amended Rule 318 Certified Tribunal Record of the Minister of Fisheries and Oceans dated June 29, 2018 in T-1710-16 and the Amended Rule 318 Certified Tribunal Record filed in T-430-18, as they illustrate that the Delegate's decisions to continue the Policy are, in effect, a series on ongoing decisions culminating in the June 28, 2018 PRV Policy Decision, which is under review in these applications.

i) *June – July 2015 Decision*

There is no written record of this decision.

The CTR contains,

a) May 2014 DFO web statement regarding PRV;

b) June 26, 2015 internal email regarding a statement concerning PRV;

c) DFO Publication, "Regulating and Monitoring British Columbia's Marine Finfish Aquaculture Facilities 2011–2014".

ii) ***September 2015 Decision***

There is no written record of this decision.

The CTR contains,

a) A final draft for endorsements, with tracked changes, of "Assessment of the Occurrences, Distribution and Potential Impacts of Piscine Reovirus on the West Coast of North America", prepared by the the Canadian Science Advisory Secretariat ("CSAS").

iii) ***June 2016 Decision***

There is no written record of this decision.

The CTR contains,

a) June 2016 DFO web statement regarding PRV;

b) September 11, 2015 (approved) Canadian Science Advisory Secretariat ("CSAS"), Science Response 2015/037, "Assessment of the Occurrence, Distribution and Potential Impacts of Piscine Revirus on the West Coast of North America" ("2015 CSAS Science Response");

c) DFO publication "Regulating and Monitoring British Columbia's Marine Finfish Aquaculture Facilities 2011–2014".

iv) ***January 30, 2017 Decision***

Decision - Memorandum for the Regional Director General, "Management Approach to PRV and HSMI for Fish Transfers in British Columbia (For Decision)", which was approved on January 30, 2017 ("RDG Memorandum").

The CTR contains,

a) 2015 CSAS Science Response (an attachment to the RDG Memorandum);

b) Science Overview of PRV and HSMI (DFO) (an attachment to the RDG Memorandum);

c) The Minister of Fisheries and Oceans' (Minister) Interpretation of Section 56 of the *Fishery (General) Regulations* (FGRs) ("Minister's Interpretation") (an attachment to the RDG Memorandum);

d) Mortality Events Reported in BC 2011–2015 (an attachment to the RDG Memorandum);

e) Draft DFO web statement "Piscine Orthoreovirus (PRV) and Heart and Skeletal Muscle Inflammation (HSMI)".

v) ***March 9, 2018 Decision***

Decision - mail dated March 9, 2018 from Allison Webb, Regional Director General ("RDG"), confirming that DFO will continue the PRV Policy.

The CTR contains,

a) March 5, 2018 Centre for Science Advice Pacific FPP non-CSAS Request for Rapid Science Response ("March 2018 Rapid Science Response" or "March RSR");

b) RDG Memorandum;

c) 2015 CSAS Science Response;

d) Science Overview of PRV and HSMI (DFO);

e) Minister's Interpretation;

f) Mortality Events Reported in BC 2011–2015;

g) February 19, 2018 Draft DFO Internet Posting "Piscine Orthorevirus (PRV) and Heart and Skeletal Muscle Inflammation (HSMI)";

h) Table of 2016 BC Mortality events;

i) Tables of aquaculture reporting compliance 2011–2017 (DFO).

vi) ***June 28, 2018 Decision***

Decision - email dated June 28, 2018 from Allison Webb, RDG, confirming that DFO will continue the PRV Policy.

The CTR contains,

a) June 27, 2018 (approved) – Centre for Science Advice Pacific FPP non-CSAS Request for Rapid Science Response ("June 2018 Rapid Science Response" or "June RSR");

b) March 2018 Rapid Science Response;

c) RDG Memorandum;

d) 2015 CSAS Science Response;

e) Science Overview of PRV and HSMI (DFO);

f) Minister's Interpretation;

g) Mortality Events Reported in BC 2011- 2015;

h) February 19, 2018 Draft DFO Internet Posting "Piscine Orthorevirus (PRV) and Heart and Skeletal Muscle Inflammation (HSMI)";

i) Table of 2016 BC Mortality events;

j) Tables of aquaculture reporting compliance 2011–2017 (DFO);

k) Document entitled "Regulating and Monitoring British Columbia's Marine Finfish Aquaculture Facilities 2017" (DFO).

B. Decision Under Review

[47] The June 28, 2018 email from Allison Webb, the RDG and Minister's Delegate, to two other DFO members, Melanie McNabb and Lauren Lavigne, comprises the decision under review. It states as follows:

> Melanie and Lauren – Based on the most recent advice received from Science Branch (Centre for Science and Advice Pacific) on June 27, 2018 which I have read as well as considering the background documents here, DFO will continue the policy approach explained in the briefing note signed on January 30, 2017 that explains that the Department will not test for PRV and HSMI prior to transfers of fish. This is germane to what information is considered before making decisions regarding s. 56 of the FGR.
>
> DFO will continue to actively monitor this area and as new information becomes available consider whether changes will be required in our current management approaches.

[48] The background documents attached to this email are those contained in the Amended Rule 318 CTR for T-430-18, which documents are also found in the Further Further Amended CTR for T-1710-16.

[49] It is necessary to devote some time to describing certain of these documents because they set out the science background utilized by DFO in confirming the PRV Policy, and demonstrate how DFO has responded to new science concerning PRV and HSMI.

i) ***2015 CSAS Science Response***

[50] The Canadian Science Advisory Secretariat, or CSAS, is a DFO entity that responds to requests for science advice or questions. This can be done by way of a full Science Peer Review Process, which produces a Science Response summarizing key research findings and which can take up to 6 months to produce, or by a Science Response Process if a faster response is needed.

[51] The 2015 CSAS Science Response notes that concerns have been raised regarding the presence of PRV in farmed fish on the Pacific coast and the potential impacts to the health of wild salmonid populations arising from the transfer of hatchery reared fish that carry this virus to marine-based aquaculture facilities. As the advice sought was required within four weeks, a CSAS Science Response was utilized.

[52] The report is, in essence, a technical review of data and studies from a variety of sources which are identified therein. There were four contributors, three from DFO and one (Dr. Gary Marty) from the British Columbia Ministry of Agriculture, and three reviewers, two from the US Geological Survey, Western Fisheries Research Centre and one from the Alaska Department of Fish and Game, Commercial Fisheries Division. It was approved by Carmel Lowe, Regional Director, Science Branch, Pacific Region, DFO, on September 11, 2015.

[53] Based on the review, it finds, amongst other things, that,

- BC-PRV occurs in wild salmonids in western Canada and the US and there is uncertainty about the prevalence of the virus among species and life-history stages of wild Pacific salmon and among farmed salmon in western Canada;

- controlled laboratory experiments in Chinook, sockeye and Atlantic salmon provide good evidence that infection with BC-PRV does not cause disease in those species and that the absence of associated mortality or pathology in infected fish exhibiting high viral loads also indicates that BC-PRV is of low pathogenicity although, apart from an absence of disease, the challenges resulted in similar infectivity and distribution in host tissues as described for Norwegian PRV obtained from fish with HSMI (the report notes that in Norway many challenge studies and diagnostic testing of samples for HSMI outbreaks have provided evidence towards an association between PRV and HSMI);

- diagnosis of HSMI is by combination of clinical signs (usually occurring 5–9 months after sea transfer and including abnormal swimming behaviour, anorexia and up to 20% mortality) confirmed by histological examination of tissues. Based on the current state of knowledge, there have been no reports of HSMI in farmed or wild fish in British Columbia, Washington or Alaska. While idiopathic cardiomyopathy (heart muscle disease of an unknown cause) had previously been reported in British Columbia farmed salmon, including HSMI-like lesions first diagnosed as the probable cause of death nine years earlier (referencing the Cohen Commission), because skeletal muscle was not sampled as part of the DFO Audit Program until 2013, it has only been after that time that it has been determined that a few cases of idiopathic cardiomyopathy in British Columbia match the pattern of microscopic lesions associated with HSMI in Norway. A retrospective analysis of test results for PRV of Audit Program samples from 2009 found PRV to be common and not associated with any cause of mortality, including idiopathic cardiomyopathy. In summary, there is no combined clinical and histological evidence for the occurrence of HSMI in farmed salmonids in British Columbia. There is a low prevalence of idiopathic cardiomyopathies of unknown cause(s) in audit samples, with 0.2% of fish examined since 2014 having signs of significant inflammations of both heart and skeletal muscles. If it is assumed that those lesions are caused by an infectious agent, the low percentage of infected fish suggests that it is not a highly infectious disease;

- as to an evaluation of the adequacy of current farm-based and wild monitoring practices to detect HSMI or other diseases possibly associated with PRV, this describes fish health auditing and reporting measures for farmed fish, and states that diagnostic evaluations of farmed salmon conducted by aquaculture companies, the Province and DFO are highly likely to have found evidence of HSMI in BC assuming a similar presentation as seen in Norway (clinical symptoms). As all of the aquaculture companies in BC also farm Atlantic salmon in Norway where HSMI is common, it is unlikely that their veterinarians, other fish health staff or managers would not be aware of the clinical signs of HSMI. In summary, assuming a similar clinical presentation of HSMI in BC farmed salmon as seen in Norway, company veterinarians and or government audit programs would be expected to have identified HSMI if it were present;

- the above information is then summarized as factors that should be considered in any evaluation of risk posed to wild Pacific salmon, as well as key uncertainties including that the role that PRV plays in the development of HSMI in Norway remains unclear;

- based on the information available, it concludes that the ubiquitous nature of PRV, its apparent long-time presence in wild Pacific salmonid stocks, and the lack of a clear association with disease in laboratory challenge trials suggests a low likelihood that the presence of the virus in any life stage of farmed Atlantic and Pacific salmon would have a significant impact on wild Pacific salmon populations.

ii) ***January 30, 2017 RDG Memorandum***

[54] In its summary, the 2017 RDG Memorandum notes that research confirming the presence of HSMI in one Atlantic salmon farm in British Columbia in 2013/2014 would be published shortly (this reference is to the study ultimately published as Di Cicco *et al* (2017), *Heart and Skeletal Muscle Inflammation (HSMI) disease diagnosed on a British Columbia Salmon farm through a longitudinal farm study*, PLoS ONE 12(2) = e01271471.doi=10.1371 ("Di Cicco 2017")). The Memorandum notes that this new research would document the development of HSMI at one marine salmon farm, resulting in low level mortality. Further, that information from DFO's audit program, industry reports, and DFO scientists does not show elevated fish mortalities associated with disease in BC. Given the current science knowledge and the mortality reporting to date, the Memorandum recommends that DFO maintain its policy of not testing for PRV and HSMI prior to transfers of fish as PRV and HSMI are not of serious concern in BC.

[55] The Background section of the document references the 2015 CSAS Science Response and summarizes the Minister's Interpretation of s 56(b). Under Science Advice, it states that a

peer reviewed article in a top tier journal, PlosOne, confirming the presence of HSMI in one Atlantic salmon farm in BC, will be published within the next three weeks. That article will document the development of HSMI at that farm over an 11 month period resulting in a low level of mortality (<2%). That level of mortality is at the low end of estimates from outbreaks in Norwegian farms (0–20%) and, although the number of reported cases in Norway has increased over the years, this does not inform DFO of whether the severity of disease had increased or not. Further, while PRV is widely considered the leading cause of HSMI, its role in the development of HSMI and other diseases is uncertain. There are a number of strains of the PRV virus and it is not yet known if some are more prone to result in disease, if species susceptibility differs among strains and/or if other factors are involved in disease development. PRV variants have been associated with diseases in Atlantic and coho salmon as well as rainbow trout. PVR has been documented in aquaculture and wild fish on both the Atlantic and Pacific coasts; challenge trials in BC have demonstrated that despite infection with loads of PRV similar to or higher than PRV loads reported in Atlantic salmon with HSMI lesions in Norway, Atlantic, sockeye and Chinook salmon have failed to exhibit any symptoms of the disease. And, while PRV is found in wild Pacific fish, there have been no reports of HSMI in wild fish in BC, Washington or Alaska. The Memorandum notes that as PRV and HSMI are globally active areas of scientific research, new findings on the virus, the disease and the links between them are emerging at an incredibly rapid pace.

[56] It recommends as follows:

ADVICE AND RECOMMENDATIONS TO REGIONAL DIRECTOR GENERAL

Given the analysis set out above, it is recommended that DFO maintain its policy of not testing for PRV and HSMI prior to transfer of fish in that:

1. Experimental exposures of the strain of PRV present in BC to Pacific and Atlantic salmon in BC have failed to induce disease or mortality.

2. The current evidence is that HSMI causes very low mortality in fish farms in BC.

3. Transfers of fish with low potential to cause mortality do not harm the protection and conservation of fish at a population level and can be authorized as per the Minister's interpretation of s 56(b) of the FGR.

[57] The RDG Memorandum, authored by Andrew Thomson, concludes by stating that DFO is committed to protecting and conserving both wild and farmed fish, is actively reviewing key new findings and is prepared to make changes as necessary. The recommendation was accepted by Rebecca Reid, RDG, Pacific Region, on January 30, 2017.

iii) ***March 2018 Rapid Science Response***

[58] This document was generated as an emergency response to a December 27, 2017 request from Cory Jackson and Allison Webb and was required by February 2018. The responders were Kyle Garver, Mark Polinski and Stewart Johnson, of DFO Science, a branch of DFO that it describes as conducting research on and contributing to global scholarship on PRV and HSMI. The document states that it does not constitute delivery of peer-reviewed Science advice but is intended as a rapid response to an immediate requirement for Science input. It was reviewed by

Lesley MacDonald of the Centre for Science Advice – Pacific Region and was approved by Dr. Carmel Lowe, Regional Director Science – Pacific Region, on March 5, 2018.

[59] The March RSR provides background information, including that DFO does not require any pre-transfer testing for specific diseases or disease agents, such as PRV, before fish are transferred from hatcheries to marine aquaculture sites. However, as part of the salmon transfer application review, DFO assesses overall fish health at the source facility by examining company fish health records, any fish health and/or mortality reporting submitted as part of the aquaculture licence condition requirements, and results from DFO farm audits. The March RSR states that DFO does not test for PRV as part of its routine fish farm audits as experimental exposures of the strain of PRV present in BC to Pacific and Atlantic salmon have failed to induce disease or mortality and the current evidence is that HSMI causes very low mortality in BC fish farms. However, research into PRV and HSMI is an active area of scholarship worldwide. Given this, and the profile of PRV and HSMI, it is important that DFO consider new science information as it becomes available. The March RSR states that it is a request for a review of recent publications/peer reviewed literature (within the last year) and for science advice regarding whether changes to DFO's management approach should be considered as a result. The recent primary peer reviewed literature on PRV includes six listed papers. One of these is Di Cicco 2017.

[60] The review was requested by Aquaculture Management Division of DFO to ensure DFO's testing and fish health management approach are informed by the latest scientific evidence and to answer two questions:

> Does this recently published literature alter the scientific perspective on the role of PRV in the development of disease? If so, how?
>
> How are these studies and any other recent studies on PRV and HSMI relevant (or not relevant) to the testing and management of PRV and HSMI in BC?

[61] In answer to the first question, the March RSR references the uncertainty expressed in the 2015 CSAS Science Response as to the relationship between PRV and HSMI and the subsequent study, Wessel *et al* (2017), *Infection with Purified Piscine orthorevirus demonstrates a causal relationship with heart and skeletal muscle inflammation in Altantic Salmon*, PLoS ONE 12(8), e0183781 ("Wessel 2017"), which used purified PRV as inoculum in an experimental challenge trial to confirm that PRV is the causal agent of HSMI. The March RSR states that by addressing (presumably meaning resolving) the question of whether PRV is the etiological agent of HSMI in Atlantic salmon, the PRV/HSMI research community has re-directed scientific endeavours to no longer evaluate what causes HSMI, but rather to understand how the disease is caused by PRV. As discussed in Wessel 2017, in Norway, HSMI has consistently been reproduced experimentally in Atlantic salmon after PRV exposure (three studies by different authors are footnoted in support of this), however, in Canadian PRV studies, HSMI had yet to be induced in experimentally infected fish (one study, Garver *et al* (2016), *Piscine orthoreovirus from western North America is transmissible to Atlantic salmon and Sockeye salmon but fails to cause Heart and Skeletal Muscle Inflammation*, PLoS ONE 11(1):e0146229 ("Garver 2016"), is cited in support of this). The March RSR states that the development of HSMI or lack thereof in laboratory fish with equally high PRV infections illustrates that PRV screening is currently not an informative diagnostic for disease development. Consequently, PRV research is underway to

better understand what factors are responsible for the altered disease scenarios, and what conditional requirements exacerbate non-virulent PRV infections into a HSMI disease state. This is summarized by the statement in the March RSR that Wessel 2017 provides evidence that PRV infection can directly cause HSMI in Atlantic salmon, yet that study acknowledges that it remains unclear as to why in many instances infections do not lead to disease. Further, that in developing the ability to purify PRV, Wessel 2017 also made it possible for the research community to characterize potential PRV strain differences, host differences, and environmental factors.

[62] The March RSR then discusses the HSMI experience in Norway, noting that during outbreaks in farms there, clinical signs of the disease together with elevated mortalities alert farm personnel to conduct fish health investigations. For diagnosis of HSMI, fish are examined using histology to visualize characteristic pathologies in the heart and skeletal muscles that differentiate the disease from other known diseases in salmon. To date, HSMI has only been reported in farmed fish, globally.

[63] The March RSR states that in British Columbia there are no reports of elevated levels of mortality or production losses in farmed Atlantic salmon due to HSMI. It describes the Di Cicco 2017 study as having conducted a histological assessment of Atlantic salmon during the course of a marine production cycle on one BC farm and as having documented the progression of cardiac lesions found in those fish as consistent with histopathological diagnosis of HSMI in Norway. During the period of highest prevalence, HSMI was diagnosed in between 20–44% of sampled fish with an additional 35–70% having some degree of minor heart inflammation.

However, despite the occurrence of lesions, there was no associated elevation in mortalities. The March RSR concludes that the Di Cicco 2017 study "strongly confirms" the lack of mortality and clinical disease associated with HSMI in British Columbia; identifies a potential linkage of PRV in the occurrence of HSMI; and, importantly, provides evidence that PRV infection of farm fish in that instance was by marine reservoir.

[64] As to insight into the prevalence of PRV in wild salmon, the March RSR lists three studies, the first of these is Purcell MK *et al* (2017), *Molecular testing of adult Pacific salmon and trout (Oncorhynchus spp) for several RNA viruses demonstrates widespread distribution of piscine orthoreovirus in Alaska and Washington*, J Fish Dis 2017; 1-9 ("Purcell 2017"). The March RSR states that the Purcell 2017 study findings are consistent with other studies indicating PRV to be widespread among many species and stocks of Pacific salmon within western North America. The RSR asserts that it is worth noting that while a range of Pacific salmon species may be susceptible, coho and Chinook salmon accounted for 97.4% of all PRV positive findings in Purcell 2017, thereby revealing species susceptibility differences. And, while the sampled fish were not assessed clinically at the time of sampling, it is noteworthy that the fish screened in the Purcell 2017 study represented returning adult fish that have successfully completed their life cycle. As to a study by Morton A *et al* (2017), *The effect of exposure to farmed salmon on piscine ortheovirus infection and fitness in wild Pacific salmon in British Columbia*, PLoS ONE (12)(12): e0188793 ("Morton 2017"), which suggested geographic differences in PRV prevalence between areas with and without salmon aquaculture, the March RSR states the authors of Morton 2017 acknowledge that because of limited sampling, no definitive conclusions are able to be made. The March RSR states, however, that Morton 2017

does serve to corroborate PRV in farmed and wild salmon. And, as observed in Purcell 2017, to understand the epidemiology of PRV in salmon populations, investigations must consider host species susceptibility differences; involve an understanding of the phytogeography of PRV; and incorporate aspects of the biology and migratory behaviour of Pacific salmon. Another study referenced, Madhun AS *et al* (2018), *Prevalence of Piscine Ortheovirus and salmonied and alphavirus in sea-caught returning adult salmon (Salmo Solar L.) in northern Norway*, J Fish Dis; 1-7 ("Madhun 2018"), showed no association between salmon farming and the prevalence of PRV infection in wild salmon in northern Norway.

[65] As to biomarkers for identifying viral associated pathological disease, the March RSR states that what triggers the host fish to respond to PRV infection in some instances is yet unknown. Following the Di Cicco 2017 findings, Miller KM *et al* (2017), *Molecular indices of viral diseases development of wild migrating salmon*, Conserv Physiol 5(1); cox036 ("Miller 2017") identified that, like in Norway, fish experiencing HSMI in BC had a heightened expression of genes associated with virus recognition and antiviral defence relative to non-diseased fish. Those authors used tissue sampling from sea pen raised Chinook salmon to identify a high (90%) prevalence of PRV within the sampled population (36 fish) and identified that diseased fish experiencing jaundice syndrome – a sporadic disease typically observed in a small portion (1.5%) of Chinook during a production cycle – had systematic activation of viral associated genetic biomarkers which were attributed to the presence of PRV. The March RSR notes that while prior investigations had been unable to induce jaundice in chinook (referencing Garver KA *et al* (2016), *Piscine reovirus, but not Jaundice Syndrome, was transmissible to Chinook Salmon, Oncorhyunchus tshawytscha (Walbaum), Sockeye Salmon, Oncorhyunchus*

nerka (Welbaum), and Atlantic Salmon, Salmo Salar, L. J. Fish Dis. 39(2): 117-28 ("Garver 2016(a)")), the Miller 2017 findings indicate that in the rare occasions where fish become jaundiced, the recognition of PRV in those diseased fish may exacerbate tissue pathology or possibly contribute to its initial development. However, why the disease is observed in only a small number of PRV infected fish remains unclear. The March RSR states that these data aid in directing continued research into identifying the conditional requirements associated with HSMI in Atlantic salmon and possibly jaundice in Chinook salmon. Further, Miller 2017's identification that PRV is prevalent in at least some populations of sea pen raised Chinook salmon in BC further confirms the ubiquitous presence of PRV in marine salmon along the western coast of North America and its low virulence within those populations.

[66] As to the second question, the March RSR states,

> "The most significant finding stemming from the new scholarship reviewed in this rapid science response is in the establishment of PRV as a causative agent of HSMI as described by Wessel et al 2017. This study is novel and relevant to the testing and management of PRV and HSMI in BC in that the identification of the infectious etiology of a disease is a necessary step for its management. However, based on current scientific literature it's clear that the sole detection of PRV remains insufficient as a disease determinate. For instance, high loads of PRV are commonly detected in apparently healthy fish without clinical disease revealing the uninformative nature of PRV screening as a diagnostic for disease development."
>
> Nevertheless, the works reviewed in this science response provide information to better direct future research investigations and importantly corroborate and strengthen (re-affirm) previous results that are of relevance to the management and testing of PRV and HSMI. These are:
>
> - In both Norway and British Columbia, 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 occurrences of lesions diagnostic of HSMI in farmed Atlantic salmon
- HSMI has only been described in farmed fish, globally
- PRV may contribute to the rare disease occurrence of Jaundice Syndrome in BC farmed Chinook but in most circumstances has low to no virulence within Pacific salmon species

> Moreover, in the context of testing and management of PRV and HSMI in BC, it is worth noting that the Pacific Northwest Fish Health Protection Committee (PNFHPC), an organization in the United States of technical and policy representatives from conservation agencies, tribes and commercial fish producers from the Pacific Northwest, conducted a review in September 2017 of the information available on PRV and concluded, "The ubiquitous nature of piscine orthorevirus (PRV), its apparent historic presence in wild Pacific salmonid stocks in the Pacific Northwest and the lack of clear association with disease in Pacific salmonids suggest the virus poses a low risk to wild species of Pacific Salmonids."

iv) ***June 2018 Rapid Science Response***

[67] The June 2018 RSR was made in response to a June 14, 2018 request by Allison Webb, RDG, and required a response by June 21, 2018. The June RSR also states that it does not constitute delivery of peer-reviewed Science advice. The responders were Mark Higgins and Stewart Johnson, DFO Science. It was reviewed by Lesley MacDougall on June 21, 2018, and approved by Carmel Lowe on June 27, 2018. It repeats the introductory background information found in the prior RSR, but notes that since then, there had been at least one new paper published in the primary peer-reviewed literature on PRV. This paper is identified as Di Cicco *et al* (2018), *The same strain of Piscine orthorevirus (PRV-1) is involved with the development of different, but related diseases in Atlantic and Pacific Salmon in British Columbia*, FACETS, in

press (subsequently published as FACETS 3:599-641.doi:10.1139 / facets – 2018-008, accepted April 23, 2018, published June 18, 2018) ("Di Cicci 2018")).

[68] The request posed two questions:

1. How does this recently published paper, and other recently published papers not yet reviewed, alter the scientific perspective on the role of PRV in the development of disease?

2. Given the recent review (DFO, 2018), how is this study relevant (or not relevant) to the testing and management of PRV and HSMI in BC?

[69] The June RSR notes that it limits its discussion primarily to the evidence presented in Di Cicco 2018 for a link between infection with PRV to development of Jaundice Syndrome in farmed Chinook salmon. Links between infection with PRV and HSMI in Atlantic salmon are the subject of the prior informal March RSR and the perspective presented there remains valid.

[70] The June RSR states that Di Cicco 2018 provides information and related inferences/interpretations on the impacts of PRV in BC farmed Chinook salmon and expands on the previously reported HSMI diagnosis. The June RSR states that its review of the manuscript reveals deficiencies with the data presented and the criteria used to characterize jaundice disease that render the article's conclusions unsupported. Further, the study fails to consider previously published information that has direct relevance to the role of PRV in the development of Jaundice Syndrome. Therefore, altering the current scientific perspective of the role on PRV in the development of disease is not recommended.

[71] More specifically, the Aquaculture Management Division's Fish Health Audit and Surveillance Program ("FHASP") assigns a diagnosis of Jaundice Syndrome in a farmed Chinook population when there is an elevated mortality rate with a substantial proportion of the carcasses presenting a characteristic yellow discolouration of the skin of the abdominal and periorbital region. Di Cicco 2018 utilized a broader suite of signs drawn from notes made by the attending veterinarian at the time of collection to re-classify the archived samples, including that such Chinook salmon were classified as "jaundice/anemia" if the veterinarian's diagnostic comments indicated "Jaundice Syndrome" or "jaundice – no agent", and/or the gross lesions indicated "yellow fluid", "yellow bile" or "yellow bile like fluid" noted in the peritoneal cavity or on the pyloric caeca and/or liver. The RSR states that as a consequence of this broader classification, Di Cicco 2018 characterized three times as many fish (9 fish or 3.7% of the study samples) as showing signs of a new disease which they referred to as "jaundice/anemia". The June RSR states that the Di Cicco 2018 authors do not provide a clear description of why they broadened the definition, nor discuss how the lesions they considered compare to those described for Jaundice Syndrome in Garver 2016(a). Nor did the authors acknowledge that several of the characteristics they included in their definition of jaundice/anemia are shared with other diseases, leading to bias in their conclusions. They also provide little consideration of the role of other pathogens.

[72] The June RSR also states that Di Cicco 2018 proposes a cause and effect relationship between infection with PRV and the development of jaundice/anemia, yet present no direct evidence to support this. Additionally, the study does not consider the findings, which the June RSR then summarizes, of previously published studies, being Garver 2016(a), and more recent

challenge trials in Washington state as reported on the BC Salmon Farmers website, which indicate that even though a potential linkage between PRV presence in the occurrence of HSMI has been determined, presence of PRV does not guarantee the development of HSMI or Jaundice Syndrome in Chinook, sockeye, coho or Atlantic salmon.

[73] Further, while Di Cicco 2018 stated that individuals infected with PRV and identified as being in a viral state represent a fish that is destined to develop jaundice/anemia and die, that prognosis has not been established. To accurately assess fish in varying states of disease progression, it is necessary to examine live, moribund and recently dead fish over time. As Di Cicco 2018 only examined samples that were in the same point in disease progression, their assessment of disease progression is unsupported. And, although mixed pathogen infections were detected in the salmon examined, Di Cicco 2018 does not discuss the potential of one of these (Erythrocytic Necrosis Virus) to contribute to the histopathological response they associate with jaundice/anemia. Nor does Di Cicco 2018 explicitly state what proportion of the Chinook salmon audit samples were infected with PRV, and it provides no data on the proportion of farmed Chinook salmon carrying PRV, or on the loads of PRV in apparently healthy fish. The June RSR states that this is essential information to support Di Cicci 2018's conclusions on the importance of PRV load in the development of jaundice/anemia or other disease in Chinook salmon.

[74] This is summarized as:

> Di Cicco et al. (2018), demonstrated that PRV is found in association with a variety of different types of lesions on a small sample of recently dead Chinook salmon. Di Cicco et al. (2018) conclude that PRV is "*likely* also to be the cause of

> jaundice/anemia in farmed Chinook salmon". However, theirs is not a cause and effect study, but rather a retrospective analysis of archived FHASP audit samples. The authors failed to consider the findings from important published cause and effect studies, including: 1) Jaundice Syndrome challenge trials reported in Garver et al. (2016), which injected tissues from Jaundice Syndrome fish but failed to cause jaundice, although PRV was transferred, and 2) Chinook and Coho PRV challenge trials conducted in Washington State which similarly did not result in anemia or other signs of disease. Di Cicco et al (2018) included a larger number of disease signs, many of which are shared with other diseases known to occur in Pacific Salmon, to establish a new disease which they have referred to as "jaundice/anemia". By doing this the number of fish within the audit samples that are identified as having jaundice relative to the AMD's audit data is increased threefold.
>
> (emphasis original)

[75] As to the second question, the June RSR repeats some of the above concerns, adding, regardless of the clinical signs used, jaundice in farmed Chinook salmon on the west coast of British Columbia is uncommon, yet this is not discussed or put into the context of overall factors leading to mortality of farmed Chinook salmon. Nor do the authors demonstrate why the disease is observed in some PRV infected fish and not others. Further,

> The statement in the paper's abstract that "Chinook salmon may be at more than a minimal risk of disease from exposure to PRV occurring on salmon farms" is not substantiated. Di Cicco et al. (2018), in summarizing the results, state that "Given that PRV-1a is the cause of HSMI in farmed Atlantic salmon, and likely also to be the cause of jaundice/anemia in farmed Chinook salmon,…illustrates that there may be very real risks associated with PRV transmission from farmed salmon (in which PRV is highly prevalent) to wild Pacific salmon". However, this statement is subsequently qualified with "*The severity and extent of those risks still remain elusive…*". We note that the magnitude of the risk of disease was not examined in the study nor should it have been reported given the quantity and quality of the data they utilized.
>
> (emphasis original)

V. ‘NAMGIS’ MOTION FOR AN INJUNCTION (T-430-18)

[76] On March 9, 2018, ‘Namgis brought a motion in T-430-18 seeking an injunction to prevent the Minister from issuing a transfer licence to Marine Harvest and preventing Marine Harvest from seeking or acting upon such a licence.

[77] By Order and Reasons dated March 23, 2018, Justice Manson denied the motion. Based on the evidence before him and applying the three-part conjunctive test for interlocutory relief set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, Justice Manson found there was a serious issue to be tried relating to the Minister’s obligation to regulate fish transfers and the duty to consult and accommodate ‘Namgis. Further, irreparable harm had been established based on a lack of consultation, the importance of wild salmon to ‘Namgis, the wild salmon fishery being at serious risk given the depleted wild salmon populations in ‘Namgis’ asserted territory, and recent science establishing a connection between PRV and HSMI and the resulting risk of disease and mortality. However, the balance of convenience favoured Marine Harvest. The evidence was that it would take several weeks to prepare a different site to receive the nearly 1 million smolts intended for transfer to Marine Harvest’s Swanson Island facility, but that this option was not available as the smolts were ready and in need of immediate transfer. ‘Namgis had, without explanation, delayed in bringing its injunction motion. Although it had been told by Marine Harvest in December 2017 that the company planned to restock the facility in March or April 2018, ‘Namgis did not file its injunction motion until March 9, 2018, mere days before the transfer was set to begin. As the third branch of the tripartite test for injunctive relief had not been met, the motion was denied.

VI. ISSUES

[78] In my view, the issues arising in these three applications can be addressed as follows:

Issue 1: Is the PRV Policy Decision Reasonable (T-1710-16 and T-430-18)?

a) Preliminary Issue – Rule 312 Motions (T-1710-16)
b) Standard of review
c) Was the Minister's interpretation of s 56 of the FGRs reasonable?
d) Did the Minister derogate from the precautionary principle?
e) Did the Minister ignore the health of wild salmon?
f) Did the Minister act in bad faith? (T-430-18)

Issue 2: Did the Minister breach the duty to consult 'Namgis concerning the PRV Policy Decision? (T-430-18)

a) Standard of review
b) Was there a duty to consult and, if so, was it breached?

Issue 3: Was the decision to issue the Marine Harvest transfer licence reasonable? (T-744-18)

a) Was the transfer licence issued in contravention of s 56 of the FGRs?
b) Did the Minister breach the duty to consult?
c) Did the Minister breach the duty of procedural fairness?

Issue 4: Remedies

Issue 5: Costs

[79] As a preliminary observation, I note that the materials filed in these three applications for judicial review are extensive. The records filed by each party include lengthy affidavits with

multiple exhibits, reply affidavits as well as transcripts of cross-examinations of the deponents. There are also multiple outstanding preliminary motions deferred by the Case Management Judge, other motions, and attendant records. By my estimation, approximately 35,000 pages have been filed. In the result, while I have reviewed and considered all of the parties' submissions, these reasons do not attempt to describe all of the evidence or capture the level of detail contained in the evidence that is described. Nor do they set out every submission or nuance of every submission made before me. Instead, I have set out in these reasons the evidence and submissions that I consider to be most relevant to the resolution of the applications.

VII. ANALYSIS

A. Issue 1: Is the PRV Policy Decision Reasonable (T-1710-16 and T-430-18)?

i) *Preliminary Issue – Rule 312 Motions (T-1710-16)*

[80] By Direction of July 12, 2018, the Case Management Judge required that Ms. Morton and 'Namgis, the Applicants in T-1710-16 and T-430-18 respectively, file any proposed supplemental affidavits no later than July 13, 2018 and that the Respondents raise any objections to the proposed supplemental affidavits by July 20, 2018. In the event of an objection, the applicant seeking to file the proposed supplemental affidavit would bring an informal motion (written representations only) for leave, pursuant to Rule 312, to be determined by the Applications Judge.

[81] On August 17, 2018, Ms. Morton filed written representations in T-1710-16 seeking to file the supplemental affidavit of Carmen M. Valenzuela, legal assistant employed by

Ms. Morton's counsel, Ecojustice Canada, sworn on July 9, 2018 ("Valenzuela Affidavit"), for the purpose of placing on the record evidence provided by Ms. Morton, which she submits was: in the possession of the decision-maker; should have been considered in making the June 28, 2018 PRV Policy Decision; and, is relevant to the issues raised in her application for judicial review.

[82] The Valenzuela Affidavit attaches as exhibits correspondence between counsel for the Minister and counsel for Ms. Morton pertaining to the anticipated decision. By letter of June 1, 2018 (Exhibit A), counsel for the Minister informs counsel for Ms. Morton that DFO is considering options for reviewing the PRV Policy based on new information that has arisen since the March 9, 2018 reconsideration, including the Di Cicco 2018 publication. Minister's counsel advises that instructions are expected shortly in that regard, which will be relayed.

[83] In response, on June 6, 2018 (Exhibit B), counsel for Ms. Morton sent an email to counsel for the Minister asking that her letter, which was attached, be forwarded to the Minister and, in keeping with the desire of Minister's counsel to keep communication through counsel, that it also be forwarded to those in DFO charged with reviewing the PRV Policy, and others. Attached was a June 6, 2018 letter from Ecojustice (Exhibit C), on behalf of Ms. Morton, to the Minister. This letter states that Ecojustice is writing to ensure that the Minister and DFO are aware of information that Ms. Morton believed to be germane to any reconsideration of the PRV Policy and attaches the following:

- Office of the Auditor General of Canada, *Reports of the Commissioner of the Environment and Sustainable Development to the Parliament of Canada, Independent Auditor's Report, Report 1: Salmon Farming* (spring 2018) ("Auditor General Report");

- A pre-release of Di Cicco *et al*, "The same strain of Piscine orthoreovirus (PRV-1) is involved in the development of different, but related disease in Atlantic and Pacific Salmon in British Columbia", accepted for publishing in FACETS on April 23, 2018;

- A Washington Department of Fish and Wildlife News news release, dated May 17, 2018 regarding the Department's refusal to issue a transfer permit for PRV-infected farmed salmon ("Washington State news release"); and

- December 14, 2017, correspondence from Ecojustice, on behalf of Ms. Morton, to the Minister setting out Ms. Morton's view that the PRV Policy was creating significant risk for wild salmon migrating past fish farms, identifying what she believed to be significant recent scientific developments regarding PRV since the January 2017 decision and which she felt must be considered in the context of the health of wild salmon stocks. She requested that the Minister reconsider and revise the PRV Policy in light of this.

[84] Minister's counsel, by email of June 14, 2018 (Exhibit D), advises counsel for Ms. Morton that DFO has instructed him that the letter has been forwarded to the Minister's office and to the decision-maker, Allison Webb, as well as others.

[85] However, these materials are not included in the June 28, 2018 decision materials in the CTR. Given this, on July 3, 2018 (Exhibit E), Ms. Morton's counsel wrote to the Minister's counsel requesting that the CTR be re-certified to include the materials. By letter of July 9, 2018 (Exhibit H), counsel for the Minister advises that the reason the materials are not included in the June 28, 2018 materials in the CTR is that they were not before the decision-maker when she reconsidered the PRV Policy on that date. Counsel for the Minister states that, "As you can appreciate, DFO receives many submissions from the public regarding aquaculture. Not all materials received by DFO are automatically included in considerations by decision-makers." The letter states that as the materials were not before the decision-maker, they are irrelevant.

a) Rule 312

[86] Rule 312 permits a party, with leave of the Court, to file additional affidavits. The Federal Court of Appeal in *Forest Ethics Advocacy Assn v National Energy Board*, 2014 FCA 88 at paras 4–6 (also see *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 6 ("*Connolly*") set out the requirements that must be met to obtain an order under Rule 312. First, an applicant must satisfy two preliminary requirements:

(1) The evidence must be admissible on the application for judicial review. Generally the record before the reviewing court consists of the material that was before the decision-maker, although there are exceptions to this; and

(2) The evidence must be relevant to an issue that is properly before the reviewing court.

[87] If the two preliminary requirements are met, the applicant must then convince the Court that it should exercise its discretion in favour of granting the order under Rule 312. Three questions have been identified to guide the Court in determining whether the granting of an order under Rule 312 is in the interests of justice:

(a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?

(b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?

(c) Will the evidence cause substantial or serious prejudice to the other party?

[88] In *Association of Universities and Colleges of Canada v Canadian Copyrights Licensing Agency*, 2012 FCA 22 ("*Assn of Universities and Colleges*"), Justice Stratas pointed out that, in determining the admissibility of an affidavit in support of an application for judicial review, the differing roles played by the Court and the administrative decision-maker must be kept in mind. Parliament gave the administrative decision-maker, and not the Court, jurisdiction to determine certain matters on their merits. Because of this demarcation of roles, the Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before a Court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible.

[89] Justice Stratas listed three such exceptions and noted that the list may not be closed. The exceptions are an affidavit that, provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, noting that care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker; brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker so that the Court can fulfill its role of reviewing for procedural unfairness; and, highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding.

[90] Justice Statas revisited the general rule in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 ("*Bernard*"), referencing the Federal Court of Appeal's prior decisions in *Assn of*

Universities and Colleges; *Connolly*; and *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45 ("*Delios*"), and elaborated on the three recognized exceptions:

> [23] The background information exception exists because it is entirely consistent with the rationale behind the general rule and administrative law values more generally. The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers. The background information placed in the affidavit is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision-maker. In no way is the reviewing court encouraged to invade the administrative decision-maker's role as merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.
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> [24] The second recognized exception is really just a particular species of the first. Sometimes a party will file an affidavit disclosing the complete absence of evidence on a certain subject-matter. In other words, the affidavit tells the reviewing court not what is in the record-which is the first exception-but rather what cannot be found in the record: see *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.) and *Access Copyright*, above at paragraph 20. This can be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence at all. This too is entirely consistent with the rationale behind the general rule and administrative law values more generally, for the reasons discussed in the preceding paragraph.
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> [25] The third recognized exception concerns evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider: see *Keeprite* and *Access Copyright*, both above; see also *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69, 274 N.B.R. (2d) 340 (improper purpose); St. John's Transportation Commission v. Amalgamated Transit Union, Local 1662 (1998), 161 Nfld. &

P.E.I.R. 199 (fraud). To illustrate this exception, suppose that after an administrative decision was made and the decision-maker has become *functus* a party discovers that the decision was prompted by a bribe. Also suppose that the party introduces into its notice of application the ground of the failure of natural justice resulting from the bribe. The evidence of the bribe is admissible by way of an affidavit filed with the reviewing court.

[26] I note parenthetically that if the evidence of natural justice, procedural fairness, improper purpose or fraud were available at the time of the administrative proceedings, the aggrieved party would have to object and adduce the evidence supporting the objection before the administrative decision-maker. Where the party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so, the objection cannot be made later on judicial review: *Zündel v. Canada (Human Rights Commission)*, (2000), 195 D.L.R. (4th) 399; 264 N.R. 174; In *re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.).

[27] The third recognized exception is entirely consistent with the rationale behind the general rule and administrative law values more generally. The evidence in issue could not have been raised before the merits-decider and so in no way does it interfere with the role of the administrative decision-maker as merits-decider. It also facilitates this court's ability to review the administrative decision-maker on a permissible ground of review (*i.e.*, this Court's task of applying rule of law standards).

[28] The list of exceptions is not closed. In some cases, reviewing courts have received affidavit evidence that facilitates their reviewing task and does not invade the administrative decision-maker's role as fact-finder and merits-decider: *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at paragraph 24. For example, in one case the applicant wished to submit that the administrative decision-maker's decision was unreasonable because it wrongly construed certain submissions made by counsel as admissions. But counsel's submissions to the administrative decision-maker were not in the record filed with reviewing court. The reviewing court admitted evidence of counsel's submissions so that it could assess whether the decision was unreasonable: *Ontario Shores Centre for Mental Health v. O.P.S.E.U.*, 2011 ONSC 358. In another case, a reviewing court admitted a partial transcript of proceedings before an administrative decision-maker. The transcript was prepared by one of the parties, not by the administrative decision-maker. In the circumstances, the reviewing court was satisfied that the partial

> transcript was reliable, did not work unfairness or prejudice, and was necessary to allow it to review the administrative decision: *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, 336 D.L.R. (4th) 577.

In *Delios*, Justice Stratas stated as follows with respect to the general background exception:

> [44] Under this exception, a party can file an affidavit providing "general background in circumstances where that information might assist [the review court to understand] the issues relevant to the judicial review": *Access Copyright*, above at paragraph 20(a).
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> [45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy - that is the role of the memorandum of fact and law - it is admissible as an exception to the general rule.
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> [46] But "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20(a).

[91] The Federal Court of Appeal has also held that an affidavit must be premised upon personal knowledge and that its purpose is to adduce facts relevant to the dispute without gloss or explanation. The purpose of an affidavit is not to be confused with the written submissions a party is entitled to make in support of their application (*Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at paras 2–3). Affidavits must be free from argumentative materials and the deponent must not interpret evidence previously considered by a tribunal or draw

negative conclusions (*Canadian Tire Corporation v Canadian Bicycle Manufacturers Association*, 2006 FCA 56 at paras 9–10 ("*Canadian Tire Corp*"); also see *Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18).

b) Ms. Morton's Position

[92] Ms. Morton notes that in August 2016 she sent a letter and an expert report to the Minister in support of her demand that he change the PRV Policy. Those materials were included in an affidavit affirmed by Ms. Morton. Although the Respondents sought to have the materials struck from the record, by Order dated August 11, 2017, the Case Management Judge refused to strike them on the basis that she was not prepared to foreclose Ms. Morton's right to argue on the merits of the application that such material should have been before the decision-maker and, accordingly, found that the materials fell within the *Assn of Universities and Colleges* exceptions. The Case Management Judge also stated that she would not foreclose Ms. Morton's ability to place before the Court evidence regarding the information and documentation that she had transmitted to the Minister, which Ms. Morton asserted was relevant to the Minister's decision to adopt the PRV Policy. Ms. Morton submits that the Valenzuela Affidavit should be admitted on the same grounds.

[93] Additionally, the Valenzula Affidavit and materials are admissible because they provide important background information for this Court's assessment of the reasonableness of the PRV Policy and the decision-making process in adopting that Policy. The rejection of Ms. Morton's good-faith response, excluded from the CTR, provides information as to the reasonableness of the decision-making process. Further, the background materials will assist the Court in

understanding issues relevant to the judicial review. They provide the Court with a more accurate and complete factual context within which to understand and assess the legality of the Minister's PRV Policy.

[94] Ms. Morton also submits that the Valenzuela Affidavit meets the interests of justice test. None of the materials attached to the Valenzuela Affidavit existed when Ms. Morton filed her initial affidavit in November 2016 in support of the application. Further, the materials are relevant because Minister's counsel assured Ms. Morton that they were in the decision-maker's possession. The Affidavit establishes that those materials were not considered by the decision-maker, which is probative to Ms. Morton's assertion that the PRV Policy and the process for maintaining it were unreasonable. This evidence will also help the Court to discern the reasonableness of the Policy and the underlying decision-making process. Further, as to prejudice, the Case Management Judge gave the Respondents an opportunity to file Rule 312 affidavits responding to the Valenzuela Affidavit. The Minister has done so, filing the July 28, 2018 Affidavit of Lauren Situ ("Situ Affidavit"), which attaches correspondence that the Minister claims should have been included in the Valenzuela Affidavit. Ms. Morton does not object to the filing of the Situ Affidavit. Thus, to the extent that the Valenzuela Affidavit causes prejudice, the opportunity to file additional materials cures this. Marine Harvest and Cermaq chose not to file responding affidavits, which speaks to the lack of prejudice that the Valenzuela Affidavit being included in the record will cause.

c) The Respondents' Positions

[95] The Respondents submit that the Valenzuela Affidavit does not meet the preliminary requirements for admitting additional affidavit evidence. It is inadmissible and irrelevant as it is evidence that was not before the decision-maker and is not admissible under any of the exceptions to the general rule against extrinsic evidence on judicial review. A court sitting in judicial review is not a forum for fact finding on the merits of the decision, its job is not to conduct a trial *de novo* on the issues, and it is not an academy of science tasked with mediating scientific debates (*Assn of Universities and Colleges* at paras 17–18; *Inverhuron and District Ratepayers' Assn v Canada (Minister of the Environment)*, [2000] 191 FTR 20 at para 71; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 41). The Minister submits that under the *Fisheries Act* and its associated regulations, it is the Minister who is responsible for managing fisheries. The role of the Court is to consider whether the decision under review is reasonable based on the grounds of review set out in the notice of application, pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, and on the record that was before the decision-maker.

[96] The Respondents submit that here, Ms. Morton seeks to introduce additional evidence and argument going to the merits of the decision. In particular, the June 6, 2018 letter attached as Exhibit C of the Valenzuela Affidavit contains extensive argument by Ms. Morton on the merits of the PRV Policy. The Affidavit attaches additional evidence intended to supplement the findings of the decision-maker and encourage the Court to form its own view on the factual merits of the reviewed decision. Nor does the Valenzuela Affidavit meet the requirements of helpful, general background information. And, although Ms. Morton seeks to admit the Affidavit to show that the decision-maker chose not to consider these materials, her pleadings

have not challenged the Minister's process for maintaining the PRV Policy. Thus, although Ms. Morton submits that the Valenzuela Affidavit illustrates that the Minister chose not to consider the submitted material, these materials are irrelevant. If admitted, the parties would be prejudiced because it puts evidence before the Court that did not form a part of the record and raises a new issue of procedural fairness that Ms. Morton does not challenge in her application for judicial review.

[97] Marine Harvest adds that while Ms. Morton's public interest litigant standing is not contested, she is still just a member of the public, and while she is entitled to send materials to the Minister, she is not entitled to have them considered in specific decisions, and she is not entitled to "shape the record". The idea that a private party without a right of hearing can send materials to a decision-maker and then argue that they form part of the record could have far-reaching consequences.

d) Analysis

[98] I have considerable difficulty with the Minister's refusal to include the correspondence and materials attached to the Valenzuela Affidavit in the CTR. It is apparent from these materials that subsequent to Ms. Morton commencing her application on October 12, 2016, counsel for the Minister advised Ms. Morton's counsel that DFO was considering reviewing the PRV Policy as new information had become available. Ms. Morton was not, at this stage, just another member of the public. She had commenced her application and had an ongoing interest in the Policy reconsiderations that post-dated her application. It was in this context that she was specifically advised by counsel for the Minister of the intended further reconsideration.

[99] She also specifically requested that the letter and materials provided in response be sent to the Minister and those within DFO who would be reviewing the PRV Policy. Her counsel was advised by counsel for the Minister that this had been done, specifically referencing the decision-maker, Allison Webb. Given this, it is impossible to see how counsel for the Minister could subsequently attempt to justify the omission from the CTR on the basis that Ms. Morton's letter was not before Ms. Webb when she reconsidered the PRV Policy on June 28, 2018. And while it may be true that DFO receives many submissions from the public regarding aquaculture and that they are not automatically included in considerations by decision-makers, here Ms. Morton requested and was told that the materials had been forwarded to Ms. Webb.

[100] It was, of course, open to Ms. Webb to afford the letter and materials little weight or to find that they were not relevant to her consideration. However, in my view, she was not entitled to pretend that they did not exist or were not before her and, on that basis, exclude them from the record.

[101] Accordingly, the correspondence and materials attached as exhibits to the Valenzuela Affidavit, in these circumstances, should have been included in the CTR.

[102] However, Ms. Morton did not bring a motion challenging the refusal of the Minister to re-certify the record. Nor does she argue that the Minister's Delegate breached the duty of procedural fairness by excluding the materials from the record, thereby failing to consider them when reconsidering the PRV Policy. Instead, Ms. Morton relies primarily on the general

background exception to the rule precluding the submission of new evidence that was not before the decision-maker.

[103] Given this, and applying the above requirements that must be met to obtain an order under Rule 312, I find that only paragraphs 1 to 3 of the Valenzuela Affidavit and two of the documents attached to the exhibits of the Affidavit are admissible.

[104] Exhibit C, Ecojustice's June 6, 2018 letter on behalf of Ms. Morton is not admissible as it contains what is described as her scientific opinion that the PRV Policy was creating a significant risk to migrating wild salmon and that the materials she attached supported her opinion that the PRV Policy was unlawful and unreasonable. The letter also summarizes what it describes as the most pertinent points of the Auditor General's Report and Di Cicco 2018, as well as including what are described as brief references to "the dire state of wild Chinook stocks in British Columbia" and the significance of the Washington State news release. This letter, and other letters of Ecojustice to the Minister that are enclosed with it, go beyond what is encompassed by the general background exception for non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker, and instead provide opinion evidence relevant to the merits of the matter decided by the administrative decision-maker.

[105] However, the Auditor General's Report, which is attached as part of Exhibit C, is an independent report and a public document. It is a performance audit focused on whether DFO and the Canadian Food Inspection Agency ("CFIA") managed the risks associated with salmon

aquaculture in a manner that protected wild fish. It follows up on the Federal Government's commitment to implementing the recommendations of the Cohen Commission. The Auditor General's Report makes recommendations and includes DFO's responses to each recommendation. In my view, the Auditor General's Report is helpful background information. I would also point out that the Auditor General's Report was put to Andrew Thomson, Regional Director of the Fisheries Management Branch of DFO, when he was cross-examined by counsel for Ms. Morton on his January 29, 2018 affidavit filed by the Minister in T-1710-16 ("Thomson Affidavit #1"). It is therefore before me as Exhibit 7 to the transcript of cross-examination on Thomson Affidavit #1. The transcript of that cross-examination also indicates that counsel for the Minister agreed that the cross-examination of Mr. Thomson with respect to the questions posed by and answers responding to counsel for Ms. Morton in T-1710-16 could be utilized by 'Namgis in T-430-18 and T-744-18, subject to any objections by the Minister made pursuant to Rule 95(1). The Auditor General's Report is therefore also found as an exhibit to that cross-examination in 'Namgis' application records in T-430-18 and T-744-18. The Auditor General's Report is also referenced by Mr. Thomson in his affidavit sworn on July 5, 2018 and filed in T-430-18 ("Thomson Affidavit #2").

[106] As to Di Cicco 2018, it was this report that prompted the Minister to conduct the June 28, 2018 reconsideration of the PRV Policy. The June 2018 Rapid Science Response indicates that the Aquaculture Management Division of DFO requested a review of that paper, and other recently published studies, to ensure that DFO's testing and fish health management approach are informed by the latest scientific evidence and to determine if changes to DFO's management approach should be considered as a result of the new information Di Cicco 2018. Di Cicco 2018,

which was authorized in part by DFO sicentists, was also put to Mr. Thomson on cross-examination on Thomson Affidavit #1 by counsel for Ms. Morton in T-1710-16 and is therefore in the record before me as Exhibit 11 to the transcript of that cross-examination and, as stated above, it is similarly found as an exhibit in 'Namgis' application records in T-430-18 and T-744-18. Di Cicco 2018 is also background information to the extent that it informed the June 2018 Rapid Science Response upon which the Minister's Delegate relied in reaching her decision, and it is admissible on that basis.

e) Situ Affidavit

[107] The Minister also brought a Rule 312 motion seeking to admit the July 27, 2018 Situ Affidavit in the event that the Valenzuela Affidavit is admissible. The Situ Affidavit attaches as exhibits a copy of an October 24, 2017 letter from counsel for the Minister to counsel for Ms. Morton responding to Ecojustice's letter of September 28, 2017 (enclosed with the June 6, 2018 letter from Ecojustice). Additionally, an email dated January 10, 2018 from counsel for the Minister to counsel for Ms. Morton advising that the Minister had forwarded copies of Ecojustice's letter of December 14, 2017 (enclosed with the June 6, 2018 letter from Ecojustice) to counsel, who asked that, in future, all communications dealing with the subject matter of Ms. Morton's litigation against the Minister be directed to the Department of Justice litigation counsel. Counsel for Ms. Morton responded by email on the same date advising that Ecojustice had not communicated directly with any Minister and had sent all correspondence through the Minister's counsel to be forwarded, she was therefore unclear as to the nature of the objection.

[108] The Minister submits that the Situ Affidavit falls under the general background exception as it will assist the Court's understanding of the relevant issues in the underlying judicial review as the exhibits identify documents that are key to the Court's understanding of the record and provide important context not otherwise in the Court's knowledge or in the evidentiary record. According to the Minister, should the Valenzuela Affidavit be admitted into evidence, then it would be in the interest of justice to admit the Situ Affidavit, which provides a complete record of the relevant communications and will assist the Court in understanding the context of the materials attached to the Valenzuela Affidavit.

[109] In my view, the Situ Affidavit adds little to the Court's understanding of the record or the context of the materials attached to the Valenzuela Affidavit. As is clear from Ecojustice's cover email of June 6, 2018, it requested counsel for the Minister to forward its letter of June 6, 2018 to the Minister and to the decision-maker. Counsel for the Minister confirmed that this had been done. In any event, given my finding above, communications between counsel concerning the routing of such correspondence are not relevant. The Situ Affidavit is therefore not admissible.

ii) ***Standard of Review***

[110] The parties submit, and I agree, that the Delegate's decision to maintain the PRV Policy of not testing for PRV or HSMI prior to issuing fish transfer licences is reviewable on the reasonableness standard. Indeed, in *Morton 2015* Justice Rennie found that the question of whether the licence conditions at issue in that case were consistent with s 56 of the FGRs was to be assessed against that standard.

[111] As stated by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*"), reasonableness is a deferential standard. Certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process and also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[112] Although the parties agree on the reasonableness standard, they emphasize different considerations in the application of that standard.

[113] Ms. Morton emphasizes that the overarching issue to be resolved by this Court is whether the impugned PRV Policy Decision is a reasonable articulation, or expression, of the mandatory requirements of s 56 of the FGRs. Reasonableness must be assessed in light of the particular type of decision-making involved, as well as all relevant factors. That is, it is a contextual inquiry (*Dunsmuir* at para 64; *Catalyst Paper Corporation v North Cowichan (District)*, 2012 SCC 2 at para 18). Statutes and case law can constrain what is considered to be acceptable and defensible or within the margin of appreciation of the administrative decision-maker (*Canadian Copyright Licensing Agency (Access Copyright) v Canada*, 2018 FCA 58 at paras 95, 98 ("*Access Copyright*"); *Delios* at para 39).

[114] The Minister emphasizes that in the context of reviewing discretionary policy decisions concerning licencing, the Court should not interfere by substituting its own opinion (*Malcolm v*

Canada (Minister of Fisheries and Oceans), 2014 FCA 130 at para 35 ("*Malcolm*") and should afford the Minister considerable deference (*Ahousaht Indian Band v Canada (Attorney General)*, 2009 BCSC 1494 at para 879, affirmed on point, reversed and varied in part on other grounds 2011 BCCA 237).

[115] Marine Harvest takes a similar position, noting that the Minister has broad discretion with respect to licencing (*Comeau's Sea Foods Ltd. v Canada (Minster of Fisheries and Oceans)*, [1997] 1 SCR 12 at paras 36–37 ("*Comeau's Sea Foods*"); *UHA Research Society et al v Canada (Attorney General)*, 2013 FC 169 at para 10). Further, that when applied to a statutory interpretation exercise, a reasonableness review recognizes that the delegated decision-maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute. Reviewing Courts must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Canada (Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55).

[116] Cermaq builds on this, noting that the contextual approach includes, for example, that when the decision-maker is a Minister of the Crown and the decision is one of public policy, it has been held that the range of decisions that will fall within the ambit of reasonableness is very broad (*Canada (Attorney General) v Abraham*, 2012 FCA 266 at paras 47–48). While the range of decisions that are reasonable is narrower with respect to the statutory interpretation of s 56, it is much broader for the Minister's factual assessment regarding the risk of PRV (*Canada (Attorney General)* v *Canada (Human Rights Commission)*, 2013 FCA 75 at para 14).

iii) ***Was the Minister's Interpretation of s 56 of the FGRs reasonable?***

[117] Ms. Morton submits that the PRV Policy cannot subvert the law (*Ishaq v Canada (Citizenship and Immigration)*, 2015 FC 156 at paras 53, 55, 57), more specifically, the regulatory requirements of s 56 of the FGRs. The PRV Policy, as continued by the PRV Policy Decision, must be consistent and not conflict with the statutory authority under which it was created or it will be found to be unlawful (Donald Brown & John Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf revision 2017-4) (Toronto: Thomson Reuters Canada Ltd., 2017) at 15:81–15:83 ("Brown"); *Morton 2015* at para 49; *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at paras 156–158). Thus, the PRV Policy cannot grant that which the FGRs exclude (*Morton 2015* at para 5). To determine whether the PRV Policy offends s 56 of the FGRs, it is necessary to determine the scope and nature of the Minister's authority under that provision applying the principles of statutory interpretation as set out in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27; *Apotex Inc v Canada (Health)*, 2012 FCA 322 at paras 24–24. Here, Justice Rennie has already interpreted s 56 and his determinations are conclusions of law that bind the Minister (*Apotex Inc v Allergan Inc*, 2012 FCA 308 at para 48). *Morton 2015* also provides important context against which the reasonableness of the PRV Policy must be assessed. However, the Minister disregarded *Morton 2015* when developing and maintaining the Policy and instead adopted an interpretation of s 56 that conflicts with that decision and other case law concerning "conservation" under the *Fisheries Act* (*R v Marshall*, [1999] 3 SCR 533 ("*Marshall*"); *R v Douglas*, 2008 BCSC 7089 ("*Douglas*"); *R v Aleck*, 2000 BCPC 177 at para 35, aff'd 2008 BCSC 1096 ("*Aleck*")). Decision-makers who decide contrary to statutory wording or case law without satisfactory explanation will fail the reasonableness review (*Access Copyright* at para 98). Further, the Minister brought but abandoned an appeal of

Morton 2015, which places a greater burden on the Minster to explain why that decision should not be followed (*Canada (Attorney General) v Bri-Chem Supply Ltd*, 2016 FCA 257 at paras 59–61 ("*Bri-Chem*")).

[118] In T-430-18, 'Namgis characterizes the Minister's interpretation of s 56 as unreasonable, primarily in the context of its arguments on bad faith. However, it also submits that the interpretation is inconsistent with *Morton 2015* in that the Minister's interpretation of "protection and conservation of fish" is limited to the word "conservation" and omits, without justification, any analysis of the word "protection", instead relying on the definition of "conservation" found in *Canada's Policy for Conservation of Wild Pacific Salmon* (Ottawa: Fisheries and Oceans Canada, 2005) ("Wild Salmon Policy"). Further, it effects a very high threshold of risk and harm in connection with the protection and conservation of fish. 'Namgis submits that, ultimately, the Minister's interpretation turns the very function of s 56 on its head by associating a very high threshold of risk and harm with the phrase "protection and conservation of fish". This serves to allow all transfers of fish excepting those with a very high risk and magnitude of harm to an entire conservation unit of wild fish or an entire population of a fish farm, as opposed to the lower threshold of harm determined in *Morton 2015*.

[119] Conversely, the Minister submits that his interpretation is reasonable. The Court should refrain from measuring interpretive outcomes by reference to its own exercise of statutory interpretation and from finding any inconsistency to be unreasonable (*Delios* at para 28), and that the Court must defer to any interpretation that the statutory language can reasonably bear (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 23-33). Moreover,

Morton 2015 is distinguishable. Marine Harvest and Cermaq both also submit that the Minister's interpretation is reasonable, consistent with *Morton 2015* and entitled to deference.

[120] In my view, the starting point for this issue is the Minister's Interpretation itself.

[121] The Minister's Interpretation of s 56 of the FGRs first appears in the record in connection with the January 30, 2017 reconsideration of the PRV Policy and is then found in the background materials for all subsequent reconsiderations. It is undated and makes no reference to *Morton 2015*. Its introduction states that the three s 56 requirements are general in nature and relate to the broad purposes of the *Fisheries Act*. The interpretation itself includes:

> 4. Section 56(b) does not prohibit all transfers where the fish have a disease or disease agent. Rather it prohibits transfers where the fish have a disease or disease agent that may be harmful *to the protection and conservation of* fish. This is an important qualifier. While all disease agents may be harmful to one degree or another, not all disease agents may be so harmful as to threaten the protection and conservation of fish.
>
> (emphasis on original)

[122] Further, it states that "protection and conservation of fish" relates to the Minster's general duty to conserve under the *Fisheries Act*:

> 7. The Minister interprets "protection and conservation" as consistent with the definition of "conservation" in DFO's *Wild Salmon Policy*:
>
> *Conservation*: The protection, maintenance, and rehabilitation of genetic diversity, species, and ecosystems to sustain biodiversity and the continuance of evolutionary and natural production processes.
>
> 8. This definition was adopted in the Final Report of the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River.

9. In this context the Minister interprets the "fish" which must be protected and conserved to be an aggregate of fish rather than an individual fish. The Minister considers the applicable aggregate of fish to be a farm for salmon aquaculture and a stock or conservation unit of wild fish.

10. The Minister's interpretation is that s. 56(b) only prohibits transfers of fish 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. The Minister's interpretations is also that s. 56(b) only prohibits a transfer which may be harmful to the entire populations of Atlantic salmon at a given farm.

11. The Minister's interpretation is that s. 56(b) does not prohibit all transfers where there is potential harm to a fish, or where potentially certain fish will die. Rather s. 56(b) prohibits transfers where the potential harm to fish reaches the level of potential harm to "the protection and conservation of" fish.

12. In short, the potential harm s. 56(b) is aimed at is macro in nature.

13. All of the many disease agents that exist are capable of causing disease, and therefore causing harm, given the appropriate host and environment. Outbreaks of disease cause harm at the level of the individual, and in some cases harm at the population from which that individual comes. It is a separate question as to whether that particular harm "is harm to the protection and conservation of fish". There is a whole spectrum of harm. One disease may cause minor harm to the individual fish and clear the system in short order; another may cause a quick death. One disease may be extremely infectious and spread rapidly to other fish of the same or other species of fish; another may not.

14. There are also geographic considerations. For example, to use a hypothetical, a disease agent or pathogen that may cause harm to the protection of conservation of fish in the Indian Ocean may not be a concern for wild Pacific salmon species or farmed Atlantic salmon in the Pacific. As is set out in the definition of "disease" in the Conditions of Licence, a disease is a condition that can be caused "by a suite of infectious, non-infectious and inherent factors." All of the necessary factors to cause a given disease may not be present in a different locale. In addition, where a disease does occur in a given locale, a wide variety of host and environmental factors which may be specific to that area influence the outcome of harm caused by the infection.

15. The broad requirement or principle set out in s 56(b) of protection and conservation of fish does not provide the Minister with specific guidance

> as to the circumstances in which a given transfer would be to the contrary. The Minister's interpretation of s 56(b) is set out above. The application of that interpretation to the facts of a given transfer is a complex decision involving complex factual matters outside of s 56(b), for example the bodies of scientific knowledge in regard to fish disease and disease agents and the state of the fisheries for different species of fish.

[123] In my view, the Minister's Interpretation of "fish" which must be protected and conserved, as being an aggregate of fish, and his consideration of the appropriate aggregate of fish to be a farm for salmon aquaculture and a stock or conservation unit of wild salmon, is not, in and of itself, unreasonable or inconsistent with *Morton 2015*. Nor is this seriously challenged by Ms. Morton or 'Namgis.

[124] For the purposes of these applications, the only aspect of the Minister's Interpretation that is in issue is the phrase "may be harmful to the protection and conservation of fish". In that regard, in my view, to interpret "protection and conservation" in a manner that is consistent with the definition of conservation as found in DFO's Wild Salmon Policy and the Cohen Commission is also, in and of itself, not unreasonable.

[125] However, and significantly, the Minister's Interpretation appears to impose a threshold or "level" of potential harm that essentially permits any transfer of fish having a disease or a disease agent unless the transfer places genetic diversity, species or conservation units of fish at risk. This is not consistent with the Wild Salmon Policy definition of conservation, and it is unreasonable.

[126] By way of background, the Wild Salmon Policy was developed by DFO in June 2005. While it is not amongst the documents listed as comprising the record before the Delegate when conducting her June 2018 reconsideration of the PRV Policy, it is referenced in the Minister's Interpretation, which the Delegate applied, and it is reasonable to infer that the Minister and Delegate must have been aware of the Wild Salmon Policy, as well as the Cohen Commission, which is also referenced in the Minister's Interpretation. The Cohen Commission is also mentioned in *Morton 2015*, following which decision DFO implemented the ITC transfer licence process, including that the Delegate would consider the ITC recommendation when making her decision. In my view, knowledge of those keystone documents would comprise part of the Minister's and the Delegate's underlying expertise.

[127] I also note these documents are evidence in the records before me. The Wild Salmon Policy is Exhibit 2 to the transcript of cross-examination of Andrew Thomson on Thomson Affidavit #1 conducted by Ms. Morton on July 26, 2018, as are extracts of the Cohen Commission (Exhibit 1), the Auditor General's Report (Exhibit 7), and other documents. As noted above, that cross-examination was agreed by counsel for the Minister to also be utilized by 'Namgis in T-430-18 and T-744-18 and, accordingly, those exhibits, including the Wild Salmon Policy, are also found in each of those application records. The admissibility of the Wild Salmon Policy, the Cohen Commission extracts and the Auditor General's Report has not been challenged and the Minister has included portions of the Cohen Commission in its Book of Authorities in each application.

[128] The Wild Salmon Policy defines “species” as the “fundamental category of taxonomic classification consisting of organisms grouped by virtue of their common attributes and capable of interbreeding.” The five species of wild salmon in British Columbia are Chinook, coho, sockeye, pink, and chum.

[129] A conservation unit is defined by the Wild Salmon Policy as “A group of wild salmon sufficiently isolated from other groups that, if extirpated, is very unlikely to recolonize naturally within an acceptable time frame”. Extirpation is defined as local extinction of a species.

[130] Populations are groups of interbreeding salmon that are sufficiently isolated to have persistent adaptations to their local habitat. According to the Wild Salmon Policy, local adaptations and genetic differences between populations are an essential part of the diversity needed for long-term viability of Pacific salmon. A conservation unit will contain one or more populations of the same species of salmon and the number and size of conservation units will vary considerably among species.

[131] Section 56(b) of the FGRs states that the Minister may issue a licence if the fish do not have any disease or disease agent “that may be harmful to the protection and conservation of fish.” The Minister’s interprets “protection and conservation” as consistent with the definition of “conservation” found in the Wild Salmon Policy, that is, “the protection, maintenance, and rehabilitation of genetic diversity, species, and ecosystems to sustain biodiversity and the continuance of evolutionary and natural production processes.”

[132] However, the Minister interprets s 56(b) as *only* prohibiting transfers of "fish" 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. The Minister clarifies this by adding that s 56(b) prohibits transfers where the potential harm to fish reaches the level of potential harm to the protection and conservation of fish and points out that outbreaks of disease can cause harm at the individual level, and in some cases harm to the population from which that individual comes, but that it is a separate question whether that particular harm is harm to the protection and conservation of fish.

[133] This is consistent with the Minister's approach to potential harm from transfers in the aquaculture setting. There the Minister interprets "fish" which must be protected and conserved to be an aggregate of fish, which is a farm for salmon aquaculture, and that transfers are only prohibited if they may be harmful to "the entire population of Atlantic salmon at a given farm".

[134] Thus, the Wild Salmon Policy definition of conservation speaks to the protection of genetic diversity of wild salmon and species of wild salmon and their ability to sustain biodiversity and reproduce. Conversely, the Minister's Interpretation of s 56(b), based on that definition, is that it would only preclude a transfer of fish if the genetic diversity, species or ecosystem of a stock or conservation unit may be harmed "such that it cannot sustain biodiversity and the continuance of evolutionary and natural production processes." As the Minister interprets "fish" as an aggregate of a stock or conservation unit of wild fish, this interpretation suggests a level of acceptable potential harm at the conservation unit or species level.

[135] The Minister and Cermaq submit that the Minister's Interpretation of s 56(b) includes that the potential harm aimed at is macro in nature. This means that it prohibits a transfer where the potential harm to fish reaches the level of potential harm to the protection and conservation of fish. They submit that this view is supported by the French version of s 56(b). While the English version reads "protection and conservation of fish", the French version reads "la protection et à la conservation des espèces". The English translation of "espèces" being species. While I appreciate that the point the Minister and Cermaq are making is that the Minister's interpretation of s 56 includes requirements that are general in nature and relate to the broad purpose of the *Fisheries Act*, I am not persuaded that the difference in the French and English versions assists them. This is because the Minster specifically interpreted "fish", in the context of s 56 in the Interpretation, as the aggregates described above. And, if anything, the French version supports the suggestion that the Minister's Interpretation of s 56(b) is such that any transfer of fish is permissible so long as it does not cause harm at the species level – which exceeds even a conservation unit level risk.

[136] As to the submissions by Ms. Morton and 'Namgis that the Minister's Interpretation is inconsistent with *Morton 2015*, I would first note that in that decision Justice Rennie found that s 56 established specific constraints on the Minster's discretion in respect of transfer conditions forming part of an aquaculture licence. Specifically, the Minister can only issue a transfer licence if the three pre-conditions set out in ss 56(a), (b) and (c) are met. Justice Rennie was concerned with whether the licence conditions in that case were consistent with s 56 and found that two of the conditions at issue maintained a lower standard than required by the regulatory scheme and, therefore, were inconsistent with s 56(b). In that context, he interpreted s 56 and

held that the Minister's legal duty under s 56 extends to any disease or disease agent that "may be harmful to the protection and conservation of fish." He found that interpreting s 56(b) in that manner was consistent with a purposive and contextual approach, as it supported conservation of the resource, the Minister's primary obligation under the *Fisheries Act* (citing *Marshall* at para 40). Justice Rennie found that this interpretation was also consistent with the precautionary approach and stated as follows:

> [57] Again, a purposive, contextual and plain meaning analysis of the language "that ***may*** be harmful" suggests this phrase means any disease or disease agent that *might be harmful* to the protection and conservation of fish. This interpretive approach is again consistent with the precautionary principle, the essence of which is that where a risk of serious or irreversible harm exists, a lack of scientific certainty should not be used as a reason for postponing or failing to take reasonable and cost-effective conservation and management measures to address that risk (*Cohen Commission* vol 3 at 20)…..

[137] Justice Rennie also stated that,

> [97] In my view, subsection 56(b) of the *FGRs*, properly construed, embodies the precautionary principle. First, subsection 56(b) prohibits the Minister from issuing a transfer licence if disease or disease agents are present that "may be harmful to the protection and conservation of fish." The phrase "may be harmful" does not require scientific certainty, and indeed does not require that harm even be the likely consequence of the transfer. Similarly, the scope of "any disease or disease agent" in subsection 56(b) should not be interpreted as requiring a unanimous scientific consensus that a disease agent (e.g., PRV) is the cause of the disease (e.g., HSMI).

[138] In *Morton 2015*, Justice Rennie did not interpret s 56(b) so as to define the phase "protection and conservation" of fish, other than finding that the word "protection" does not stand for "management" but means "preservation". Nor did he determine the specific level of

harm that is permissible under that provision, other than in the context of the precautionary approach, which I have addressed below.

[139] However, he did state as follows:

> [69] In my view, condition 3.1(b)(iii) is consistent with section 56(b). Condition 3.1(b)(iii) precludes transfer where stock is known to have had any diseases listed in Appendix IV – that is, where fish are known to have had any diseases that can "*severely* impact fisheries." This is a reasonable articulation of the section 56(b) requirement that a fish transfer occur only where the fish do not have any disease or disease agent that *may be harmful* to the protection and conservation of fish.
>
> (emphasis original)

[140] Thus, transfer of fish known to have diseases that can severely impact fisheries is inconsistent with the s 56(b) prohibition of transfers of fish having disease or disease agents that may be harmful to the protection and conservation of fish. In my view, a transfer of fish that may potentially cause harm up to the conservation unit or species level is a severe potential impact. Moreover, it represents a risk of serious or irreversible harm that, as will be discussed further below, is contrary to the precautionary approach.

[141] It should also be noted that the Minister's Interpretation speaks only to s 56(b). However, also relevant to the Minister's definition of conservation is s 56(c). That section permits the issuance of a transfer licence if 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. The high level of potential harm that the Minister imports by his interpretation of s 56(b) could also adversely affect stock size or, by diminished numbers, the genetic characteristics of fish or fish

stocks. Nor is it clear to me that this level of potential harm would be in keeping with the proper management and control of fisheries as required by s 56(a).

[142] In my view, and contrary to the submissions of Ms. Morton and 'Namgis, the failure of the Minister's Interpretation to specifically mention *Morton 2015* is not fatal. Further, neither the Minister's interpretation of "fish", nor the utilization by the Minister of the Wild Salmon Policy definition of conservation in his interpretation of s 56(b), conflicts with Justice Rennie's decision. However, as Ms. Morton notes, in *Aleck* at para 35, the Court held that conservation means more than the protection of stocks from extinction. And, in *Douglas* at paras 29, 61, it was held that conservation is more than preservation of a stock and includes enhancement of that stock for the future benefit of all user groups as an essential component in the management of the resource. It includes the concepts of preservation and sustainability. While I do not agree with Ms. Morton's suggestion that the Minister's Interpretation conflicts with these decisions or that it was an error for the Minster not to have addressed them, what these cases do highlight is that, because the Minister's Interpretation suggests that a high level of potential harm is required to preclude a transfer of fish, this may also conflict with the obligation to protect fish, which term is not addressed by the Minister's Interpretation. It is unclear whether the Minister believes the word "protection" sets a higher or lower threshold than "conservation" or whether he is of the view that "protection" is subsumed within the definition of "conservation". However, given my findings below concerning the precautionary principle and the health of wild salmon, I need not further address this point.

[143] Nor do I agree with Ms. Morton's and 'Namgis' submissions that it was particularly unreasonable for the Minister to fail to grapple with *Morton 2015* as the Minister initially brought, and then abandoned, an appeal in that matter. Ms. Morton submits that rather than fighting *Morton 2015* in Court, the Minister appears to have simply developed the PRV Policy to resist it at the administrative level. This is unreasonable and places a greater burden on the Minister to explain why *Morton 2015* should not be followed (*Bri-Chem* at paras 59–61). Conversely, the Minister submits that there is no issue with compliance with *Morton 2015* because counsel for Ms. Morton agreed that the Minister complied with the Court's order in *Morton 2015*.

[144] In my view, the issue of the appeal is largely answered by the Affidavit of Rio Mujagic, legal assistant with the Department of Justice, sworn on January 26, 2018 and filed in T-1710-16, which attaches, as Exhibit A, a December 7, 2016 letter from counsel for the Minister to counsel for Ms. Morton concerning the appeal and Ms. Morton's new application in T-1710-16. In a responding letter dated December 12, 2016, Exhibit B, counsel for Ms. Morton notes, amongst other things, that the mere fact that PRV is involved in both of Ms. Morton's applications does not make them the same. *Morton 2015* challenged the *vires* of conditions of aquaculture licences, while T-1710-16 challenges the Minister's refusal to properly apply s 56 of the FGRs in making transfer decisions. Further, Justice Rennie's order appears to have been implemented by DFO when it removed the illegal licence conditions. The correspondence states that Ms. Morton still considers the appeal moot and the new application does not change her position. Justice Rennie's order quashed conditions in aquaculture licences that are no longer in aquaculture licences – hence the appeals are moot (the December 7 and 12, 2016 correspondence is also

found as Exhibits AA and BB, respectively, of Thomson Affidavit #2, which affidavit also addresses the appeal.

[145] This correspondence provides an explanation of why the appeal was likely abandoned and, in any event, the evidence before me does not support that the Minster is attempting to fight the *Morton 2015* decision by resisting it at the administrative level. Further, given DFO's confirmation to Ms. Morton that it does not intend to go back to the process whereby transfer conditions formed part of the aquaculture licence conditions, and Ms. Morton's confirmation that she considers the appeal to be moot, it is not open to Ms. Morton to now claim, on the basis of the withdrawn appeal, that it is unreasonable for the Minister not to address *Morton 2015* in his Interpretation.

[146] In summary, the Minister's Interpretation, while purporting to adopt the Wild Salmon Policy definition of conservation, in effect, defeats the actual purpose of, and conflicts with, that definition by incorporating a level or magnitude of potential harm at the species or conservation unit level before s 56(b) will be triggered to preclude a transfer.

[147] Given the foregoing, and considering the purpose of s 56(b), as well as the definition of conservation adopted by the Minister, and the Minister's primary obligation under the *Fisheries Act* to conserve the resource (*Morton 2015* at para 56), I am not persuaded that s 56 of the FGRs can justifiably bear the Minister's Interpretation of the phrase "may cause harm to the protection and conservation of fish".

[148] Moreover, this is tied to the issues of the application of the precautionary principle and the failure to consider wild salmon health, which are discussed below.

iv) ***Did the Minister derogate from the precautionary principle?***

[149] Ms. Morton points out that in *Morton 2015*, Justice Rennie found that s 56(b) of the FGRs embodies the precautionary principle and that the consequence of interpreting s 56(b) consistently with that principle is that the licence conditions must also reflect and not derogate from it. Ms. Morton submits that this must also hold true for the PRV Policy, which operationalizes s 56, and that Canada and the Minister have committed to upholding that principle including by way of the Wild Salmon Policy.

[150] She also submits that the Minister's Interpretation of s 56, which sets the PRV Policy level of harm at the potential loss of an entire population of wild salmon is, *prima facia*, not precautionary. Further, that the PRV Policy fails to embody the precautionary principle because it effectively requires the Minister's delegates to ignore PRV and the harm it might cause (by not testing or gathering information) when making a transfer licence decision, and perpetuates a state of willful blindness on the part of the Minister with respect to the extent of PRV infection in hatcheries and fish farms. In doing so, the PRV Policy fetters the Minister's Delegate's discretion by preventing him from responding to the differential risk that PRV may present to healthy, as opposed to endangered, conservation units of wild salmon. This lack of discretion risks harm to at least some conservation units of wild salmon, particularly those at imminent risk of extinction.

[151] Additionally, Ms. Morton submits that the Minister unreasonably relies on a lack of full scientific certainty to justify the adoption and continuation of the PRV Policy. This is because under s 56(b) the Minister may only issue a transfer licence if "the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish." Justice Rennie concluded that the phrase "may be harmful" does not require scientific certainty for s 56 to preclude a transfer. Despite Justice Rennie's findings, DFO has made statements that demonstrate its continued reliance on scientific uncertainty to justify its Policy, even though scientific literature subsequent to *Morton 2015* provides an even stronger argument that PRV and HSMI cause harm to fish. This is also a badge of unreasonableness.

[152] In T-430-18, 'Namgis submits that the purpose authorized by s 56 is the protection and conservation of fish in accordance with the precautionary principle and that *Morton 2015*, in applying that principle, found the potential for harm to be at a much lower magnitude and probability. Further, by failing to assess conservation units of wild salmon, the Minister failed to adhere to even his own interpretation of s 56 or to the Government of Canada's Framework for the Application of Precaution in Science Based Decision Making about Risk as identified by Mr. Thomson as guidance for DFO's assessment of risk.

[153] The Minister, in T-1710-16 and T-430-18, submits that DFO fisheries management is informed by the precautionary approach to conservation including its Decision Framework (A Framework for the Application of Precaution in Science-based Decision-Making about Risk). Further, as regards to the PRV Policy, the precautionary principle serves as a guiding principle, and a decision-maker need only account for considering it, not prove that it was adhered to (*Lake*

Waseosa Ratepayers' Assn v Pieper, 2008 CanLII 6999 (ON Div Crt) ("*Lake Waseosa*"); *Sierra Club Canada v Ontario (Ministry of Natural Resources)*, 2011 ONSC 4655 at paras 53, 59–60 (Div Crt) ("*Sierra Club*")). Its application is also subject to considerable deference (*Western Canada Wilderness Committee v British Columbia (Ministry of Forests)*, 2003 BCCA 403). The decision to continue the PRV Policy of not testing, incorporates and is also consistent with the precautionary principle. The PRV Policy provides science-based guidance to the decision-maker about how to consider PRV and HSMI when deciding whether to authorize transfers of fish under s 56, and DFO updates the PRV Policy when new information is received. DFO's attention to novel science from a variety of sources reflects its attentiveness to the precautionary approach. Here the decision-maker relied on her expertise and DFO's science driven policy and, in this way, considered and accounted for the precautionary principle when making a fact based judgment call.

[154] Marine Harvest takes the position that Justice Rennie did not expressly state that s 56 requires the application of the precautionary principle. An interpretation of that section requiring the application of the principle could lead to extreme results, and clear and unambiguous language would be required to support that interpretation. Nor does the PRV Policy violate the principle as the decision record contains no evidence that the transfer of fish with BC-PRV will cause serious or irreversible harm to fish.

[155] Cermaq takes the position that the Minister's interpretation of harm with respect to s 56 is consistent with the precautionary principle as the focus of the principle is on serious or irreversible damage and that Justice Rennie's discussion of the principle is *obiter*. Further,

DFO's approach to the PRV Policy in its regular review and assessment of developing science regarding PRV and HSMI takes an "adaptive management" approach which has developed in conjunction with the precautionary principle (*Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302 at para 32), and the Delegate states in her decision that DFO will continue to actively monitor this area, and as new information becomes available, consider whether changes will be required. Further, s 56 itself is reflective of the precautionary principle as it prohibits a transfer where a threat exists to the protection and conservation of fish, the principle does not provide additional substantive rights to limit the Minister's discretion. In any event, the Minister considered the risk of PRV and determined that it was not a risk to the protection and conservation of fish, therefore, the precautionary principle is not engaged and whether scientific certainty on that issue exists is irrelevant.

a) Analysis

[156] In my view, Cermaq's position, that Justice Rennie's findings concerning s 56 and the precautionary principle are *obiter*, is of no merit. Justice Rennie devoted an entire section of his decision to considering the meaning of the precautionary principle. In that regard he referenced *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 ("*Spraytech*") and *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 at para 20, in which the Supreme Court referred to the principle as an emerging principle of international law, which informed the scope and application of the legislative provision in question. Justice Rennie stated as follows:

> [43] The precautionary principal recognizes, that as a matter of sound public policy the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to

> protect the environment, as there are inherent limits in being able to predict environmental harm. Moving from the realm public policy to the law, the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law: *Spraytech* at paras 30-31. However, except as discussed in Part VII, the legal contours of the principle need not be determined here, as this decision does not rest or depend on the application of the principle.

[157] Later in his analysis he stated,

> [96] I have concluded that licence conditions 3.1(b)(ii) and (iv) are inconsistent with subsection 56(b) on the basis of first principles governing the interpretation of subordinate legislation. While not necessary to the disposition of this application, I return to the relationship between the precautionary principle and the licence conditions and what is a second basis for their invalidity. These two licence conditions are also inconsistent with subsection 56(b) in light of the precautionary principle.
>
> [97] In my view, subsection 56(b) of the *FGRs*, properly construed, embodies the precautionary principle. First, subsection 56(b) prohibits the Minister from issuing a transfer licence if disease or disease agents are present that "may be harmful to the protection and conservation of fish." The phrase "may be harmful" does not require scientific certainty, and indeed does not require that harm even be the likely consequence of the transfer. Similarly, the scope of "any disease or disease agent" in subsection 56(b) should not be interpreted as requiring a unanimous scientific consensus that a disease agent (e.g., PRV) is the cause of the disease (e.g., HSMI).
>
> [98] The consequence of interpreting subsection 56(b) consistently with the precautionary principle is that the licence conditions must also reflect the precautionary principle. As the licence conditions cannot derogate from or be inconsistent with subsection 56(b), they therefore cannot derogate from the precautionary principle. As noted earlier, the Minister did not attempt to justify that licence condition 3.1(b)(iv) was consistent with the precautionary principle, but confined his argument in this respect to licence conditions 3.1(b)(i), (ii) and (iii).
>
> [99] In my view, the Minister's argument cannot stand. For the reasons given, conditions 3.1(b)(ii) and (iv) are inconsistent with

> section 56(b) and thus with the precautionary principle. The conditions dilute the requirements of subsection 56(b), a regulation designed to anticipate and prevent harm even in the absence of scientific certainty that such harm will in fact occur.

[158] It is clear that Justice Rennie's findings are not *obiter*, but represent another basis upon which he found the impugned licence conditions to be invalid.

[159] I am also of the view that Justice Rennie's reasons serve to inform my analysis of the reasonableness of the PRV Policy in the sense that, as s 56 embodies the precautionary principle, the Minister's Interpretation of s 56 must also be informed by that principle. This, in turn, informs the PRV Policy, which applies the Interpretation, and any decisions made pursuant to s 56 and the Policy.

[160] In any event, the Minister acknowledges that it is intended that the precautionary principle will inform all aspects of fish management including the PRV Policy. For example, the Wild Salmon Policy references Article 6.2 of the 1995 *United Nations Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks* whereby participating states will be more cautious when information is uncertain, unreliable or inadequate, and that the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures. The Wild Salmon Policy states that the precautionary approach identifies important considerations for management: acknowledgment of uncertainty in information and future impacts and the need for decision-making in the absence of full information. It implies a reversal of the burden of proof and the need for longer term outlooks in the conservative of resources. And,

> The application of precaution in the WSP will follow the guidance provided to Federal Departments by the Privy Council Office publication entitled "*A Framework for the Application of Precaution in Science-based Decision Making About Risk"* (Canada, Privy Council Office 2003). That Framework includes five principles of precaution:
>
> - The application of the precautionary approach is a legitimate and distinctive decision-making approach within a risk management framework.
> - Decisions should be guided by society's chosen level of risk.
> - Application of the precautionary approach should be based on sound scientific information.
> - Mechanisms for re-evaluation and transparency should exist.
> - A high degree of transparency, clear accountability, and meaningful public involvement are appropriate.

[161] The Minister also points to the Auditor General's Report as evidence that DFO implements the precautionary approach. There the Auditor General notes that in its Aquaculture Policy Framework, DFO committed to applying the precautionary approach to its decision making.

[162] This is true, however, the Auditor General states that DFO had not clarified how it would do so in the management of aquaculture. The Auditor General recommends that DFO determine and communicate how it will apply the precautionary approach to managing aquaculture when there is uncertainty about the effects of aquaculture on wild fish. Further, that DFO should also clearly articulate the level of risk to wild fish that it will accept when enabling the aquaculture industry. DFO accepts the Auditor General's recommendation and states that it will continue to

apply the precautionary approach according to the Government of Canada's framework on precaution. DFO states that it applies the precautionary approach where appropriate, as a subcomponent within an overall decision-making approach, to deal with risks of serious or irreversible harm even with considerable scientific uncertainty. In Thomson Affidavit #2, Mr. Thomson states that in response to the Auditor General's Report, DFO is in the process of articulating a specific precautionary-approach framework for aquaculture.

[163] That said, the precautionary principle does not serve to create or to provide Ms. Morton or 'Namgis with substantive rights, such as requiring the Minister to test or gather information on the presence of PRV or HSMI in salmon before a transfer.

[164] And while paragraphs 97 to 99 of *Morton 2015* establish that the phrase "may be harmful" does not require scientific certainty or that harm will even be the likely consequence of the transfer, in my view, not requiring scientific certainty does not equate to total absence of uncertainty as 'Namgis submits. Within the confines laid out by s 56(b), the Minister or his delegate maintain the flexibility to assess the risk of harm including by weighing DFO's scientific advice, other and contrary scientific reports, and factual considerations in order to determine the allowable level of scientific uncertainty in a given situation. The Court must defer to that conclusion as long as "the decision was made in accordance with the governing legislation and that it is a reasonable decision in light of the evidence and information which was before the decision-maker" (*Mountain Parks Watershed Assn v Chateau Lake Louise Corp.*, 2004 FC 1222 at para 17).

[165] The difficulty that the Minister faces in this matter is that his interpretation of the phrase "the protection and conservation of fish" contained in s 56(b) of the FGRs, ascribes a level of harm that fails to embody and is inconsistent with the precautionary principle. In the result, decisions made under s 56 that apply the PRV Policy, which adopts that Interpretation, are also made in derogation of the precautionary principle.

[166] The Minister submits that although the threshold is high, the underlying science on which the PRV Policy Decision is based serves to mitigate this. In my view, even if that is the case, this cannot cure the unreasonableness of the PRV Policy Decision or its failure to embody the precautionary principle. And, in any event, I note that RDG Memorandum ultimately concludes that because experimental exposures to BC-PRV have failed to induce disease or mortality, and the current evidence is that HSMI causes low mortalities in BC fish farms, therefore, transfers of fish with a low potential to cause mortality "do not harm the protection and conservation of fish at a population level and can be authorized as per the Minister's Interpretation of s. 56(b) of the FGR." It is unclear why the RDG Memorandum sets the threshold at the population level, which is not included in the Minister's Interpretation. However, the point is that it is not science that is the mitigating factor, it is the level of harm arising from the Minister's Interpretation of s 56(b).

[167] Nor do I find *Sierra Club* to assist the Minister. In *Morton 2015*, Justice Rennie found that the precautionary principle is embodied by s 56. Thus, in my view, this requires that it be adhered to, not merely considered. As to *Lake Waseosa*, this was an application for leave to appeal, which was granted. The Divisional Court of the Ontario Superior Court of Justice found that a ground of appeal arose from the treatment of the precautionary principle by a Review

Panel of the Ontario Municipal Board, and, in so finding, the Superior Court stated that there is no standard to be met with respect to the precautionary principle. Rather, "[i]t is a policy consideration that provides that when there is a risk of serious or irreversible environmental damage, one should err on the side of caution even when there is not full scientific certainty with respect to the risk: *114957 Canada Ltée (Spraytech Société d`arrosage) v Hudson (Town)*, [2001] 2 S.C.R. 241 at para 31 (S.C.C.)." The appeal was ultimately discontinued (see 2008 CanLII 65771 (ONSC Div Crt)), thus there was no substantive analysis of the question of whether the Review Panel wrongly applied the precautionary principle.

[168] Cermaq submits that by interpreting the type of harm that s 56 seeks to prohibit as harm that may occur to the "genetic diversity, species or ecosystem of a stock or conservation unit" the Minister is interpreting s 56 consistently with the precautionary principle's focus on serious or irreversible harm. It submits that an interpretation of the harm element of s 56 as intending to protect against any disease that may cause harm on a lower threshold of harm would be contrary to that focus. I am unable to accept this view. I do not understand the precautionary principle to mean that the risk of any level of potential harm is acceptable until it reaches the level of serious or irreversible harm, such as extirpation. Rather, its focus is to exercise more caution when information is uncertain and, where appropriate, to ensure that steps are taken to prevent irreversible harm, even when the potential risk of causing that harm is uncertain.

[169] As stated in "Science and the Precautionary Principle in International Courts and Tribunals":

> "While preventive action involves intervention prior to the occurrence in relation to known risks, precaution involves a

> preparedness by public authorities to intervene in advance in relation to potential, uncertain or hypothetical threats. If the risk is sufficiently serious in character, precaution may posit intervention even where a risk is simply suspected, conjectured or feared".

[170] Further, the Minister's Interpretation permits harm to genetic diversity, species or ecosystem of a stock or conservation unit to the point where a stock or conservation unit "cannot" sustain biodiversity and the continuation of evolutionary and natural production. It is difficult to see how this is consistent with the precautionary principle. And, in my view, it is not.

[171] As will be discussed below, the precautionary principle also comes into play in the context of the consideration of wild salmon health when making the PRV Policy Decision.

v) *Did the Minister fail to consider the health of wild salmon?*

[172] Ms. Morton submits that the PRV Policy fails to consider the health of wild salmon and that where a decision-maker fails to taken into account a relevant factor in making decision, the decision will be unreasonable (*Frémy v Canada (Procureur general)*, 2018 FC 434 ("*Frémy*")). It is the Minister's duty to manage, conserve, and develop the fishery on behalf of Canadians in the public interest (*Comeau's Sea Foods* at pp 25–26), the duty to conserve is paramount amongst those duties (*Marshall* at para 40; Cohen Commission, v 3, pp 10–12 and recommendation 2), and s 56 of the FGRs reflect the Minister's duty to conserve fisheries (*Morton 2015* at para 56). Given the role that conservation of fisheries plays in the regulatory regime governing transfers of fish to fish farms, wild salmon, by necessary implication, are a

relevant factor that should have been considered by the Minister when adopting and continuing the PRV Policy.

[173] While the PRV Policy considers farmed salmon, such as their mortality, Ms. Morton submits that there is a complete absence in the record of any consideration of the health of wild fish, including any information before the decision-makers of the status of wild salmon populations, including vulnerable conservation units that migrate through areas having high concentrations of fish farms. And although Ms. Morton sent new information on the declining health of populations of wild salmon and other information to the Minister, it does not appear on the record. Further, the failure to audit or monitor the health of wild fish outside fish-farm open-net pens was recently confirmed in the Auditor General's report, which also concludes that DFO had not set limits or thresholds for when to take action if it observed declines in wild fish stocks in areas where aquaculture was prevalent. Again, this is not reflected in the record. Similarly, there is no evidence of consideration by the Minister of other threats facing wild salmon, such as overfishing, pollution and climate change, and how these additional threats might exacerbate the harm caused by PRV. Ms. Morton submits that this lack of evidence as to the health of wild salmon represents an unreasonable failure to consider a highly relevant factor.

[174] 'Namgis, in T-430-18, submits that the health of farmed salmon cannot be used as a proxy for, or to assess, the health of, or risk to, wild salmon because it ignores differences in physiology and environmental conditions. 'Namgis asserts that the Minister's senior scientist, Dr. Garver, stated that disease outcomes for farmed Atlantic salmon cannot be used to predict disease outcomes for wild Pacific salmon. Therefore, the Minister's reliance on data evidencing

low mortality rates among farmed Atlantic salmon ignores the risk that PRV could pose to wild salmon, making it inconsistent with the precautionary principle.

[175] ‘Namgis also submits that the health of wild salmon is a relevant factor even if the Minister’s interpretation of s 56 is accepted. Under the Minister’s interpretation, he would have had to consider how PRV could affect conservation units of wild salmon. The Minister’s affiant, Dr. Hyatt, agreed that the PRV Policy did not examine any specific populations or conservation units of wild salmon. DFO also failed to consider six important risk factors: i) the spread of PRV from fish farms; ii) PRV’s potential impacts on wild salmon’s ecological components of fitness; iii) flawed sampling techniques used for wild salmon; iv) the capacity of conservation units to withstand exposure to PRV; v) the ability of fish farms to maintain a reservoir host population that continually infects endangered wild populations with PRV; and vi) the role fish farms play in amplifying and spreading disease.

[176] Conversely, the Respondents submit that the Minister and his Delegates considered the health of wild fish. The Minister submits that DFO’s awareness of issues concerning wild fish is demonstrated by the fact that much of the data relied upon by ‘Namgis comes from DFO. Further, the record demonstrates that the Minister considered the risk that PRV poses to wild fish. Specifically, DFO considered scientific advice that wild fish do not get disease from PRV and that transfers of fish with low potential to cause mortality do not harm the protection and conservation of fish at a population level.

[177] Further, even if the record does not demonstrate the Minister's consideration of wild fish, this would not justify setting aside the PRV Policy Decision. Given DFO's expertise in managing and regulating matters of fish health, the Court should follow the Supreme Court of Canada's guidance in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 17 ("*Newfoundland Nurses' Union*"), and "pay 'respectful attention' to the decision-maker's reasons and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful."

[178] Marine Harvest adds that although the PRV Policy Decision makes no explicit reference to specific species of salmon or stock size, it does discuss the potential risk of harm to farmed and wild Pacific salmon from BC-PRV. If BC-PRV was found to be of more than of low pathogenicity and virulence, and therefore represent a risk of harm to wild Pacific salmon, only then would only make sense to consider stock sizes. Cermaq agrees and states that to ask that studies be done on every species before a decision is made would be impractical and contrary to the scientific method.

[179] As a preliminary point, I note that in support of its submissions, 'Namgis has relied heavily on its expert evidence, the admissibility of which has been challenged, as will be addressed below. In my view, it is not necessary to refer to that expert evidence as this issue can be resolved on the basis of the record that was before the Delegate.

[180] As Ms. Morton submits, this Court has previously noted that discretionary powers are often circumscribed. Legislation sometimes states that a decision-maker must consider a particular set of factors. In other circumstances, the common law identifies factors that must be considered. In those situations, failure to consider all the relevant factors may give rise to an unreasonable decision (*Frémy* at paras 43–44 citing *Canada (Attorney General) v Almon Equipment Limited*, 2010 FCA 193 at para 39 ("*Almon*")). However, in my view, this is not a "statutory recipe" case like *Almon*.

[181] That said, it is beyond doubt that under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (*Comeau's Sea Foods* at para 37; *Morton 2015* at paras 29–30; *Malcolm* at para 52). In *Comeau's Sea Foods*, the Supreme Court noted that the Minister's power to issue or authorize fishing licences is found in s 7 of the *Fisheries Act*. It found that in the absence of applicable regulations, the Minister's discretion under s 7 was restricted only by the requirement of natural justice. The Minister was bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith.

[182] In this case, the applicable regulations are the FGRs. They prescribe the Minister's s 7 discretion to issue transfer licences by requiring that the three stipulated pre-conditions must be met (*Morton 2015* at para 14). These include, of course, s 56(b) which, in effect, requires the Minister deny a transfer licence if fish have a disease or disease agent that "may be harmful to the protection and conservation of fish". The Minister's Interpretation is that "fish" means an aggregate of fish, which, for wild fish, is a stock or conservation unit.

[183] There can also be no doubt that the protection and conservation of fish extends to wild fish, such as wild Pacific salmon.

[184] Thus, while this is not a circumstance where the legislation explicitly states that the decision-maker must consider the status or health of wild salmon as a particular factor when issuing a transfer licence, I agree with Ms. Morton and ‘Namgis that, given the role that conservation of fisheries plays in the regulatory regime governing transfer of fish to fish farms, and as reflected in s 56, including the Minister’s Interpretation of that section, wild salmon, by necessary implication are a relevant factor that the Minister was required to consider when adopting and continuing the PRV Policy, which Policy informs the issuance of transfer licences. I would add that as fish transfer licences are also required with respect to salmon enhancement projects, in which hatchery raised smolts are released into wild Pacific salmon populations, the health of wild salmon is obviously a relevant factor to consider as the release of smolts carrying a disease or disease agent potentially could directly impact the health of those populations.

[185] The obviousness of the health of wild Pacific salmon being a relevant factor to be considered by the Minister in his adoption and reconsiderations of the PVR Policy, and issuance of transfer licences, is perhaps highlighted by the fact that this is not challenged by the Respondents.

[186] As to whether the Delegate considered this factor, some background is required. The health of wild Pacific salmon stocks has been in the forefront of public and DFO concern for some time. The Wild Salmon Policy, first affected by DFO in 2005, states that conservation of

wild salmon and their habitat is the highest priority for resource management decision-making. It identifies the five species of wild Pacific salmon, which are grouped into conservation units that reflect their geographic and genetic diversity. The Wild Salmon Policy states that, for each conservation unit, higher and lower benchmarks will be defined that will delimit three status zones, Green, Amber and Red. A conservation unit in the Red zone is said to be "undesirable because of the risk of extirpation, and the loss of ecological benefits and salmon production. The presence of a [conservation unit] in the Red zone will initiate an immediate consideration of ways to protect fish, increase their abundance, and reduce the potential risk of loss." As noted above, the Wild Salmon Policy is attached as an exhibit of the transcript of the cross-examination of Andrew Thomson conducted in T-1710-18 and adopted in T-430-18 and T-744-18.
Mr. Thomson was questioned on the document and agreed that there are salmon conservation units that are in the Red zone, which indicates that they are at some level of risk of extinction, but stated that qualifying that level of risk was very hard to do.

[187] Subsequent to the effecting of the Wild Salmon Policy, the Cohen Commission issued its report. As noted by Justice Rennie in *Morton 2015*,

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

> should be "DFO's number one priority in conducting fish health work" (Cohen Commission vol 2 at 113 and vol 1 at 474).

[188] As noted above, an extract of the Cohen Commission report is attached as an exhibit of the transcript of the cross-examination of Mr. Thomson. An extract is also found in the Supplementary Book of Authorities filed by the Minister in T-430-18.

[189] Ms. Morton points out that DFO's *Integrated Fisheries Management Plan June 1, 2017 - May 31, 2018, Salmon Southern BC* (Ottawa: DFO, 2017) ("IFMP"), reports that status evaluations were completed and consensus reached on the status designation for fifteen of the thirty-five southern BC Chinook conservation units. Of these, eleven were assigned Red status, one was assigned a Red/Amber status, one was assigned Amber status, and two were assigned Green status. Of the remaining twenty conservation units, nine were considered data deficient and eleven were not evaluated. I note that similarly the IFMP indicates that seven of twenty-four Fraser River conservation units were assigned Red status, four were assigned Red/Amber and four were assigned Amber status. An excerpt of the IFMP is Exhibit 4 of the transcript of cross-examination on Thomson Affidavit #1 filed in T-1710-16, as adopted in the records of T-430-18 and T-744-18.

[190] Ms. Morton also notes that, the DFO Albion Test Fishery – chinook gill net indicates very low returns of chinook for the beginning of the 2018–2019 fishing season as compared to previous years. When cross-examined, Mr. Thomson confirmed that this is a test fishery, which DFO uses as a tool to conduct in-season monitoring of salmon returns. The DFO Albion Test

Fishery report is Exhibit 6 to the transcript of the cross-examination on Thompson Affidavit #1, as adopted in the records of T-430-18 and T-744-18.

[191] As to sockeye salmon, in 2017 the Committee of the Status of Endangered Wildlife in Canada ("COSEWIC"), an independent scientific body established under Canada's *Species at Risk Act*, SC 2002, c 29, to assess and report on the status of wildlife in Canada, issued a news release indicating that it is estimated that in 2016, the lowest number of sockeye salmon returned to the Fraser River since record keeping began in 1893. COSEWIC recommended that fifteen of the twenty-four distinct groups of Fraser River Sockeye salmon be listed for protection under that Act. Eight of these populations were assessed as endangered, two as threatened, and five as special concern. The COSEWIC news release is Exhibit 5 to the transcript of cross-examination on Thomson Affidavit #1, as adopted in the records of T-430-18 and T-744-18.

[192] The Auditor General's Report focuses on whether DFO and CFIA managed the risks associated with salmon aquaculture in a manner that protected wild fish. It concludes that DFO did not adequately manage the risks associated with salmon aquaculture consistent with its mandate to protect wild fish. Although DFO had some measures to control the spread of infectious diseases and parasites to wild fish in British Columbia, it had not made sufficient progress in completing the risk assessments essential for key diseases that were required to understand the effects of salmon aquaculture on wild fish. Significantly, the Auditor General also found that DFO had not defined how it would manage aquaculture in a precautionary manner in the face of scientific uncertainty. Further, that DFO did not adequately enforce compliance with aquaculture regulations to protect wild fish.

[193] More specifically, the Auditor General's Report considers whether DFO carried out research on the effects of aquaculture on wild fish. In the context of research funding, the Report finds that DFO identified potential stressors from aquaculture activities on wild fish and their habitat, such as the release of pathogens, deposits of drugs and pesticides, and fish escapes, and focused research on those areas. However, DFO provided only short-term funding for research focused on informing policy and management decisions. In contrast, DFO provided long-term funding for collaborative research to advance the sustainable aquaculture industry. As to gaps in scientific research, the Auditor General's Report finds that DFO conducted research on interactions between farmed fish and wild fish including the effects of disease and parasite transmission. Despite this, the Report finds that there were knowledge gaps remaining in these areas and, significantly for purposes of these applications, the Report finds that DFO was not monitoring wild fish health. The Report states that DFO was aware that additional work in those areas was needed to reduce uncertainty and to ensure adequate oversight of the aquaculture industry. The Auditor General's Report also finds that DFO had completed only one of the ten risk assessments of key diseases that it had committed to completing by 2020 to evaluate the consequences of disease transfer from aquaculture operations to wild fish. At the time of the audit, DFO had a plan to complete the remaining nine risk assessments by 2020. The Report recommends that DFO conduct its planned disease risk assessments by 2020 to increase knowledge of the effects of aquaculture on wild salmon. In its response, DFO agreed with the recommendation and states that it will deliver the risk assessments, as planned, by the September 2020 deadline specified in the Cohen Commission. The Auditor General's Report is attached as Exhibit 7 of the transcript of the cross-examination on Thomson Affidavit #1, as adopted in the records of T-430-18 and T-744-18.

[194] In Thomson Affidavit #2, filed in T-430-18, while addressing "forthcoming changes", Mr. Thomson states that under DFO's Sustainable Aquaculture Program, DFO committed to delivering environmental risk assessments to support science-based decision-making related to aquaculture activities. In that regard, in or about 2015, the Aquaculture Science Environment Risk Assessment Initiative was implemented to assess the risks of aquaculture to wild fish and the environment. Mr. Thomson deposes that the risks associated with environmental stressors identified in Pathways of Effects for Aquaculture ("Pathways"), which document is attached as Exhibit I of his affidavit, will be assessed as per the Aquaculture Science Environmental Risk Assessment Framework. I pause here to note that the Pathways document states as follows:

> 7. The extent to which pathogens released from aquaculture sites are stressors requires knowledge of infection and disease in wild aquatic populations. In Canada and other jurisdictions, pathogen surveillance of wild animal populations is virtually non-existent and should be established. Without this knowledge the extent to which pathogens are stressors cannot be assessed. There is scientific evidence that pathogens present in wild populations are the sources of initial infections in aquaculture animals and some evidence that aquaculture animals release pathogens in their environment. However, evidence of pathogen transfer from aquaculture animals and/or products to wild populations is very limited.

[195] The document also notes that pathogens occur naturally in wild populations and can be amplified, diluted or modified in cultured populations. Further, that a measurable outcome of infection can be disease and that disease is not synonymous with infection, but also requires the confluence of environmental or host factors. Disease can be lethal or sub-lethal (e.g. affecting growth, reproduction). Understanding the potential of a pathogen to cause an infection in a population requires an understanding of the importance of the modulating factors, including concerning the host (species (stock, age), immunity, stress, density, nutrition, health status (e.g

co-infection); pathogens (strain (pathogenicity, virulence, infectivity), concentration, dose, bioavailability); and, environmental factors (temperature, salinity, water quality, contamination, currents, intermediate hosts and carriers) for that particular pathogen. These can be more or less important in determining the potential for transmission and disease in a population. As to knowledge gaps, these include as follows:

> Pathogen effects in wild salmon populations may be detected by measuring changes in pathogen prevalence, intensity or by changes in the demographics of affected individuals within the target population. Therefore, a pathogen reference baseline is required for the target populations, which may be obtained by systematic surveillance or other epidemiological methods. In Canada, however, pathogen surveillance of wild aquatic animal populations is virtually non-existent and should be established.

[196] Mr. Thomson states that his understanding is that the Minister has directed DFO to undertake, in the fall of 2018, a comprehensive risk assessment to address concerns related to idiopathic heart disease, PRV, HSMI and perceived impacts on the health of wild salmon. This will be completed through a full Science Peer Review Process which will develop a fish pathogen and disease characterization working paper, a risk assessment and a Science Advisory Report summarizing the science advice for Aquaculture Management. Both the working paper and the risk assessment will require review, synthesis and critical analysis of the relevant scientific literature. A steering committee for that process will be established to review terms of reference for the peer-review meeting and to recommend reviewers and expert participants for the meeting. The steering committee will be composed of a cross-section of expertise from DFO Pacific Science Branch, DFO Aquaculture Management, the Province of BC, BC industry, BC ENGOs and BC First Nations, and the steering committee will also be invited to participate in the peer-review meeting. Mr. Thomson states that he anticipates that the working paper will be

complete by September 2018, and the risk assessment by early December, 2018. DFO will then convene a CSAS peer-review meeting in January 2019 to review the working paper and risk assessment, to produce a Science Advisory Report, the final form of which will be published on DFO's website. Aquaculture Management will also consider the report to make a new decision to either maintain or change the PRV Policy. Mr. Thomson also describes reviews currently underway by DFO as to its fish health management activities, changes being made to managing salmon transfers and fish health, and states that DFO is considering implementing a number of changes to further improve the programme in response to the Auditor General and other reports.

[197] What this background establishes is that the status and health of wild Pacific salmon has been raised, and acknowledged by DFO, as a concern for many years and that disease risk assessments to increase knowledge of the effects of aquaculture are incomplete, including with respect to PRV and HSMI. Against this background is the question of whether in adopting and reconsidering the PRV Policy, the Delegate considered wild salmon health.

[198] I am not persuaded that the record before the Delegate when she made the PRV Policy Decision completely ignores considerations of wild Pacific salmon. For example, the 2015 CSAS Science Response contains a summary of the key considerations for an evaluation of risk posed to wild salmon though the transfer of PRV-positive fish to the marine environment, as well as key uncertainties related to data, studies, or the evidence reviewed.

[199] However, that said, the record that was before the Delegate contains virtually no information as to the status or health of wild Pacific salmon in British Columbia or how this

may, or may not, have factored into the decision to continue the PRV Policy. Moreover, potential impacts on wild salmon are addressed almost exclusively in the context of the effects of PRV and HSMI on farmed salmon.

[200] For example, the 2015 CSAS Science Response notes that concerns have been raised about the presence of PRV in farmed fish and the potential impact of this on the health of wild salmon arising from transfers. Its listed objectives speak to the provision of a technical review of data and studies pertaining to PRV and wild and farmed salmon and the evaluation of the adequacy of current farm-based and wild monitoring practices to detect the presence of HSMI or other diseases possibly related to PRV. However, the portion of the response entitled "Evaluation of the adequacy of current farm-based and wild monitoring practices to detect the presence of HSMI or other diseases possibly associated with PRV" only addresses audits and other information gathered from fish farms. It contains no information concerning the monitoring of wild salmon as to health or numbers. Nor does it acknowledge that some conservation units of wild Pacific salmon are at risk or address whether or not wild Pacific salmon are potentially at a higher risk from PRV because of the differing environment and stressors they experience as compared to farmed fish. And, as indicated above, the subsequent Auditor General's Report indicates that DFO is not monitoring wild Pacific salmon health.

[201] Essentially, the 2015 CSAS Science Response, based in large part on the Garver 2016 challenge study, finds that infection of Chinook, sockeye and Atlantic salmon with BC-PRV "does not cause disease in those species". Further, that the absence of associated mortality or pathology in infected fish also indicates that BC-PRV was non-pathogenic. It acknowledges,

however, that apart from the absence of disease, the challenges resulted in similar infectivity and distribution in host tissues as described in Norwegian studies of fish infected with Norwegian-PRV/ HSMI. I note that, at that time, diagnosis of HSMI by DFO was by combination of clinical signs (abnormal swimming, anorexia etc.) and histological evidence. The 2015 CSAS Science Response concludes, assuming a similar clinical presentation in farmed BC salmon, that HSMI would have been identified if it were present. Of course, HSMI was subsequently diagnosed in BC farmed fish utilizing a diagnosis based solely on histological studies, and apparently in the absence of clinical signs associated with the Norwegian experience.

[202] The RDG Memorandum acknowledges the anticipated publication of the Di Cicco 2017 study diagnosing HSMI on a BC fish farm. The RDG Memorandum also acknowledges that PRV is widely considered as the leading cause of HSMI, but states that PRV's role in the development of HSMI and other diseases is considered to be uncertain. It states that it is not yet known if some strains are more prone to result in disease, if species susceptibility differs among strains or if other factors are involved in disease development. Based primarily on the Garver 2016 challenge, where infection with loads of PRV similar to or higher than PRV loads reported in Atlantic salmon with HSMI lesions in Norway, but in which Atlantic, sockeye and Chinook salmon failed to exhibit any symptoms of disease, as well as HSMI causing low mortalities on fish farms, the PRV Policy was continued. Thus, the RDG Memorandum acknowledges that HSMI has now been diagnosed in Atlantic salmon on a BC farm and that there are uncertainties concerning HSMI, including as to species susceptibility. However, the RDG Memorandum does not address this information in the context of the impact of this, if any, on wild Pacific salmon, other than concluding that transfers are permissible as they would not harm the population of fish

as a whole. It is also of note that DFO's position that BC-PRV does not cause disease in the challenged species was now revised to state that the species challenged by Garver 2016 failed to exhibit any symptoms of disease.

[203] The Minister's Interpretation also recognizes that there are geographic disease considerations such that, where a disease does occur in a given local, a wide variety of host and environmental factors that may be specific to that area influence the outcome of or harm caused by the infections. And, significantly, that applying the Minister's Interpretation to the facts of a given transfer is a complex decision including factual matters outside s 56(b) "for example, the bodies of scientific knowledge in regard to fish disease and disease agents *and the state of the fisheries for different species of fish*." Yet nothing in the record before the Delegate indicates that she considered the status of wild Pacific salmon. That is, the fact that some conservation units are threatened, or if PRV and HSMI may differently impact wild Pacific salmon.

[204] The March RSR seemingly accepts, based on Wessel 2017 which used purified PRV as inoculum in an experimental challenge trial to confirm that PRV is the causal agent of HSMI, that PRV is the causative agent of HSMI, but emphasizes that Wessel 2017 acknowledges that is unclear why in many instances infections do not lead to disease. Again, based largely on the Garver 2016 BC-PRV challenge, the March RSR concludes that PRV testing is not currently an informative diagnostic for disease development. It notes that PRV research is underway to better understand what factors are responsible for the altered disease scenarios and what conditional requirements exacerbate non-virulent PRV into a HSMI disease state. In this way, the March RSR acknowledges the continuing scientific uncertainties surrounding PRV and HSMI.

[205] Nor does the March RSR address whether or not conditions to which wild Pacific salmon are exposed, as compared to farmed salmon, might exacerbate non-virulent PRV into a HSMI disease state. The impact, if any, on at-risk conservation units is not addressed. Additionally, mortality figures are all derived from farmed fish, primarily Atlantic salmon. Moreover, in addressing Di Cicco 2017, the March RSR acknowledges that Di Cicco 2017 documents the progression of cardiac lesions consistent with histopathological diagnosis of HSMI in Norway. Further, that during the period of highest prevalence HSMI was diagnosed in 20-44% of fish sampled with an additional 35-70% having some degree of minor heart inflammation. However, the RSR does not address this in the context of what impact, if any, such lesions would have on wild salmon, its conclusion relying on the low mortality rates at the fish farm studied by Di Cicco. The Di Cicco 2017 study also directly raised the issue of wild Pacific salmon, including stating that the next obvious question was what is the risk of disease in Pacific salmon and/or the risk of transmission of the virus between wild salmon and farmed salmon. Di Cicco 2017 states that such a risk assessment would require further studies.

[206] The most recent draft DFO web statement, February 19, 2018, which was apparently relied upon by the Delegate in making the PRV Policy Decision, describes the Norwegian experience with HMSI, including that although field observations have suggested that surviving fish in affected sea cages may recover, non-lethal outbreaks are still considered a significant problem in Norwegian Atlantic salmon farming due to poor growth and general performance of fish following infection. The web statement goes on to say that, while Norwegian PRV strains and the causality of HSMI has been conclusively demonstrated, the disease causing potential of North American strains in native species is uncertain, referencing the Garver 2016 challenge,

suggesting BC-PRV has a low ability to cause disease for those species. I pause here to note that Garver 2016 conducted challenge studies on three species of salmon, Atlantic, sockeye and Chinook, the latter two of which are found in the wild in BC. The remaining three species of BC wild salmon do not appear to have been subject to trials. As to Di Cicco 2017, the web statement reports that this documented the first farm level diagnosis of HSMI in BC and showed inflammatory lesions in heart and skeletal muscle tissue diagnostic of HSMI in a longitudinal study from one Atlantic Salmon farm in BC. At an individual level, not all fish carried lesions in both heart and skeletal muscle at any given point in time, but at the farm level, both were present and diagnostic of the disease. There was no associated elevation in mortalities reported at the farm level. Further, PRV was found to be correlated with the development of lesions diagnostic of HSMI and spatially located within the affected tissue, consistent with HSMI etiology from other countries.

[207] I note that in the Di Cicco 2017 study, HMSI was diagnosed by the existence of lesions and that the reported low mortality in that study was in connection with farmed fish. Although farmed Atlantic salmon exposed to BC-PRV had now been diagnosed with HSMI, the web document does not address the potential of the same outcome for wild Pacific salmon. Nor is what, if any, effects such lesions would have on at-risk wild Pacific salmon that face very different survival conditions than do farmed fish. Rather, the web statement goes on to say that the finding of lesions in the Di Cicco 2017 study were consistent with heart lesions of suspected viral origin reported through the DFO audit program since 2008 and by industry possibly as early as 2002, but never diagnosed as a specific disease. The inference seems to be that, even if not previously diagnosed by DFO (presumably as it previously required clinical signs of disease as

well as histopathological examination for diagnosis), HSMI or HSMI-like lesions, have been present in farm fish for an extended period of time without significant mortalities.

[208] Moreover, and significantly, the web statement reports that DFO scientists, and provincial and international colleagues, are conducting investigations to better understand the biology of PRV and HSMI in wild and farmed salmon. Examples include studies assessing the association between PRV infections and spawning success of sockeye salmon in the Fraser River. One study is referenced in this regard, Miller K.M. *et al* (2014), *Infectious disease, shifting climates, and opportunities predators: cumulative factors potentially impacting wild salmon declines,* Evolutionary Applications. 7(7):812-855 ("Miller 2014"). In fact, Miller 2014 is addressed in the 2015 CSAS Science Response, which states as follows:

> "Miller et al (2014) reported a weak, but significant, association between PRV infection and spawning migration losses in Chilko Lake Sockeye Salmon; however, this association was not seen in Sockeye Salmon of the Late Shuswap stock. These authors reported a 'disease response' to infection with PRV in gill tissue in adult fish sampled in the marine environment, as indicated by their identification of 20 host genes, including 9 that were involved with immunity, that were significantly associated with PRV. In contrast, recent controlled laboratory studies that were examining the host immune response have found only small transitory changes in gene expression in blood and head kidney in juvenile Sockeye Salmon, associated with early stage PRV infections in saltwater." (at p 8).

[209] This is the only direct reference to a study addressing how PRV may impact wild Pacific salmon and would seem to suggest a difference between results obtained from studies of wild sockeye salmon and experimental studies of sockeye salmon. However, the record does not indicate that over the next four years DFO further addressed this, nor suggest that further study of disease response in wild Pacific salmon has been conducted in the interim addressing this area

of uncertainty. The web statement does reference other examples of such studies, describing them as the potential association of PRV with disease in Pacific salmon; the assessment of infectious agents and histological evidence of disease in farmed, wild, and enhancement salmon; as well as studies investigating whether infection with PRV in the absence of HSMI would affect how a fish may respond when exposed to other naturally occurring viruses. However, it does not name or reference any completed studies or identify if it is DFO or other scientists who are conducting these investigations, or the status of these studies.

[210] Finally, as to Di Cicco 2018, the June RSR, which was prepared within 7 days, took issue with Di Cicco's methodology, including failure to consider the Garver 2016(a) jaundice study, and concludes that Di Cicco 2018's finding that Chinook salmon may be at more than a minimal risk of disease from exposure to PRV occurring on salmon farms is not substantiated. The June RSR also discounts the statement in Di Cicco 2018 that there may be a very real risk associated with PRV transmission from farmed salmon, in which PRV is highly prevalent, to wild Pacific salmon, on the basis that it is qualified by the further statement that the severity and extent of those risks still remains elusive. The June RSR states that the magnitude of the risk of disease was not examined in the study, and should not have been reported, given the quantity and quality of the data utilized.

[211] Significantly, although Di Cicco 2018 directly raised risk to wild Pacific salmon, which the June RSR discounts, the record does not indicate that DFO otherwise revisited and reassessed the identified risk to confirm, utilizing methodology that it considered to be valid, that it was not sufficient to require changes to the PRV Policy.

[212] The above clearly demonstrates that the record before the Delegate continued to flag uncertainties concerning PRV and HSMI. DFO recognized that the science was rapidly evolving in this area and accordingly revisited the PRV Policy. It is true that, the Delegate's reasons for reaching the PRV Policy Decision are brief, however, it must be kept in mind that her reconsideration of the PRV Policy was essentially an internal decision. Further, extensive reasons are not required (*Newfoundland Nurses' Union* at paras 14–16; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 89; *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 17(b)). It is also open to the Court to look to the record to see if it supports the decision (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54). The difficulty here is that the record relied upon by the Delegate contains no information as to the status or health of wild Pacific salmon stocks. And, if the submissions of the Minister are accepted, the Delegate was entitled to rely on her experience and expertise in making the reconsideration. The fact that some wild Pacific salmon conservation units are at risk must surely have been part of that expertise. And, although the record suggests that there may be factors that could potentially cause PRV and HMSI to affect wild Pacific salmon differently than farmed salmon, or at the very least indicate considerable uncertainly in this regard, the Delegate did not engage with the evidence or the issue, instead relying on the Garver 2016(a) and 2016 challenges and the current evidence that HSMI causes very low mortality to Atlantic salmon on BC fish farms to conclude that transfers of fish with low potential to cause mortality do not harm the protection and conservation of fish at a population level and, therefore, can be authorized as per the Minister's Interpretation of s 56(b) of the FGRs.

[213] While the Minister argues that the Delegate considered scientific advice that wild fish do not get disease from PRV, I am unable to locate such a definitive finding in the record that was before the Delegate. Accordingly, in my view, while the status and health of wild Pacific salmon may well have been part of the general backdrop to the Delegate's decision, the Delegate failed to specifically consider a relevant factor, current wild Pacific salmon health and status, in the context of the prevailing scientific uncertainties surrounding PRV and HSMI, thereby rendering the decision unreasonable.

[214] Further, given the high degree of scientific uncertainty surrounding PRV and HSMI, the rapidly evolving science, the outstanding DFO comprehensive risk assessment, and the known decline in wild salmon numbers, the Delegate's failure to address wild Pacific salmon health and status in making the PRV Policy Decision also fails to embody the precautionary principle.

vi) ***Did the Minister act in bad faith (T-430-18)?***

[215] In T-430-18, 'Namgis asserts that the Minister acted in bad faith or for an improper purpose. Much of 'Namgis' argument on bad faith is intertwined with its other arguments as to the reasonableness of the decision, such as the Minister's interpretation of s 56 of the FGRs and the failure to consider relevant factors. However, in essence, 'Namgis' submission on bad faith is that by effecting and reconfirming the PRV Policy the Minister demonstrably acted to improperly promote the interests of the aquaculture industry without regard to the protection and conservation of fish as required by s 56 of the FGRs and *Morton 2015*. 'Namgis submits that this is also demonstrated by DFO's reliance of data known to be flawed, its preferring of dated

studies that it co-authored, and its misrepresentation of evidence to conclude that PRV is endemic and ubiquitous in British Columbia.

[216] In support of its bad faith allegations, 'Namgis not only relies on the record that was before the Delegate but on the affidavits of three experts it retained in connection with this proceeding and an affidavit attaching, amongst other things, portions of documents obtained by way of requests made under the *Access to Information Act*, RSC 1985, c A-1, ("ATIP requests") made by 'Namgis' counsel. The Minister, Marine Harvest and Cermaq submit that those affidavits are inadmissible and seek to have them struck out in whole. The challenged affidavits are as follows:

i. Affidavit of Dr. Martin Krkosek affirmed on May 14, 2018 ("Krkosek Affdavit");

ii. Affidavit of Dr. Fred Kibenge affirmed on May 14, 2018 ("Kibenge Affidavit");

iii. Affidavit of Dr. Richard Routledge affirmed on May 14, 2018 ("Routledge Affidavit");

(collectively the "'Namgis Expert Affidavits")

iv. Affidavit of Mr. Won Drastil affirmed on May 9, 2018 ("Drastil Affidavit #1").

[217] Marine Harvest and Cermaq also seek to strike out portions of the Svanvik Affidavit.

a) Rule 312 – Motions to strike

[218] On May 24, 2018, the Minster filed a Motion in writing pursuant to Rule 369, seeking an order striking out the 'Namgis Expert Affidavits and Drastil Affidavit #1 in their entirety at the preliminary stage. On August 17, 2018, Marine Harvest filed a similar motion and additionally

sought to strike out paragraphs 149–165, 177–178 and 186 of the Svanvik Affidavit. On the same date, Cermaq brought a motion seeking to strike the 'Namgis Expert Affidavits, Drastil Affidavit #1 as well as paragraphs 67–73, 93–94, 116–137, 139–140, 149–156, 164-165, 167–169, 172, 174–178, 180–181, 184–187, 188–193 and exhibits N, O–U, Z, KK, LL–QQ of the Svanvik Affidavit.

[219] 'Namgis, in its written submissions made in response to these motions to strike, concedes that paragraphs 149–165, 177–178 and 186 of the Svanvik Affidavit should be struck, explaining that they had inadvertently been retained from a prior draft. This effectively resolves that portion of Marine Harvest's Motion to Strike as it relates to the Svanvik Affidavit.

[220] By way of background, by Order dated June 8, 2018, the Case Management Judge declined to exercise her discretion to strike the 'Namgis Expert Affidavits, Drastil Affidavit #1, and portions of the Svanvik Affidavit. She dismissed the Respondents' motions and held that the issue of admissibility of the impugned evidence would be determined by the Applications Judge, without prejudice to the Respondents' ability to have the impugned evidence struck at that hearing.

[221] In the result, on July 6, 2018, the Minister served 'Namgis with the Minister's responding expert affidavits of Dr. Kyle Garver, sworn on July 4, 2018 ("Garver Affidavit"), and Dr. Kim Hyatt, sworn on July 4, 2018 ("Hyatt Affidavit").

[222] Marine Harvest, in turn, filed the expert affidavit of Dr. Ahmed Siah, affirmed on July 6, 2019, responding to the Kibenge and Routledge Affidavits, the expert affidavit of Dr. Michael Kent, affirmed on July 5, 2018, also responding to the Kibenge and Routledge Affidavits, and the expert affidavit of Dr. Anthony Farrell, affirmed on July 9, 2018, responding to the Kibenge Affidavit (collectively the "Marine Harvest Expert Affidavits"). Cermaq filed the expert affidavit of Dr. Donald Noakes, affirmed July 6, 2018, responding to the Krkosek Affidavit.

[223] Ultimately, the parties prepared and filed their respective written submissions in these applications treating the contested evidence as if it were admissible. The five days allocated at the hearing for these applications was primarily utilized only for that purpose and the parties largely relied on their written submissions with respect to all of the motions, including those challenging the admissibility of the 'Namgis Expert Affidavits.

[224] The Minister, Marine Harvest and Cermaq submit that the 'Namgis Expert Affidavits as well as Drastil Affidavit #1 are inadmissible and irrelevant. They did not form a part of the record that was before the Minister's Delegate and the exceptions to the general rule against extrinsic evidence on judicial review do not apply to them. They submit that the 'Namgis Expert Affidavits are also inadmissible because they go to the ultimate issue in the underlying applications for judicial review. The affiants make arguments relating to their own interpretation of the PRV Policy, they suggest materials they believe should have been before the decision-maker and they reach conclusions based on their own interpretations of their suggested materials.

[225] Marine Harvest adds that the 'Namgis Expert Affidavits expressly serve to reassess the facts in the decision record and to argue that the underlying administrative decision is wrong. Such evidence is not admissible on judicial review. Moreover, if admitted, the Court will become embroiled in the scientific debate, which is not its role.

[226] The Respondents submit that Drastil Affidavit #1 is a lay affidavit attaching as exhibits irrelevant material, consisting primarily of internal and draft DFO documents received pursuant to ATIP requests. The 'Namgis Expert Affidavits and Drastil Affidavit #1 attempt to expand the record before the Court beyond that which was before the Minister's Delegate, such that the Court may conduct a trial *de novo* on the issues. Marine Harvest and Cermaq add that the content of Drastil Affidavit #1 is entirely hearsay or double hearsay.

[227] The Minister adds, as to the admissibility of the evidence as related to the duty to consult, that courts have excluded evidence that was not before the decision-maker in some matters involving judicial review of Aboriginal consultations unless the new evidence relates to the issue of the status of an applicant, whether a duty to consult exists, and the scope of that duty. However, advancing a duty to consult claim within a judicial review application does not avoid the principles that underpin the rule against extrinsic evidence. Here, the 'Namgis Expert Affidavits go beyond what is admissible evidence for the purpose of establishing a particular duty to consult. It is extrinsic to the record and does not go to the nature of any potential duty to consult. In effect, 'Namgis is asking the Court to rely on the 'Namgis Expert Affidavits to conclude that there is potential harm, under the auspices of the duty to consult test. Such a conclusion would effectively substitute the opinion of 'Namgis' experts for the decision of the

Minister's Delegate regarding the PRV policy. Marine Harvest and Cermaq add that while judicial reviews concerning consultation do enjoy some flexibility with respect to admissible evidence, this has limits and a party is not permitted to file evidence that is irrelevant or is intended to have the judicial review judge conduct a *de novo* hearing and usurp the jurisdiction of the decision-maker. Here, the majority of 'Namgis' impugned evidence serves only to attack the merits of the decision under review and to transform the judicial review into an inquiry into PRV.

[228] For its part, 'Namgis asserts that the 'Namgis Expert Affidavits and Drastil Affidavit #1 are admissible as extrinsic evidence under all three of the exceptions to the general rule and also as supporting the allegation that the Minister breached the duty to consult. Together, the impugned affidavits paint a compelling narrative respecting the institutional bad faith and/or the improper purpose DFO pursued by adopting the PRV Policy; provide evidence that DFO has misrepresented, omitted or capriciously dismissed crucial evidence; and, that the Minster adopted and affirmed the PRV Policy in bad faith and for the improper purpose of subverting *Morton 2015*. Further, the impugned affidavits provide evidence of the potential harm PRV causes to wild Pacific salmon, which is admissible as it goes to the existence and scope of the Crown's duty to consult.

Analysis

[229] I have set out above, in the context of the Rule 312 Motion of Ms. Morton in T-1710-16, the jurisprudence pertaining to the admissibility of affidavits in support of applications for judicial review. That is, because of the demarcation of the roles of between an administrative

decision-maker and the Court, the Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before a reviewing Court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that goes to the merits of the matter is, with certain limited exceptions, not admissible.

[230] Before delving into whether any of these exceptions permit the admissibility of these affidavits, it is worth adding a few words on the jurisprudence concerning the improper purpose or bad faith exception, as it is heavily relied upon by 'Namgis.

[231] The improper purpose exception applies to admit evidence that was not before the decision-maker on the basis of bad faith. Pursuit of an improper purpose, or bad faith decision-making, has been described as decision-making for a purpose not authorised by the statute (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 72 ("*JP Morgan*"). Other examples include fettering of discretion or acting under the diction of someone not authorized to make the decision (*JP Morgan* at para 72), bribery of a decision-maker (*Bernard* at para 25) or where the proceedings are tainted by misconduct of the Minister, a tribunal or parties appearing before the tribunal, for the purpose of proving the particular misconduct (*Williams v Canada (Public Safety and Emergency Preparedness*, 2015 FC 32 at para 23). It has also been noted that bad faith has been equated to acting "dishonestly, maliciously, fraudulently or with mala fides" or manifesting serious misconduct bordering on the corrupt, while in other instances the term seems to have been given a meaning akin to arbitrariness. An ulterior motive may establish bad faith (Brown 15:2443).

[232] However, good faith is always presumed and the onus is on the party claiming bad faith to prove it, which, by necessity, is often done by way of extrinsic evidence (Brown 15:2443; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 99).

[233] I will next consider the admissibility of each of the impugned affidavits in the context of the guiding jurisprudence.

Krkosek Affidavit

[234] Dr. Martin Krkosek is an Assistant Professor of Ecology and Evolutionary Biology at the University of Toronto. The letter of instruction to Dr. Krkosek includes that he assess the current state of wild Pacific salmon populations that use 'Namgis' territories and, based on this, prepare an analysis of the PRV Policy Decision and the scientific analysis it relies on.

[235] In his affidavit, Dr. Krkosek states that he has been retained by counsel for 'Namgis to assess the impacts of PRV on wild and hatchery-raised Pacific salmon without first testing the fish to be transferred for PRV, and to assess the PRV Policy. For that purpose, he has reviewed the RDG Memorandum, 2015 CSAS Science Response, March 2018 Rapid Science Response, listed scientific articles, information publically available through DFO, as well as listed online scientific databases.

[236] Dr. Krkosek concludes that the rational for the PRV Policy should have, but does not, include an assessment of the effect of PRV on wild salmon because the PRV Policy cannot rely on an assessment of the putative health of farmed salmon to determine the potential risk to wild

salmon. Therefore, the PRV Policy "improperly and without explanation instead focuses on the risk to, and the health of, farmed salmon." Dr. Krkosek also opines that documents on the record before the Delegate were deficient and were missing what he believed to be key considerations necessary for the effective assessment of risk posed by PRV to wild Pacific salmon. Specifically, i) the extent to which PRV may spread from salmon farms into the surrounding environment; ii) the effects of PRV infection on the ecological components of salmon fitness, which are the primary determinants of mortality, migratory failure, or reproductive failure of wild salmon in their natural ecological setting; iii) the DFO review of studies that tested for PRV infection in wild-caught fish does not justify its conclusion, as fish sampled at the end of their migration route constitute a biased sample that would not capture those infected fish who were removed from the population by predation, starvation or migratory failure; iv) the PRV Policy is based in part on the Minister's Interpretation of s 56 of the FGRs, which fails to consider the status of populations or conservation units of wild Pacific salmon that would experience elevated infection risk due to exposure to PRV from fish farms, sixty-nine populations of wild Pacific salmon migrate through 'Namgis' territory, including the Johnstone Strait and the Broughton Archipelago, where more than 20 fish farms are located and many of those populations have some degree of conservation concern, and; v) the dynamic of a reservoir host populations (farmed salmon in the marine environment) infecting an imperilled host population (wild salmon) is the most significant risk factor by which an infectious disease can cause the extirpation of endangered populations. The result of these omissions is an unexplained underestimation of risk to wild salmon.

[237] In my view, the Krkosek Affidavit does not provide helpful background information. It does not summarize the evidence that was before the decision-maker nor is it necessary for the Court to understand the issues relevant to the judicial review. It is not a non-argumentative orienting statement. And, although the scientific debate at the heart of these applications is no doubt complex, this affidavit is not reviewing in a neutral and uncontroversial way the evidence that was before the Delegate. Rather, the affidavit provides new information, speaks to the merits of the matter decided by the Delegate; engages in the interpretation of the evidence; and challenges the reasonableness and scientific validity of the PRV Policy and the reconsideration decision.

[238] And, while Dr. Krkosek highlights what he views as deficiencies in the Delegate's analysis, this is not a circumstance where he is demonstrating that a key finding of fact by the Delegate is unsupported by any evidence. Rather he is putting forward his view of what should have been considered in reaching the decision under review. While I have concluded above that the Delegate did not consider a relevant factor, the health and status of wild salmon, that conclusion was based on the record that was before the Delegate, and not on an unsupported key finding of fact made by the Delegate.

[239] As to the improper purpose or bad faith exception, nothing in Dr. Krkosek's affidavit suggests misconduct or bad faith. While he suggests that a fish-sampling method used by DFO constitutes a biased sample, which is therefore unsupportive of DFO's conclusion based on it, this speaks to an objection to methodology, not bad faith.

[240] Indeed, in its written submissions responding to the motion to strike, ‘Namgis describes the Krkosek Affidavit as “an explanation of how a flawed decision-making process can affect an outcome, and should be addressed as such as part of arguing the application on the merits.” In my view, this and similar arguments tend to conflate the purposes of the exceptions to the general rule precluding admission of evidence that was not before the decision-maker with a challenge to the reasonableness of the decision on its merits based on extrinsic evidence. The evidence is not admissible for the latter purpose, and ‘Namgis is not challenging the decision-making process as such.

Kibenge Affidavit

[241] Dr. Fred Kibenge is a Professor of Virology at the University of Prince Edward Island. The instructions provided to Dr. Kibenge include that he was to provide his analysis of the PRV Policy Decision and the scientific analysis it relied on, addressing listed issues.

[242] In his affidavit Dr. Kibenge states that he has been retained by counsel for ‘Namgis to assess the potential impacts of PRV on wild and hatchery-grown Pacific salmon without first testing the fish to be transferred for PRV, and to assess the reasoning of DFO in support of the Policy. For that purpose, he has reviewed the RDG Memorandum; 2015 CSAS Science Response; March 2018 Rapid Science Response; specified documents disclosed as a result of ATIP requests, an email exchange between Dr. Gary Marty, fish pathologist with the British Columbia Ministry of Agriculture’s Animal Health Centre, and Ms. Morton between May 24, 2016 and December 22, 2016; and listed scientific articles. Dr. Kibenge’s affidavit is 218 paragraphs in length and attaches 13 exhibits.

[243] Dr. Kibenge states that, in his professional judgement, the documentation that supports the PRV Policy repeatedly misrepresents scientific findings, makes unsubstantiated conclusions and relies on data collected using methods that deviate from accepted scientific consensus. In support of this he lists his concerns with the RDG Memorandum and the March 2018 Rapid Science Response and then outlines how, in his opinion, DFO misrepresented, minimized or ignored scientific findings on six identified issues.

[244] In brief, as to the RDG Memorandum, Dr. Kibenge states that DFO, without explanation,

(a) deviated from the consensus diagnostic criteria for diagnosing HSMI, which allowed it to incorrectly claim that HMSI was not present in BC;

(b) relied on its own failure to experimentally induce HSMI in challenged fish to claim the PRV is not pathogenic (does not induce disease) for Pacific salmon despite the fact that PRV has induced such evidence of disease in other countries;

(c) overstated the evidence suggesting that PRV is native to BC and minimized or ignored evidence that PRV has likely been imported from Norway;

(d) minimized or ignored evidence that farmed salmon in open-net pens are the most significant source of PRV, instead misrepresenting scientific papers as providing evidence that fish in open-net pens were infected by a marine source of PRV;

(e) relied on the lack of mortality on Atlantic salmon farms to conclude PRV would not cause harm to wild Pacific salmon.

[245] Similar criticisms are made concerning the March 2018 Rapid Science Response including that, DFO minimized the pathology from the Canadian BC-PRV challenge studies to interpret them as being less meaningful than they likely are, and avoided finding that mild

lesions in the challenged fish were indicative of a host response to PRV; failed to significantly revisit the PRV Policy now that a causal relationship has been unequivocally proven by Wessel 2017 and, although the 2018 Rapid Science Response accepts PRV as the causative agent of HSMI, it argues that it needs to better understand what strain differences, host differences and environmental factors are required for HSMI development; focused almost exclusively on fish farm mortality events to determine the risk to wild fish, while ignoring other adverse health effects or key differences between farmed and wild fish; and failed to address Di Cicco 2017 and Di Cicco 2018.

[246] Dr. Kibenge dedicates the rest of his affidavit to outlining how, in his view, DFO misrepresented, minimized, or ignored scientific findings on six issues:

(a) the presence of HSMI on BC fish farms;

(b) the low mortalities of Atlantic salmon on BC fish farms as an indicator of risk to wild Pacific salmon;

(c) the evidence that PRV is native to British Columbia and that it is ubiquitous and stable in British Columbia;

(d) the failure of DFO challenge studies to induce HSMI from PRV;

(e) the source of PRV infections; and

(f) the role fish farms play in amplifying and spreading viruses like PRV.

[247] In my view, the Kibenge Affidavit is very much an attack on the merits of the PRV Policy Decision. It is an assessment of how Dr. Kibenge thinks DFO should have interpreted

and weighed the science before it, as well as an opinion on what other science should have factored into DFO's analysis.

[248] I agree with the Respondents that Dr. Kibenge's critique of DFO's scientific and decision-making processes do not amount to helpful background information. Like the Krkosek Affidavit, it does not summarize or review in a neutral and uncontroversial way the evidence that was before the Delegate. Nor is it necessary for the Court to understand the issues relevant to the judicial review. It does not provide evidence to demonstrate the existence of a critical gap in the record that could not be demonstrated based on the record itself.

[249] Nothing in the Kibenge Affidavit supports 'Namgis' allegation that the decision to adopt and maintain the PRV Policy was done with a view to improperly further the interests of the aquaculture industry. It does not establish an ulterior motive. And while Dr. Kibenge characterizes DFO's underlying science and DFO's assessment of other science as amounting to misrepresentations, minimizations and omissions, I am not persuaded that his evidence establishes bad faith on the part of the decision-maker, the Delegate, or on the part of DFO's scientists in providing advice to the Delegate. Rather, these terms are used by Dr. Kibenge as part of a critique of the approach taken by DFO to the science. However, DFO's weighing or assessment the science, or any failure to assess other science, goes to the merits of the decision, it does not establish bad faith.

Routledge Affidavit

[250] Dr. Richard Routledge is an Assistant Professor Emeritus at Simon Fraser University, who holds a Ph.D. in statistical ecology. Dr. Routlege was retained to provide an opinion including his analysis of the PRV Policy Decision and the scientific analysis it relies on, addressing specified issues. His affidavit is 125 paragraphs long and attaches 12 exhibits.

[251] Dr. Routledge describes his mandate as being to assess the reasoning used by DFO to support its PRV Policy. For that purpose, he has reviewed the RDG Memorandum, 2015 CSAS Science Response, March 2018 Rapid Science Response, specified documents disclosed as a result of ATIP requests, and listed scientific articles.

[252] Dr. Routledge states that in his professional judgement the PRV Policy is not scientifically justifiable or defensible. Its three key tenets are found in the RDG Memorandum, being that experimental challenges of Atlantic and Pacific salmon to BC-PRV have failed to induce disease or mortality; HSMI causes very low mortality on fish farms; and, transfer of fish with low potential to cause mortality does not harm the protection and conservation of fish at a population level. He states that the PRV Policy continues to be founded on those tenants "despite there being no discernable basis in science, fact or logic associated with" that reasoning.

[253] Dr. Routledge states that the documents that he reviewed reveal that, in deciding not to test for PRV, and repeatedly reaffirming that decision, the Minister, without providing any explanation:

(a) relied on data known to have been collected using flawed methods and which relied heavily on an unexplained departure from the international standards for diagnosing HSMI;

(b) relied on faulty logic in drawing conclusions, such as that low mortalities due to HSMI in farmed salmon leads to the conclusion that PRV does not pose a risk to wild Pacific salmon;

(c) failed, repeatedly, to consider important scientific literature that was contrary to the PRV Policy; and

(d) overstated or misrepresented, repeatedly, certain conclusions found in the scientific literature such that the risk to wild Pacific salmon was significantly understated, while ignoring associated scientific uncertainty with respect to that risk.

[254] Dr. Routledge addresses the RDG Memorandum recommendation to continue the PRV Policy, referring to the three reasons given for the recommendation, which he terms the "False HSMI Premise", the "False PRV Premise", the "False Equivalence Premise".

[255] As to the reliance on the Canadian challenge experiments that failed to induce disease or mortality, this relies on estimates generated from the DFO's FHASP, which Dr. Routledge states are unreliable for the reasons he sets out.

[256] Further, in the 2015 CSAS Sciences Response, DFO justifies its conclusion that there is a low likelihood that PRV in farmed salmon would have a significant impact on wild Pacific salmon based on PRV being ubiquitous and present in wild Pacific salmonids for a long time, and that laboratory experiments have failed to demonstrate a clear association between PRV and disease. However, neither of these conclusions is firmly established scientific fact based on

convergent scientific evidence. Rather, DFO relies on four "outlier" papers to justify these conclusions and in doing so, fails to address, or minimizes, the scientific uncertainty respecting the spread of PRV in BC and the risk of infection to wild Pacific salmon. Nor is this remedied by the RDG Memorandum.

[257] Dr. Routledge also states that the PRV Policy uses the putative health of farmed salmon to assess the risk to wild salmon based on faulty reasoning, and that a lack of evidence showing HSMI or Jaundice/Anemia in wild Pacific salmon does not imply that PRV poses no threat to their survival. That conclusion also ignores a growing body of evidence showing that PRV expresses itself differently in Pacific salmon than it does in Atlantic salmon and that Pacific salmon may be more susceptible to the risks of PRV than Atlantic salmon are.

[258] Further, the 2018 Rapid Science Report ignores published evidence indicating that PRV-infected farmed salmon may well pose a risk to wild salmon without showing readily apparent signs of disease. It therefore operates to evade the real issue, which is not whether PRV can be used as an indicator of the current disease state of a farmed Atlantic salmon, but whether the presence of PRV-infected fish in a large, densely packed population of Atlantic salmon in flow-through net pens in the marine environment poses a risk to the survival and reproductive success of wild Pacific salmon.

[259] Dr. Routledge also concludes that in updating the PRV Policy, DFO failed to consider a significant portion of the relevant scientific literature. Further, that the 2015 CSAS Science Response, the RDG Memorandum and the March 2018 Rapid Science Response provide an

incomplete, if not misleading, perception of the rapidly strengthening evidence that the transfer of PRV-infected farmed fish in to the marine environment poses a considerable risk to wild Pacific salmonids, for which a substantial and growing number of conservation units are already at risk of imminent extinction.

[260] Upon review of the Routledge Affidavit, I conclude that it is premised on the affiant's own interpretation of the logic and rational of the PRV Policy. And, like the prior affidavits, Dr. Routledge states repeatedly that insufficient reasons were given to support DFO's conclusions, and opines on the weight given to certain factors by DFO. In my view, the Routledge Affidavit not only speaks to the merits of the matter before the Delegate, it reweighs and reconsiders the evidence, addresses evidence Dr. Routledge believes should have been considered by DFO, and speaks to the affiant's opinion of the sufficiency of the Delegate's reasons. In effect, the Routledge Affidavit seeks to step into the shoes of the Delegate and re-make the decision as the affiant deems appropriate. The Routledge Affidavit addresses many of the same issues and concerns as did the prior two affidavits and, for the same reasons, it is not admissible under any of the exceptions.

[261] Although I have concluded that the 'Namgis Expert Affidavits are not admissible, I feel compelled to make a several further comments about this evidence.

[262] First, the responding expert evidence tendered by DFO, Marine Harvest and Cermaq speaks to the science with which 'Namgis' experts take issue. This evidence illustrates that there is scientific debate and even disagreement concerning PRV and HSMI. However, in my view,

the fact that scientists hold differing views does not establish bad faith. Indeed, even within DFO there is scientific disagreement concerning PRV and HSMI. The Di Cicco 2017 and Di Cicco 2018 studies were authored by the Strategic Salmon Health Initiative ("SSHI"), described by DFO as a collaboration between DFO, the Pacific Salmon Foundation and Genome BC to better understand microbes in BC salmon and the potential mechanisms of microbial interaction between wild and cultured salmon. Some members of SSHI, including Di Cicco, are DFO scientists. What this debate does establish, however, is that extra care is required in decision-making concerning PRV and HSMI with respect to wild Pacific salmon.

[263] Further, I note the Federal Court of Appeal's finding in *Greenpeace Canada v Canada (Attorney General)*, 2016 FCA 114 in the context of statutory criteria:

> [61] As Pelletier J. (as he then was) noted in the oft-cited passage at paragraph 71 of *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of The Environment)*, 191 F.T.R. 20, 2000 CanLII 15291 (F.C.), the function of the Court in judicial review [of this sort of decision] is not to act as an "academy of science" or a "legislative upper chamber". In dealing with any of the statutory criteria, the range of factual possibilities is practically unlimited. No matter how many scenarios are considered, it is possible to conceive of one which has not been. The nature of science is such that reasonable people can disagree about relevance and significance. In disposing of these issues, the Court's function is not to assure comprehensiveness but to assess, in a formal rather than substantive sense, whether there has been some consideration of those factors which the Act requires the comprehensive study to address. If there has been some consideration, it is irrelevant that there could have been further and better consideration.

[264] And, as stated by the Federal Court of Appeal in *Delios*, in judicial review this Court can only review the overall legality of what a decision-maker has done, not delve into or re-decide the merits of what the decision-maker has done.

[265] The admission of the ‘Namgis Expert Affidavits would have the effect of transforming the judicial review, intended to be a summary process, into a trial *de novo* on the merits of the science, taking the Court out of its proper role and becoming a forum for fact finding on the merits. And while ‘Namgis puts the ‘Namgis Expert Affidavits forward on the basis of the exceptions to the rule precluding the admission of evidence that was not before the decision-maker, in reality this is little more than a cloaked attack on the science underlying the decision under review and seeking to provide the Court with an assessment of the evidence that differs from that made by the Delegate and DFO (*Canadian Tire Corp* at paras 11–13; *Blaney v British Columbia (Minister of Agriculture Food and Fisheries)*, 2005 BCSC 283 at para 34). And, in response to the ‘Namgis Expert Affidavits, the Minister filed the Garver and Hyatt Affidavits, Marine Harvest filed the expert affidavits of Dr. Siah, Dr. Kent and Dr. Farrell, and Cermaq filed the expert affidavit of Dr. Noakes. ‘Namgis then sought to file the Kibenge Supplemental Affidavit, prompting the Minister to seek to file the Garver Supplemental Affidavit, all of which speak to the specifics of the attacked underlying science. Moreover, there were cross-examinations on these affidavits, which again delved into and challenged the underlying science and/or DFO’s treatment of it.

[266] And, while opinion evidence of a properly qualified expert may be admissible if it is relevant, necessary to assist the Court, and not subject to any exclusionary rule, the ‘Namgis Expert Affidavits in this matter do not meet those qualifications. Even if they might contain useful factual information, it is so intertwined with unnecessary opinion evidence that it cannot realistically be severed. Accordingly, based on all of these concerns, the ‘Namgis Expert Affidavits in whole have been struck (*Alberta Wilderness Assn v Canada (Minister of*

Environment), 2009 FC 710 at para 34). In the result, the responding expert evidence is unnecessary and is also struck out. That is, the Garver and Hyatt Affidavits filed by the Minister, the Marine Harvest Expert Affidavits (Drs. Siah, Kent and Farrell), as well as the affidavit of Dr. Noakes filed by Cermaq, are all struck as inadmissible. Further, the motions of 'Namgis seeking to file the Kiberge Supplemental Affidavit and of the Minister seeking to file the Garver Supplemental Affidavit, are denied.

[267] In summary, the 'Namgis Expert Affidavits do not fall within any of the exceptions to the rule precluding the admission of evidence that was not before the decision-maker and, therefore, they are not admissible. And, even if they were admissible solely for the purpose of establishing bad faith, having carefully reviewed the 'Namgis Expert Affidavits and the other evidence, I do not agree with 'Namgis' view that the 'Namgis Expert Affidavits establish that DFO has repeatedly acted inconsistently with its statutory purpose with such reckless disregard that the absence of good faith can be deduced and bad faith presumed. Nor that these Affidavits demonstrate that DFO acted improperly to promote the interests of the aquaculture industry.

Drastil Affidavit #1

[268] Won Drastil is a legal assistant employed by Gowling WLG (Canada) LLP ("Gowling"), counsel for 'Namgis. He states that Sean Jones, an associate at Gowlings and solicitor of record for 'Namgis, informs him and he verily believes that Mr. Jones obtained documents in response to six ATIP requests to DFO made between November 2016 and May 2017. Mr Drastil describes each request, and documents received in response are included in Exhibits "A" to "F" of his affidavit. Mr. Drastil also states that he is advised by Mr. Jones that Mr. Jones had

obtained the additional documents attached as Exhibit "G". The source of those documents is not identified. They are comprised of email correspondence between Ms. Morton and Dr. Gary Marty, Senior Fish Pathologist, Animal Health Centre, BC Ministry of Agriculture, a transcript of a cross-examination of Dr. Marty in another matter, and an email chain between a redacted sender and Ms. Morton. Additionally, Mr. Drastil states that Mr. Jones informs him that Mr. Jones had been provided with a copy of the Di Cicco 2018 paper as submitted for publication, attached as Exhibit "H". The source who provided that document is not identified. Further, Mr. Drastil states that on May 9, 2019, he retrieved from the Pacific Salmon Foundation's website a final version of that paper, attached as Exhibit "I".

[269] As a preliminary point, I note that although some of the 'Namgis Expert Affidavits rely in part on documents that form exhibits to Drastil Affidavit #1, this does not serve to make Drastil Affidavit #1 or those Affidavits admissible.

[270] In my view, the only basis on which Drastil Affidavit #1 is admissible is for the limited purpose of assessing 'Namgis' bad faith or improper purpose allegations.

[271] In that regard, 'Namgis asserts that the documents provided in the exhibits to Drastil Affidavit #1 provide evidence that "DFO suppressed evidence regarding the presence of HSMI in BC fish farms and that DFO (referencing p 00874, 1029), at the behest of industry, suppressed evidence of the harm posed by PRV to Pacific salmon, including Chinook, in some cases over the objections of DFO's own staff (p 1038, 1042) and "Shockingly, those same documents also provide evidence that the 2015 CSAS Science Report was created as an "appeal" of Morton"

(referencing p 1020). Further, that this Court has permitted admission of documents obtained under the ATIP legislation for the same purposes (*Azizian v Canada (Citizenship and Immigration)*, 2017 FC 379 at paras 13–14 ("*Azizian*")) and when such a request is the party's only means of obtaining such documents (*South Yukon Forest Corporation v Canada*, 2010 FC 495 at paras 30–31 ("*South Yukon*")). Such documents, produced in the usual and ordinary course of business, are also admissible as business documents (*Canada (Citizenship and Immigration) v Seifert*, 2006 FC 270 at para 13 ("*Seifert*")).

[272] I would first note that having reviewed the specific pages of the ATIP documents identified by 'Namgis in support of the above assertions, I am not persuaded that they serve that purpose. Page 1029 is a June 2016 email exchange concerning the wording of an intended DFO press release. This includes disagreement with the idea of BC researchers and veterinarians developing their own set of diagnostic standards for HSMI (including clinical signs and mortality) rather than using the international standard analysis (histopathological analysis of distribution of lesions in farm fish) as well as disagreement with the addition of the word "potential" to the HSMI diagnosis. While this email exchange demonstrates disagreement within DFO as to the content of the press release, it falls short of establishing bad faith.

[273] Page 1038 is the cover page of a July 29, 2016 draft of a paper entitled "Aquaculture and Disease Related Research (Pacific Region)", page 1042 of that draft document (a final version is not found in the materials comprising Drastil Affidavit #1) does not support 'Namgis' allegation. This addresses a number of things, one of which is a jaundice study. The document states that in an ACRDP project funded in 2011, DFO undertook a study with Creative Salmon on a jaundice

syndrome that had been causing low losses overwinter on Chinook salmon farms on the West Coast and for which the cause of the disease was poorly understood. Under "Key Findings", it states that the study showed that the disease was likely infectious and most likely viral in origin. Microbe monitoring established an association of the disease with PRV, but was not designed to establish what the nature of the relationship with PRV may be (cause, opportunistic co-infection, or other) and,

> Unfortunately this was the first reported detection of PRV in BC, and the histopathologist from the province convinced the industry not to sign off on the report (after many iterations) if PRV was to be included in the analysis. Portions of this dataset, however became public in Cohen [redacted] released the data to the CFIA. Since that time, two other farm studies performed in Norway on Rainbow Trout and in Chile on Coho salmon have identified a jaundice-like syndrome (sometimes together with heart lesions resembling HSMI) in association with PRV. Jaundice was also identified in a number of Audit samples and preliminary assessments suggest that PRV loads are elevated in these samples. As such, the SSHI plans to bring this research, now in manuscript form, back to the table and pursue its publication."

[274] Thus, this does not support 'Namgis' assertion that that DFO "supressed" evidence regarding HSMI in fish farms. It addresses the first detection of PRV in BC and the fact that it was the histopathologist from the province who convinced industry not to sign off. This is not evidence of DFO, at the behest of industry, suppressing information. And, in any event, the dataset became public, other studies were referenced on the same topic, and SSHI became involved.

[275] Nor does a prior paragraph of the draft document that discusses PRV and HSMI support this allegation.

[276] As to the "shocking" revelation at p 1020, this is an undated, clearly very rough draft of a document entitled SSHI Result Communication Plan. It is littered with comments, changes and redactions via the tracked changes feature of the word processing system being utilized. The "Background" section includes the following:

- Both the federal Department of Fisheries and Oceans (DFO) and the aquaculture companies have previously vehemently denied that HSMI ~~it~~ is present in BC Fish Farms; BC provincial pathologist Dr. Gary Marty is the lead pathologist for the DFO regulatory program and the industry
- In the Alexandra Morton legal case last year, however, the judge ruled that fish farms have to use the precautionary principle with HSMI/PRV
- DFO disagreed and is appealing the ruling, including via a Canadian Science Advisory Secretariat (CSAS) review
- Eight scientists (Canadian and International) concur that HSMI is here, including those at University of Prince Edward island (UPEI), the most arms-length group working with Dr. Miller on the SSHI
- It is important to note that DFO fisheries health scientists have injected ~~HSMI~~ homogenates from PRV infected tissues in pacific Salmon (Sockeye) and Atlantic Salmon, and have observed no ~~and the major finding is there were no observed~~ mortalities or HSMI-related lesions; Gary Marty was the pathologist in these studies; ~~the fish get the disease, but then recover~~
- …

[277] Of course, the reference to DFO and aquaculture companies vehemently denying the presence of HSMI comes directly from the text of the *Morton 2015* decision (at para 37), which decision is referenced in the next bullet. And it is also true that DFO planned to, and did, seek to appeal that decision, but ultimately it discontinued the appeal as discussed above. Nor did *Morton 2015* hold that fish farms have to use the precautionary principle – either with respect to PRV and HSMI or otherwise. This was an obligation of DFO. And while the wording indicating that DFO was also appealing *Morton 2015* via a CSAS review is unfortunate, viewed

in the context of this very rough draft, it is not evidence of bad faith. Poor drafting, assuredly, bad faith no. In whole, this draft document can be afforded little weight, especially without a proper understanding of the surrounding context, which is not apparent.

[278] As to the case law relied upon by 'Namgis, *Azizian* concerned an immigration officer's determination that an applicant was medically inadmissible to Canada. On judicial review, only one of various additional affidavits that the parties sought to file was found to be admissible. It addressed the absence of a handwritten medical letter indicating the stage of the applicant's cancer, from both the application record and the certified tribunal record. The letter had been obtained by the applicant's former counsel by way of an ATIP request. It was found to be admissible under the procedural fairness exception. Thus, it was one discrete and critical document whereas in this matter the ATIP documents are hundreds of pages from various authors and sources and are not documents asserted to have been omitted from the CTR. In other words, unlike *Azizian*, they are not critical evidence that should have been included in the CTR.

[279] As to *South Yukon*, that matter involved a trial, not an application for judicial review. Justice Heneghan noted that there had been an exceptional volume of evidence and that she would not be referring to all of it, but would base her conclusions on the evidence that she found to be most compelling. She also noted that while most documents had been produced by way of the discovery process, many highly relevant documents were not, and came into the possession of the plaintiff via ATIP requests. Justice Heneghan then stated that, as she had noted above, she had reviewed every piece of evidence in the proceeding. She stated that she was satisfied that all of the documents to which she had referred were properly introduced through witnesses, or on

the consent of counsel, were business records as described by s 30 of the *Canada Evidence Act*, RSC 1995, c C-5, or met the test of necessity and reliability. It is unclear where the ATIP documents fit into that mix.

[280] Finally, *Seifit* was a 2006 immigration decision of this Court, which found that documents produced in the usual and ordinary course of government activities or operations may qualify as business documents and be admissible under s 30 of the *Canada Evidence Act* for truth of their contents. However, it also suggested that policy documents, memoranda and personal correspondence are not the kind of documents admissible as such. Based on 'Namgis' submissions, I am not persuaded that the ATIP documents fall into the business records exception.

[281] In summary, as to Drastil Affidavit #1, the ATIP documents are admissible for the limited purpose of assessing 'Namgis assertion of bad faith. However, their reliability, in that they are comprised of draft documents and various internal emails, and are an incomplete record comprised of only a portion of the more than 7000 pages actually obtained as a result of the ATIP requests, is a concern. Additionally, many of the documents are unattributed. Accordingly, I afford them limited weight.

[282] Further, upon review in whole of the ATIP documents included with Drastil Affidavit #1, it can reasonably be said that, in its communications with the public concerning HSMI, there was a tendency by DFO to downplay the discovery and its potential impact. The ATIP documents also show that there was debate and some disagreement within DFO, and between its scientists,

concerning aspects of PRV and HSMI. However, I am not persuaded that the ATIP documents establish bad faith on the part of the Delegate or DFO with respect to the science underlying the Delegate's Decision.

[283] As to the other documents attached as exhibits to Drastil Affidavit #1, these are inadmissible as they do not fall within any of the exceptions to the general rule that the evidentiary record before the reviewing Court on judicial review is restricted to the record that was before the decision-maker.

Svanvik Affidavit

[284] As noted above, Cermaq also seeks to have paragraphs of the Svanvik Affidavit struck out. Upon review of that affidavit, I find that paragraphs 67–73 are admissible to the extent that they speak to Chief Svanvik's knowledge of the lower numbers of returning wild salmon in 'Namgis' asserted territory, either personally or by way of the Nimpkish River Hatchery escapement numbers. Paragraphs 93–94 are struck as irrelevant, paragraph 115 is struck as irrelevant and hearsay. Paragraphs 116–137 describe 'Namgis' communications with Marine Harvest and the ITC pertaining to the restocking of the Swanson Island facility and are admissible. Similarly, paragraphs 139–140 confirm 'Namgis' communications with DFO and are admissible. Paragraph 167 refers to a report entitled "Reasserting 'Namgis Food Sovereignty aka "Three Boards and a Pick Up Truck"", it is unnecessary inadmissible hearsay, as is related paragraph 168. Paragraphs 169, 172, 174–176 are admissible as they speak to depletion of salmon that are necessary to 'Namgis' traditional diet. Similarly, paragraphs 180–181 are admissible as they speak to depletion of salmon populations and 'Namgis' hatchery operations.

Paragraphs 184–185 are irrelevant and inadmissible. Paragraphs 187–193 are admissible as they speak to 'Namgis' belief as to how reduced salmon populations have affected its ability to exercise its Aboriginal rights and title and its concerns about the restocking of Swanson Island facility without testing for PRV. Where paragraphs of the Svanvik Affidavit have been struck out, the exhibits linked to those paragraphs are similarly struck.

[285] As to the Svanvik Affidavit in whole, it is sufficient to say that it is unchallenged evidence of the diminishing numbers of wild Pacific salmon returning to 'Namgis' asserted territory and to 'Namgis' reliance on wild Pacific salmon.

[286] Before concluding on this issue, there are two other points to be briefly addressed. First, I have dealt with the 'Namgis Expert Affidavits and Drastil Affidavit #1 in the context of 'Namgis' bad faith submissions. 'Namgis also asserts that the duty to consult is a further exception to the general rule precluding the admission of evidence that was not before the decision-maker, in reliance on *Liidlii Kue First Nation v Canada (Attorney General)*, 2000 CanLII 15881 (FC) at para 32. However, that decision predates *Association of Universities and Colleges* and related subsequent jurisprudence that has been discussed above. And, in any event, the 'Namgis Expert Affidavits and Drastil Affidavit #1 are not necessary to determine if a duty to consult exists or to resolve 'Namgis' claim that the Minister breached the duty to consult, which I have addressed below. Nor, in these circumstances, are they necessary for purposes of determining the scope of consultation.

b) Cermaq Rule 312 Motion – Da Costa Supplemental Affidavit

[287] Secondly, in connection with 'Namgis' Expert Affidavits, the Case Management Judge declined to grant Cermaq leave to file the supplemental affidavit of Golshan Da Costa, legal administrative assistant to Fasken Martineau DuMoulin LLP ("Fasken"), Cermaq's legal counsel in this matter ("Da Costa Supplemental Affidavit"), which was sworn on August 17, 2018. The Case Management Judge directed Cermaq to file a motion for leave to be heard together with the other motions at the hearing of these applications. On August 24, 2018, Cermaq filed a motion in writing seeking to file the Da Costa Supplemental Affidavit, which attaches letters between counsel for Cermaq and counsel for 'Namgis concerning disclosure by Dr. Routledge, Dr. Kiberge and Dr. Krkosek of their working documents for purposes of being cross-examined on their respective expert reports.

[288] The background to the motion is set out in the motion records filed by Cermaq and 'Namgis, as are their respective written submissions. It is not necessary to recite that information here. Having reviewed the submissions, I have concluded that the Da Costa Supplemental Affidavit is admissible as general background information as it describes the history of the refusal by 'Namgis to disclose documents requested by Cermaq in Directions to Attend issued for each of 'Namgis' experts, and the surrounding procedural history of the motion. It is relevant only in that it establishes 'Namgis' refusal to provide the requested materials, which, as the Case Management Judge noted, is apparent from the transcript of the cross-examinations. The Da Costa Supplemental Affidavit meets the first part of the interests of justice analysis, as when Cermaq filed its affidavits under Rule 306, the cross-examinations and refusals had not occurred. Its relevance is limited to the fact that the requested documents were

not disclosed and the affiants were therefore not cross-examined on those of the documents that exist, but were not provided, in particular, the draft expert reports. However, neither party made submissions before me as to the merits of the disclosure request or the refusal, and the Da Costa Supplemental Affidavit is not probative in this regard. In the same vein, it is also not prejudicial as it was open to 'Namgis to address the merits of the request in its materials.

[289] In whole, the Da Costa Supplemental Affidavit is admissible for only the limited purpose of establishing that certain of the demanded documents were not provided. However, absent argument on the merits of whether those documents were compellable, or a motion by Cermaq seeking to compel production of the draft expert reports, I afford the affidavit little weight. In any event, as I have found the 'Namgis Expert Affidavits to be inadmissible, nothing turns on the outcome of this motion.

B. Issue 2: Did the Minister breach the duty to consult with 'Namgis concerning the PRV Policy Decision (T-430-18)?

i) *Summary of Parties' Positions*

[290] 'Namgis submits that the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it; that the duty is not confined to decisions or conduct which have an immediate impact on lands and resources, but extends to strategic, higher level decisions; and that the threshold for triggering the duty is low. Here the PRV Policy is a higher level strategic decision, Canada has knowledge of 'Namgis' claims to Aboriginal title and rights, and there is a

causal connection between the PRV Policy and the potential for adverse impacts on those title and rights. Despite this, no consultation has taken place with respect to the Policy or the Swanson Island transfer licence because of the Minister's view that consultation is not required. This is a legal error, reviewable on the correctness standard, and is sufficient grounds to quash the PRV Policy.

[291] Conversely, the Minister's position is that the PRV Policy does not trigger the duty to consult as no adverse impacts are caused by the PRV Policy decision. In the alternative, there was no breach of the duty to consult. DFO has previously consulted with 'Namgis with respect to aquaculture licences and, at that time, 'Namgis raised their concerns about the health impacts of fish farms on wild salmon stocks, which were taken into account by DFO.

[292] Marine Harvest defers to the Minister on the question of whether a duty to consult was owed.

[293] Cermaq takes the position that statutory interpretation of s 56 of the FGRs and the forming of the PRV Policy do not attract the duty to consult. Rather, they are rules of general application concerning the transfer of fish that apply throughout British Columbia. They do not create a specific, appreciable adverse effect on 'Namgis' ability to exercise their Aboriginal rights and are not strategic high level decisions. Rather, the relevant Crown conduct that may affect 'Namgis' Aboriginal rights and to which any duty to consult would attach is the approval of an aquaculture licence.

ii) *Standard of Review*

[294] As to the standard of review applicable to the duty to consult, ‘Namgis submits that the existence, extent and content of the duty to consult are legal questions reviewable on the correctness standard (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 61 (“*Haida*”); *Yellowknives Dene First Nation v Canada (Minister of Aboriginal Affairs and Northern Development*, 2015 FCA 148 (“*Yellowknives*”). The issue of whether Canada actually discharged its duty to consult is reviewable on the reasonableness standard (*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 39, *Haida* at paras 43–47; *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at paras 47–49 (“*Clyde River*”)).

[295] The Minister submits that the standard of review for assessing whether a duty to consult exists or has been triggered is correctness and that the reasonableness standard applies to questions of the extent of the duty (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 64 (“*Rio Tinto*”); *Haida* at paras 60–63; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 77 (“*Ktunaxa*”)).

[296] I note that in *Yellowknives*, the Federal Court of Appeal provided an articulation of the applicable standards of review, which it found was consistent with the Supreme Court of Canada’s decisions in *Haida* (at paras 61–62) and *Beckman* (at para 48) (and also see *Ktunaxa* at para 77). Specifically, that the existence and extent or content of the duty to consult are legal questions reviewable on the correctness standard, while the adequacy of the consultation is reviewable on the reasonableness standard. I accept this as the applicable standards of review.

iii) *Jurisprudence*

[297] To address this issue it is helpful to first set out the relevant jurisprudence, which I will then apply to the factual circumstances of this matter.

- The duty to consult is grounded in the honour of the Crown. The obligation of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It is enshrined in s 35 of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. One of the purposes of s 35(1) is the negotiation of just settlement of Aboriginal claims. In all of its dealing with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. Stated otherwise, it is a corollary of s 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. In turn, this implies a duty to consult and, if appropriate, accommodate. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation. What the honour of the Crown requires varies with the circumstances (*Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at paras 24–25 ("*Taku River*"); *Haida* at paras 16–18, 20, 25, 32; *Rio Tinto* at para 32);

- The duty to consult described in *Haida* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right (*Rio Tinto* at para 31);

– The duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida* at para 35; *Rio Tinto* at para 3; *R v Douglas*, 2007 BCCA 265 at para 44 ("*Douglas BCCA*"));

– This test has three elements:

    (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right;

    (2) contemplated Crown conduct; and

    (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

– With respect to the first element of the test, to trigger the duty to consult, the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches (*Haida Nation* at para 35). The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34). Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim (*Rio Tinto* at para 40). The claim or right must be one which actually exists and stands to be affected by the proposed government action (*Rio Tinto* at para 41);

– As to the second branch of the test, for a duty to consult to arise there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question. Government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (*Rio Tinto* at paras 42, 44);

– The third element of a duty to consult is "the possibility that the Crown conduct may affect the Aboriginal claim or right". The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice. When applying this element, a generous, purposive approach should be taken in recognition of the fact that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown (*Haida* at paras 27, 33). However, mere speculative impacts will not suffice. Rather, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right" (*Douglas* BCCA at para 44; *Hupcasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900 at paras 56, 59 ("*Hupcasath*")). The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice (*Rio Tinto* at para 46);

– Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. High-level management decisions or structural changes to a resource's

management may also adversely affect Aboriginal claims or rights even if these decisions have no immediate impact on lands and resources because they may set the stage for further decisions that will have a direct adverse impact on land and resources. However, an underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The question is whether there is a claim or right that may be adversely impacted by the current government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. To trigger a fresh duty of consultation, a contemplated Crown action must put current claims and rights in jeopardy (*Rio Tinto* at paras 47–49). *Haida* grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution and confined the duty to adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the pre-existing project of which it is a part. The subject of the consultation is the impact on the claimed rights of the current decision under consideration (*Rio Tinto* at paras 53–54);

– The scope of the duty is proportional to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potential adverse effect upon the right or title claimed (*Haida* at para 39; *Taku River* at para 29). It will vary with the circumstances, but will always require meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process (*Taku River* at para 29).

- At all stages good faith is required on both sides. The Crown must have the intention of substantially addressing Aboriginal concerns as they are raised through a meaningful consultation process. However, there is no duty to agree, the commitment is to a meaningful process of consultation. For their part, Aboriginal claimants must not frustrate the Crown's reasonable good faith attempts or take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached (*Haida* at para 42; *Ktunaxa Nation* at para 80).

- The duty to consult may be viewed on a spectrum. At one end are cases where the claim to title is weak, the Aboriginal rights limited or the potential for infringement minor. In those cases, the Crown's duty may be limited to giving notice, disclosing information and discussing any issues raised in response. At the other end of the spectrum, are cases where a strong *prima facia* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In those cases, deep consultation, aimed at finding a satisfactory interim solution, may be required. This may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and the provision of written reasons to show that Aboriginal concerns were considered and the impact they had on the decision. In between these two ends of the spectrum will lie other situations and each case must be addressed individually. Each case must also be approached flexibly as the level of consultation required may change as the process goes on and new information comes to light (*Haida* at paras 43–45). "The controlling question in all situations is what is required to maintain the honour of the Crown and to

effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (*Haida* at para 45);

– When the consultation process suggests amendment of Crown policy, the stage of accommodation has been reached. Where a strong *prima facia* case exists for the claim and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of the infringement pending resolution of the final claim. However, this process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim (*Haida* at paras 47–48). Any accommodation that may be required seeks compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation (*Haida* at para 49).

(Also see *Ktunaxa* at paras 78–83 for a restatement by the Supreme Court of Canada of the duty to consult legal principals).

iv) *Prior Consultation by DFO*

[298] Prior to analyzing whether there was a duty to consult with respect to the PRV Policy Decision and, if so, whether the duty was breached, it is useful to review DFO's evidence concerning its prior consultations and communications with 'Namgis concerning aquaculture, as this provides background and context. This information is primarily found in Thomson Affidavit #2, and the affidavit of Todd Allan Johansson, Senior Aquaculture Management Coordinator,

sworn on July 5, 2018 ("Johansson Affidavit"). The content of each of those affidavits is summarized below.

Thomson Affidavit #2

[299] Thomson Affidavit #2 is 118 pages and 439 paragraphs in length and has 97 exhibits. It describes in great detail the regulatory context of aquaculture management, the work of DFO Science Branch, the aquaculture licencing and management regime established a part of DFO's monitoring and regulatory oversight of the industry, and DFO's consultations and engagement with 'Namgis, post – *Morton 2009*, when DFO assumed regulatory control over the management of aquaculture.

[300] As to prior aquaculture related consultations, Mr. Thomson references and attaches as an exhibit a draft document entitled *Aquaculture Management Division - A Proposed Strategy for Engaging First Nations*, the purpose of which is described as to outline a proposed strategy for involving First Nations in federal aquaculture decisions in BC following *Morton 2009*. Specifically, for engaging First Nations during the transition period (September 2010–January 2011) with respect to developing draft PARs, and related policies and guidelines, including IAMPs, and the issuance of federal aquaculture licences for the approximately 600 existing fin and shell fish facilities and new facilities applied for after December 2010, including requests for licence renewals and amendments. Mr. Thomson's affidavit describes these efforts in detail, including those communications or engagements specific to 'Namgis as well as engagement with and funding of the Aboriginal Aquaculture Association and the First Nations Fisheries Council of British Columbia.

[301] Mr. Thomson also describes in detail DFO's consultations with all BC First Nation Chiefs and Council on the new federal aquaculture licencing regime that would come into effect on December 18, 2010. He states that those consultation sessions addressed licence conditions, which included conditions for fish transfer, fish health and pest and pathogen management, and describes 'Namgis' specific participation in those consultation sessions. He also states that between 2011 and 2015, DFO consulted with First Nations, including 'Namgis, on salmon farm sites in their respective territories and on annual licence conditions. In 2015–2016, DFO also consulted with First Nations on the implementation of multi-year licencing for aquaculture, and DFO continues to consult with respect to renewal of aquaculture licences and amendments to aquaculture licences within First Nations claimed territories. However,

> 363. DFO does not currently consult on introduction and transfer licences as consultation with First Nations takes place around aquaculture licencing decisions. Aquaculture licences are issued under the assumption that fish will be transferred to and from the site as part of routine operations.

[302] Mr. Thomson goes on to describe consultation on the Aquaculture Activities Regulations held between 2010 and 2015, on siting guidelines from 2014–2015, on engagement of Aquaculture Management and Advisory Committees, and other matters.

[303] Mr. Thomson states that transfer licence decisions are operational in nature, meaning that they are recurring and typically delegated to decision-makers who are tasked with implementing components of specific programs. DFO generally conducts consultations and stakeholder engagement at an earlier stage in the process prior to operational implementation. Hundreds of fish transfer licences are issued annually following the review of the recommendations of the veterinarians, scientists and aquaculture managers who form the ITC.

[304] He notes that following the decision in *Morton 2015*, the Minister amended existing aquaculture licences to include a condition that, from that date, licence holders were required to apply for and obtain an authorization to transfer fish from the ITC. More recently, on May 4, 2018, DFO implemented a new salmon transfer system, which he describes as allowing DFO to improve the controls in place to prevent disease transfers from farmed to wild fish, to better incorporate new scientific findings into decision-making, and to make more information available to the public. The new transfer process and related documents were provided to marine finfish aquaculture licence holders, industry association representatives, and First Nations via the First Nations Fisheries Council. For every transfer into and between marine salmon farm sites, aquaculture operators are now required to submit an ITC licence application as well as a revised Fish Health Attestation Form executed by the facilities veterinarian.

[305] Mr. Thomson also sets out the time line of the current DFO review process for fish health management activities including updates to the transfer authorization process and to the fish health audit and surveillance program. This includes holding discussions with industry, First Nations and others on pathogen research and other aquaculture management issues at dates to be determined, sometime post-winter 2019, and making adaptations as necessary. As to forthcoming changes, Mr. Thomson states that, under DFO's Sustainable Aquaculture Program, it committed to deliver environmental risk assessments to support science based decision-making related to aquaculture activities.

Johansson Affidavit

[306] The Minister, during the hearing of T-430-18, spent considerable time taking the Court through the 118 paragraphs Johansson Affidavit and its 90 exhibits. The following summary of that information provides background and context to the question of consultation, before me:

> 2012
>
> - In 2012, DFO invited First Nations to attend a community dialogue session concerning the development of integrated management of aquaculture plans (IMAPs). 'Namgis did attend one such session, the objects of which included providing information relating to conditions of licences for finfish aquaculture. 'Namgis subsequently advised DFO of its concerns about finfish tenures in the Broughton Archipelago, including for transmission of parasites and diseases to wild salmon and the concentration of infectious diseases at salmon farms and transmission to wild salmon;
>
> - At this time, DFO also advised 'Namgis of proposed aquaculture licence renewals and sought any site-specific concerns. 'Namgis' response expressed concern as to a lack of consultation and provided its prior correspondence with the Province setting out its aquaculture-related concerns. Various correspondence was exchanged, including DFO's October 19, 2012 strength of claims letter and an invitation to 'Namgis to attend a technical meeting with DFO experts to discuss issues raised by 'Namgis, including the health of wild and farmed salmon. It does not appear that 'Namgis responded to the invitation;
>
> - In November 2012, DFO advised 'Namgis of and provided it with information relating to the upcoming aquaculture licence renewals, and also offered an opportunity to meet with DFO to discuss pink and other salmon stocks. Amongst the attachments to that letter was a Joint Federal Impact Table, which included the federal and provincial governments' responses to 49 adverse impacts identified by 'Namgis. As to the potential for transmission of parasites and diseases to wild salmon, the concentration at salmon farms of infectious diseases and their transfer to wild salmon, the government's response stated that mandatory salmon Health Management Plans were required as a condition of a federal licence and that DFO continued to conduct audit and surveillance programs to verify the health of farmed salmon in British Columbia. DFO indicated it would be pleased to discuss the technical aspects, results and current information on that issue with 'Namgis. 'Namgis responded by again raising its concerns about consultation and aquaculture licencing. On November 28, 2012, DFO replied and also advised that all fish farm aquaculture licences would be up for renewal on December 18, 2012. On December 14, 2012, 'Namgis provided traditional knowledge maps. The aquaculture licences were renewed for one year on December 18, 2012;

2013

- In early January 2013, DFO advised ‘Namgis of the 2012 renewal and suggested a meeting to discuss the traditional use information and any other concerns. In response, ‘Namgis again expressed its concerns, including as to the consultation process preceding the renewal and the lack of reliance by DFO on the traditional use information in that regard. DFO explained that as the information had been received only 3 days prior to the expiration of the licences, it had not had sufficient time to do so before the all of the licences would lapse. Various correspondence was exchanged and DFO completed its initial review of the traditional use information;

- In October 2013, DFO advised all affected First Nations that existing aquaculture licences would expire on December 18, 2013. It also separately advised ‘Namgis of this, stating that it was doing so as a part of its ongoing consultation, and offered an opportunity for further consultation on the potential renewals. On December 17, 2013, the day before the aquaculture licences were to expire, ‘Namgis wrote to DFO stating that it had not received DFO’s prior correspondence, seeking a meeting in January to discuss its traditional use information and asking that the licences not be renewed until ‘Namgis had an opportunity to review DFO’s correspondence, and meaningful consultation and accommodation had occurred. On December 18, DFO responded advising that ‘Namgis’ request could not be accommodated on such short notice, that the licences had been renewed, and that DFO was available to meet with ‘Namgis during the January dates ‘Namgis had proposed;

2014

- During 2014, DFO and ‘Namgis exchanged various correspondence, which, in particular, was concerned with five licence amendment applications that had been received by DFO and that sought to increase the production capacity of the subject fish farms. ‘Namgis expressed an interest in consultation and accommodation. On February 14, 2014, DFO advised ‘Namgis that it was open to meeting to discuss the five licence amendment applications and, as it had previously advised, it would use a flexible 60 day decision making time line. DFO also responded to ‘Namgis’ recent letter in which it indicated that it had yet to receive any proposed mitigation or accommodate measures in response to the DFO authorized aquaculture licences. DFO referred ‘Namgis to its October 19, 2012 strength of claims assessment and DFO’s view that there was a low risk that DFO aquaculture licence decisions would have an adverse impact on ‘Namgis’ claimed aboriginal and treaty rights, and advised that DFO’s initial review of the traditional use information did not change that assessment. Accordingly, it was DFO’s current view that accommodation measures were not warranted. However, that DFO remained open to discussing the existing program measures, such as conditions of licences, that may help to address ‘Namgis’ concerns;

- On March 4, 2014, 'Namgis wrote to Transport Canada, copying DFO, in regard to aquaculture, citing concerns and seeking accommodations. On March 31, 2014, the day before the 60 day consultation period was to end, 'Namgis provided a 15-page response to the five proposed fish farm aquaculture licence amendments. It stated its concerns, including individual and cumulative effects of the proposed production increases and restated its previously voiced concerns as to the potential transmission of parasites and diseases to wild salmon and the potential for a concentration of infectious diseases. The letter, for the first time, also raised 'Namgis' concern with a lack of methodical, independent disease testing of farmed salmon with the object of understanding actual and potential impacts on wild salmon, related to disease transmission, referencing the Cohen Commission recommendations and an anticipated study by the SSHI. 'Namgis sought to be advised on the status of the latter;

- In its response, DFO stated that it was undertaking a comprehensive review of the five aquaculture licence amendment applications – including potential fish health considerations – and that, in addition to consultation with 'Namgis and other First Nations, the results of the reviews would inform the decision regarding amendments. DFO stated that it remained committed to meaningful consultation with 'Namgis, noting its prior offers to meet to discuss aquaculture related issues and that it remained open to doing so. DFO also stated that it had reviewed the scientific information available for the Broughton Archipelago area and considered many of the issues and concerns raised related to aquaculture. It attached a document containing an overview of the science advice informing DFO's management approach as well as consideration of specific impacts including disease transfer. The attached document mentioned PRV, stating that there were no indications that PRV was associated with or causative of HSMI on the west coast of North America, but that as the role PRV plays in aquatic ecosystem was not well understood, DFO scientists and others were conducting investigations to better understand the biology of PRV in wild and farmed salmon. A copy of the December 2013 Integrated Management of Aquaculture Plan for Marine Finfish (MF-IMAP) was also provided, which was described as setting out DFO's current management priorities for aquaculture in the Pacific Region. DFO also provided a status report on the SSHI study and offered to meet to provide an overview of this information and answer any questions 'Namgis may have had. DFO restated its view that the existing aquaculture sites posed a low risk to the local fisheries resources and consequently a low risk on the ability of 'Namgis to exercise its asserted rights;

- On July 24, DFO advised 'Namgis that, further to DFO's ongoing consultations regarding aquaculture licence applications, DFO had completed a preliminary environmental and fish health assessment, which it attached. DFO advised that it was willing to meet to discuss any aspect of this, or aquaculture in 'Namgis' claimed territory. On October 28, 2014, DFO advised 'Namgis that 21 finfish aquaculture licences in the Broughton Archipelago were coming up for annual renewal. 'Namgis responded, again indicating its concerns with the prior consultations, and that there had been no mitigation or accommodation despite the

traditional use information. The aquaculture licences were renewed on December 18, 2014;

2015

- On January 9, DFO advised 'Namgis of two proposed new licence applications, and that it was preparing to respond to 'Namgis' letter of December 5, 2014. It proposed meeting. On January 13, 2015, DFO advised 'Namgis that DFO was considering moving towards multi-year licences and was seeking the views of First Nations on this. With respect to the proposed new aquaculture licences, on January 19, 2015, 'Namgis responded stating that it continued to oppose the use of open-net-cage finish farms, it had repeatedly raised procedural and substantive concerns on prior efforts to consult on similar matters. It suggested a pattern was emerging whereby DFO continued its blind support of open-net-cage fish farms without accommodating First Nations' interests. On January 19, 2015, DFO responded to 'Namgis' letter of December 5, 2014, again setting out DFO's position as to risk and accommodation;

On February 16, 2015, DFO announced that it would implement multi-year aquaculture licencing for BC aquaculture operators. DFO updated 'Namgis on the five finfish licencing amendment applications on February 25, 2015. And, on November 6, 2015, DFO advised 'Namgis that it had received a further aquaculture amendment application concerning one of the original five amendment applications (Maude Island), that it would consider 'Namgis' prior submissions in that regard, that there was also a 60 day time period within which 'Namgis could respond to the revised application, and that DFO was prepared to discuss the matter;

2016

- On January 4, 2016, 'Namgis responded setting out its opposition to the Maude Island amended application, its disappointment with DFO's pattern of continued approval of more open-net finfish farms in the Broughton Archipelago, which area it considered to be vital to protect its rights to harvest traditional foods, and its position that critical wild salmon habitat at the Maude Island site should be clear of salmon farms. Further, DFO was not abiding by the recommendation of the Cohen Commission in regard to a need for further science to look at the impacts of open-net finfish farms on wild salmon stocks, and 'Namgis disagreed with DFO's view that open net farms pose a low risk to those stocks. 'Namgis stated that it remained consistent in opposing all open-net finfish farms, including the Maude Island application. On February 22, 2016, DFO advised 'Namgis that the Maude Island application was approved. In 2016, it also advised 'Namgis that it would be concluding its review of one of the other five original amendment applications (Wehlis Bay), which had been put on hold to allow the Province to update its operational land use policy for aquaculture and to

re-engage First Nations on that applications, and that another 60 day consultation period was provided, inviting ‘Namgis to respond;

2017

- Early in 2017, ‘Namgis requested a consultation meeting concerning a proposed renewal of a freshwater stocking aquaculture licence. Subsequently, ‘Namgis requested a second meeting to discuss open-net fish farming. This was held on March 17, 2017. The agenda focused on fish farms and their effects on Nimpkish River Salmon stocks and traditional food harvesting as well as fish farm disease management and contaminant leak response. On March 22, 2017, DFO provided ‘Namgis with copies of two recently published studies, the 2017 Di Cicci report and a report of Martin Krkosek entitled *Population Biology of Infectious Diseases Shared by Wild and Farmed Fish*. By email of June 15, 2017, ‘Namgis had stated that it remained committed to its stance of not being supportive of any open-net fish farm activity;

- On August 11, 2017, ‘Namgis emailed DFO to ask when the Swanson Island facility aquaculture licence would come up for renewal, DFO (Mr. Johansson) responded that he was out of the office for a few days but that the information was on DFO’s website. On September 18, 2017, ‘Namgis (Chief Svanvik) wrote to DFO stating that it had come to ‘Namgis’ attention that to stock or transfer fish into any open-net-pen fish farm, an ITC licence was necessary and that the ITC did not consult with First Nations prior to issuing such licences. ‘Namgis stated that it was never consulted as to the existence of Marine Harvest’s net-pen fish farm at Swanson Island and was opposed to an ITC transfer licence being issued for that location. On October 4, 2017, DFO provided ‘Namgis with information on the benthic performance at the Swanson Island Facility. ‘Namgis subsequently spoke with the DFO biologist who prepared that information and also requested that ‘Namgis be introduced to DFO’s Fish Health Monitoring Team. DFO provided the necessary contact information. On November 21, 2017, ‘Namgis (Chief Svanvik) wrote to the ITC stating ‘Namgis’ vehement opposition to any amendment of s 56 of the FGRs that would, amongst other things, change the application of *Morton 2015* to s 56, and stating that ‘Namgis must be consulted prior to any amendment to s 56. The letter also stated that ‘Namgis was extremely distressed with the Minister’s continued authorization to introduce or transfer smolts without testing them for PRV, which ‘Namgis considered to be unlawful. ‘Namgis urged DFO to reverse its PRV decision and consult with it. By a second letter to the ITC coordinator, ‘Namgis stated that the Swanson Island fish farm was causing very serious impacts to, and unjustified infringements of, its unceded and unsurrendered Indigenous title and rights. Further, the fish farm was being operated without ‘Namgis’ free, prior and informed consent, consultation to date had been wholly inadequate, and Canada had breached and continued to breach its duty to consult and accommodate ‘Namgis. ‘Namgis stated that it was especially concerned about the effect of PRV, which had been proven to cause HSMI. ‘Namgis stated that HSMI caused

heart damage such that it would be unlikely that wild salmon suffering from HSMI would be able to swim upstream to their spawning grounds. The letter stated that 'Namgis was extremely concerned that HSMI presents a species-level threat to wild salmon. Additionally, that PRV was also suspected to have other adverse health effects on wild salmon that can make them vulnerable to predation, including lethargy and jaundice. 'Namgis stated that it wanted to ensure that, pursuant to the precautionary principle, adequate protective measures were in place to prevent the spread of PRV to wild salmon before any further transfer authorizations were issued. It also spoke to the depletion of wild salmon stocks' in 'Namgis territory and asserted that this was part of the "existing state of affairs" that must be considered in evaluating the seriousness of any additional and incremental impacts that the ongoing operation of the fish farm would cause to its Indigenous title and rights. 'Namgis asserted that it had not been consulted on any transfer authorizations or on any underlying risk evaluations. 'Namgis stated that ITC must urgently consult with it on any applications the ITC received to introduce or transfer fish into the fish farm;

- Subsequently, there were various communications between 'Namgis and DFO as to the status of any application made by Marine Harvest for a transfer of smolts to Swanson Island. 'Namgis requesting to be kept apprised;

- On December 20, 2017, DFO sent an email to 'Namgis advising that DFO was undertaking a series of science-based risk assessments regarding potential pathogen transfers from farmed salmon to wild stocks. This was being conducted by CSAS and the first results from the risk assessment on Infectious Hematopoietic Necrosis Virus (IHNV) would be posted on DFO's website on that date. It provided links to them. These included a CSAS Science Advisory Report 2017/18 entitled "Advice from the Assessment of the Risk to Fraser River Sockeye Salmon due to Infectious Hematopoietic Necrosis Virus (IHNV) Transfer from Atlantic Salmon Farms in the Discovery Islands Areas, British Columbia", and other documents concerning IHNV;

- In January 2018, 'Namgis continued to request that DFO keep it apprised of any transfer licence application made by Marine Harvest, and made related requests, to which DFO responded. 'Namgis noted that it had met with Marine Harvest in December and had been advised that it planned to restock in March or April, 2018. During this same time, 'Namgis was communicating with Marine Harvest. On February 13, 2018, 'Namgis (Chief Svanvik) wrote to DFO advising that on February 7, 2018, 'Namgis had been advised by Marine Harvest of its intention to transfer fish to the Swanson Island fish farm on or about April 1, 2018 but that DFO had not informed 'Namgis that Marine Harvest had applied for and obtained a transfer licence. 'Namgis referenced its November 28, 2017 correspondence and stated its view that decisions to issue transfer licences were separate from decisions to grant an aquaculture licence and that consultation was required. 'Namgis also stated its position that transfer licences issued without testing for PRV, or allowing the transfer of fish infected with PRV, would be inconsistent with *Morton 2015* and unlawful. 'Namgis stated that if a transfer

licence had not yet been issued, that 'Namgis be urgently contacted to establish a consultation process prior to issuance and that it be provided with immediate notice of any application made by Marine Harvest, a copy of its application and the date of the intended transfer. 'Namgis also asserted that issuing a transfer licence would cause irreparable harm to the wild salmon that it relied on to exercise its Indigenous title and rights, as well as the juvenile salmon 'Namgis released from its hatchery each year to preserve its constitutionally protected rights;

On February 19, 2018, 'Namgis again inquired as to the status of any transfer licence application by Marine Harvest and was again advised by DFO that it had not yet received an application. On the same date, Marine Harvest responded to a February 13, 2018, letter from Chief Svanvik, copied to DFO, noting that Marine Harvest's requests to meet with 'Namgis and seek compromise and solutions to the dispute regarding Swanson Island fish farm had not been granted, that a change to Marine Harvest's short-term stocking plan was no longer possible, and explaining this was dictated by fish biology. Marine Harvest also disagreed with 'Namgis' views on PRV and the lawfulness of its operations and noted that in earlier meetings 'Namgis had made it clear that it would "not discuss science". Marine Harvest also advised that the most recent fish health screenings of the smolts destined for transfer had been confirmed as healthy and free of pathogens, including PRV. In a subsequent letter to Marine Harvest, 'Namgis noted that it had continuously objected to the presence (and operation) of the Swanson Island fish farm, and its concerns in that regard. It requested information such as the date that Marine Harvest intended to apply for a transfer licence, a copy of that application and information concerning Marine Harvest's most recent fish health screenings;

- Between February 26 and March 1, 2018, DFO and 'Namgis exchanged emails concerning the anticipated Marine Harvest application and the ITC process, including that ITC had a service standard of 10 business days to respond to a transfer application and that Marine Harvest's application was received on February 28, 2018. It was expected that ITC would complete its review by March 14, 2018 and, if approved, the transfer licence would be valid for 90 days. DFO indicated that it would advise 'Namgis when the review was complete and whether it intended to issue a transfer licence. Further, that DFO was in the process of reviewing its consultation approach for aquaculture, including transfer authorizations;

- 'Namgis continued to make inquiries of DFO as to the status of the transfer application. DFO responded to these and advised that it would advise 'Namgis as soon as a decision was reached. On March 12, 2018, 'Namgis (Chief Svanik) wrote to the ITC coordinator requesting that a meeting be set up that week to establish a government-to-government engagement process in relation to Marine Harvest's application for a transfer licence for its Swanson Island facility and restating 'Namgis' position as to the lawfulness of the issuing of a transfer licence without testing for PRV. It attached its Notice of Application for Judicial

> Review in that regard and advised that it had also filed a motion seeking injunctive relief. A similar letter was sent to the Minsters of Fisheries and Justice urging that the transfer licence not be issued and that instead a meeting be held with 'Namgis. On March 15, 2018, the Union of British Columbia Indian Chiefs wrote to the Minister in support of 'Namgis' position. The transfer licence was issued to Marine Harvest on March 23, 2018, DFO emailed 'Namgis providing a copy of the licence.

v) Analysis

[307] In this matter, the first two elements of the test as to whether a duty to consult arises are not in dispute. As to the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right, this is addressed in the Johansson Affidavit. Exhibit K of that affidavit is a letter dated October 19, 2012, from Mr. Johansson to 'Namgis' counsel at that time. Amongst other things, the letter responds to a request by 'Namgis for a strength of claims assessment. DFO provides a preliminary assessment, stated to be relevant only to DFO consultations with 'Namgis regarding renewal of aquaculture licences, as follows:

> Based on the information sources described above it is DFO's preliminary assessment that 'Namgis has a strong *prima facia* claim to an aboriginal right to fish for food, social and ceremonial (FSC) purposes within their asserted title territory and a somewhat weaker claim elsewhere within their asserted rights area. DFO is of the view that the other rights and title claimed by 'Namgis may not be relevant to these consultations. However, as discussed below, DFO is looking forward to receiving site specific Traditional Use information from you in the near future that will be used to inform ongoing consultations with 'Namgis and DFO decision making with respect to these licences.
>
> DFO has reviewed the concerns identified by 'Namgis with respect to aquaculture licences in some detail…
>
> I would note that our preliminary assessment of potential impacts on 'Namgis' claimed rights are based largely on these more general concerns. In light of the numerous regulatory and licencing requirements on fish farm operators, as well as ongoing studies, monitoring, regulatory inspections, and other mitigating measures

> (which DFO would like to discuss in more detail with 'Namgis), DFO's initial view is that there is a low risk of adverse impacts on 'Namgis' ability to exercise their claimed rights as a result of the aquaculture licences. Further, based on the above considerations, DFO's preliminary assessment regarding the level of consultation required in relation to the proposed aquaculture licencing decisions is in the middle range of the *Haida* consultation spectrum.
>
> (emphasis original)

[308] Thus, it is clear that the Crown has knowledge of 'Namgis' asserted Aboriginal right to fish for food, social and ceremonial purposes within its asserted territory.

[309] The Minister also acknowledges that the ongoing PRV Policy of issuing fish transfer licences without requiring the fish to be tested for PRV and HSMI is Crown conduct as captured by the second branch of the test.

[310] This leaves only the third element, being whether there is the potential that the contemplated conduct may adversely effect an Aboriginal claim or right.

[311] As a preliminary point and before addressing the third element of the test, I pause to note that 'Namgis relies heavily on Justice Manson's findings in the injunction hearing, brought in its application in T-430-18, to support its submission that the Minister breached the duty to consult. It is significant to note, however, that other than the Svanvik Affidavit, the affidavit evidence that was before Justice Manson is not the same affidavit evidence that is before me in T-430-18. In that regard, at the hearing of these applications, the Court requested, and by letter of December 14, 2018, the parties jointly provided, a table setting out how the evidence filed in the T-430-18 injunction motion differs from that filed in the T-430-18 and T-744-18 applications,

and identifying related motions to strike. It is not necessary to expand on this in these reasons other than to note that Thompson Affidavit #2 and the Johansson Affidavit, both discussed above, were not before Justice Manson. And, as also discussed below, in T-744-18, ‘Namgis sought to file, as exhibits to an affidavit of Won Drastil Affidavit on April 20, 2018, the affidavits that were before Justice Manson, but which are not otherwise found in the application records for T-430-18 and T-744-18, which are before me. In the injunction motion, the Minister took the position that the expert evidence relied upon by ‘Namgis in seeking interlocutory relief was, in reality, an attempt to rely on extrinsic evidence in a judicial review application and that it was therefore inadmissible. Justice Manson did not agree and stated that, to the extent that ‘Namgis was seeking a determination of the reasonableness of the PRV Policy or the Minister’s decision not to consult with ‘Namgis, he could and would not decide those issues. Justice Manson stated that he would decide whether or not the evidence before him supported the granting of the requested injunction. He also noted that interlocutory relief is not final and does not usurp the role of the Court in determining the issues before it in the judicial review.

[312] The Minister’s position is that the third element of the duty to consult is not met, and the duty to consult is therefore not triggered, because the potential adverse impact alleged by ‘Namgis is not novel to the PRV Policy Decision. The Minister is of the view that while ‘Namgis claims that transferring infected fish into open-net pens within their asserted territory is likely to adversely impact their claimed title and rights by spreading a disease agent that is harmful to the fish that ‘Namgis relies on to exercise their claimed right, the potential for the spread of PRV is not new as PRV has been observed in wild fish populations since at least 1988,

and the Swanson Island facility has been operating in substantially the same way since at least 2010.

[313] Further, the Minister states that DFO's PRV Policy is based on its scientific conclusion that PRV is not harmful to fish. While there is possible risk of disease associated with PRV transmission, the likelihood of potential for PRV to cause disease in wild salmon populations is very low. The Minister submits that 'Namgis has not shown that the PRV Policy Decision will potentially cause an adverse impact on the ability of 'Namgis to exercise its asserted s 35 rights. Rather, its argument is speculation and conjecture, which is insufficient to meet this element of the test.

[314] I will first address the Minister's argument that there was no duty to consult because the Minister has already determined that the risk of adverse impacts to 'Namgis' rights as the result of the PRV Policy Decision is low and that 'Namgis has not established a novel risk which would alter that determination or warrant revisiting it.

[315] In *Rio Tinto*, the Supreme Court stated as follows:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> [46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however,

> will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.
>
> [47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

[316] This would not seem to require the level of certainty that the Minister suggests, being that 'Namgis must establish that PRV will potentially have an adverse impact on 'Namgis' Aboriginal rights. Further, while the Minister submits that DFO has determined, based on its assessment of the science, that PRV and HSMI pose a low risk to wild salmon and, therefore, to 'Namgis' rights, in my view, it does not follow that this is a basis for refusing to consult when that risk assessment is what has given rise to the request to do so.

[317] In any event, I have found above that the Minister's Interpretation of s 56 of the FGRs is unreasonable. This is because it permits transfers of fish carrying a disease agent or of fish that are diseased to a level or threshold of harm to wild Pacific salmon at the conservation unit or

species level, it fails to embody and is inconsistent with the precautionary principle, and it fails to take into consideration the health of wild Pacific salmon. As a result of that finding, the PRV Policy Decision will be quashed. Thus, the question of whether a failure to test for PRV or HSMI may potentially adversely affect 'Namgis', s 35 rights will remain an open one until the Policy has been reconsidered. However, given the uncertainty in the science concerning PRV and HSMI with respect to wild Pacific salmon, I cannot conclude that the risk of, or potential for, an adverse impact on 'Namgis' claimed rights is merely speculative, as the Minister submits. The fact that DFO has reconsidered the PRV Policy on numerous occasions indicates that DFO recognizes that PRV may give rise to a real potential harm.

[318] Further, the science surrounding PRV and HSMI is a rapidly evolving area – as also recognized by the reconsiderations of the PRV Policy as new studies were published. Thus, while it is true, as the Minister submits, that knowledge of the existence of PRV is not new, this is not particularly significant. What is significant is the Di Cicco 2017 publication, which was new science, diagnosing sampled farmed Atlantic salmon from a fish farm in British Columbia as having HSMI. This is contrary to prior DFO science based on a challenge experiment that concluded that BC-PRV did not result in the development of disease in the species tested. The Di Cicco 2017 study was, in that respect, a novel finding. This finding supports that PRV may potentially have adverse effects on 'Namgis' Aboriginal rights if HSMI is transmissible to, and has different impacts on wild Pacific salmon than it does on farmed salmon, which issue is not adequately addressed in the science underlying the Delegate's decision to maintain the PRV Policy. Accordingly, I conclude that the PRV Policy Decision has the potential to adversely affect 'Namgis' Aboriginal rights.

[319] However, the Minister also submits that ‘Namgis’ concerns with adverse impacts from the potential transmission of infectious disease from salmon farms to wild salmon were the subject of extensive consultation between ‘Namgis and DFO from 2010 to 2015. DFO engaged in discussion on this topic as part of the consultations that occurred around DFO’s contemplated aquaculture licencing decisions. At that time, aquaculture licences included provisions for the transfer of fish from hatcheries to the marine environment. DFO’s assessment was that there was a low risk of adverse impacts and that the risk had been minimized by the numerous regulatory and licencing requirements placed on fish farm operators, ongoing studies, monitoring and regulatory inspections. Because of these measures, the Crown’s assessment was that further consultation and accommodation was not warranted.

[320] In the result, the Minister is of the view that there was no past breach of the duty to consult and, in any event, consultation and accommodation pertain only to current and prospective Crown action. Past decisions by the Crown do not alone create a procedural right to consultation in the present. Having conducted appropriate consultations when developing and implementing its aquaculture strategy, including implementation of the aquaculture licencing regime, there is no requirement for DFO to consult with each First Nation on all fish health policy decisions as these decisions are consistent with the overall aquaculture strategy and aquaculture licencing regime. Open-net aquaculture projects operate under the expectation that fish will be transferred to net pens. Nor does simply renewing an existing licence necessarily give rise to a duty to consult (*Rio Tinto*; *Fond du Lac Denesuline First Nation v Canada (AG)*, 2012 FCA 73 at para 10; *Louis v British Columbia (Minister of Energy, Mines, and Petroleum Resources)*, 2013 BCCA 412 at paras 76, 79–80; *West Moberly First Nations v British Columbia*

(Chief Inspector of Mines), 2011 BCCA 247 at para 119; *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at paras 72–78).

[321] It is clear from Thomson Affidavit #2 and the Johnson Affidavit that ‘Namgis and other First Nations were consulted with respect to the new federal aquaculture licencing regime effected in 2010. And I note that aquaculture licences issued at the time of the transition of regulation to the Federal Government were challenged unsuccessfully by other First Nations with respect to the duty to consult (see *Kwicksutaineuk As-Lwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517; *K’ómoks First Nation v Canada (Attorney General)*, 2012 FC 1160). I agree with the Minister that even if the duty to consult with respect to the new aquaculture licencing regime was not sufficient, and I make no finding in that regard, this alone would not trigger a fresh duty to consult with respect to the PRV Policy and related issuance of transfer licences.

[322] However, it is also apparent from the above summary that the Minister has continued to consult with ‘Namgis and other First Nations subsequent to the effecting of the new regulatory regime. For example, notice of the November 2012 aquaculture licence renewals was given, along with information concerning governments’ response to concerns raised about potential adverse impacts, including transmission of disease to wild salmon. DFO also advised ‘Namgis and other First Nations of the upcoming December 2013 renewals and described this as part of its ongoing consultation. In 2014, DFO advised ‘Namgis of proposed aquaculture licence amendments that sought to increase production at existing sites located within its asserted territory, and sought to engage with ‘Namgis including with respect to fish health concerns. In

2015, DFO advised ‘Namgis of two new applications for aquaculture licences within ‘Namgis’ asserted territory and advised that DFO was considering moving toward the issuance of multi-year licences. In 2016, discussions took place including concerning ‘Namgis’ opposition to the proposed amendment to the aquaculture licence for Maude Island. In 2017, ‘Namgis requested, and DFO facilitated, a meeting to discuss open-net fish farming, and DFO later provided ‘Namgis with reports concerning infectious disease in fish.

[323] What is also clear from DFO’s evidence is that it maintained ongoing consultation with ‘Namgis, and other First Nations, concerning not only aquaculture licences, but matters related to them, including fish health. Further, that DFO consistently expressed a willingness to engage with ‘Namgis on any aspect of aquaculture licencing and management that were of concern to ‘Namgis. Thomson Affidavit #2 also demonstrates and on a go forward basis DFO intends to discuss fish health management activities, including updates to the transfer authorization, with First Nations and other stakeholders.

[324] It is true, as the Minister submits, that the 2012 consultations concerning the development and implementation of the aquaculture regulatory regime and licencing did broadly address many aspects of aquaculture including fish health. It is also the case that the regime contains many measures by which farmed fish health is monitored and assessed, as described in detail in Thomson Affidavit #2. However, in my view, that cannot serve to mark the end of all potential future consultations concerning aquaculture and fish health in British Columbia as the duty to consult. Nor do DFO’s post-2012 communications and actions support that it holds that view. At almost every juncture DFO notified ‘Namgis of new licencing developments and sought to

engage with them. This is true of matters of general application such as implementing multi-year aquaculture licences for all BC aquaculture operators, as well as licencing matters specific to ‘Namgis. This ongoing approach to consultation reflects that circumstances change and that issues emerge and evolve with the passage of time.

[325] The Minister submits, given the prior consultations, that DFO was not required to consult with each First Nation on all fish health policy decisions, as these decisions were consistent with the overall aquaculture strategy and licencing regime (*Douglas* BCCA at paras 43–44) and that open-net aquaculture projects operate under the expectation that fish will be transferred to net pens. Given my finding that the Minister’s Interpretation of s 56 of the FGRs is unreasonable, it is not clear to me that the PRV Policy and related transfers were in fact consistent with DFO’s overall aquaculture strategy submits in reliance on (*R v Lefthand*, 2007 ABCA 206 at para 40.) However, I agree with the Minister that, in the normal course, it would be impractical for DFO to consult with every First Nation with respect to every fish health policy decision and every transfer licence issued to fish farms located within their asserted territories.

[326] That said, despite DFO’s practice of ongoing consultation, it does not appear that it advised ‘Namgis of the amendment to all existing aquaculture licences made on September 8, 2015 – in response to *Morton 2015* – whereby aquaculture licence holders were required to apply to the ITC for a separate licence authorization to transfer fish, that ITC would then make a recommendation in that regard, and that DFO’s Regional Manager, as the Minister’s Delegate, would then decide whether or not to issue a transfer licence. And, as noted above, DFO’s evidence is that it does not consult on transfer licences on the basis that consultation “takes place

around aquaculture licencing decisions", which are issued on the assumption that fish will be transferred as part of the routine operations.

[327] The failure to raise with 'Namgis the amendment to all aquaculture licences whereby the requirement for a separate licence authorization to transfer fish was implemented, was inconsistent with DFO's demonstrated and self-stated ongoing consultation practice concerning aquaculture licences. This deviation from DFO's usual practice was a lost opportunity for DFO to explain why aquaculture licence holders now were required to apply for a separate licence authorization and to respond to any concerns raised in connection with this, including, on a general level, related issues of fish health.

[328] Thus, while DFO was not compelled to consult on every fish health policy decision and transfer licence, on a more general level, just as DFO has done with other aquaculture licence amendments, it would not have been overly erroneous for DFO to address issues relating to fish health and transfers of fish in the context of the licence amendment and the ITC authorization process. This could have afforded First Nations the opportunity to raise any concerns in that regard, including the application of, and the basis for, the PRV Policy.

[329] Further, as acknowledged in the record before the Delegate and as demonstrated by the evidence before me, PRV and HSMI are rapidly evolving areas of science. As such, they were not specifically addressed in the original consultations concerning fish health.

[330] In my view, in September 2017, when ‘Namgis raised its concerns about continued transfers without testing for PRV, and in November 2017, when ‘Namgis sought consultation on that issue, arising from its view that the new science established that PRV causes HSMI and gives rise to a novel potential adverse impact on its rights, DFO, as part of its ongoing consultation process concerning aquaculture licencing and management, should have responded and engaged with that concern. In these circumstances, ‘Namgis’ request triggered a requirement to respond within DFO’s ongoing duty to consult. And, when DFO subsequently reconsidered the PRV Policy on June 28, 2018, without responding to ‘Namgis’ concerns even on a general level, it breached that obligation.

[331] That said, I want to make clear that I am not convinced, and do not find, that when interpreting s 56 and when initially formulating the PRV Policy, the Minister was required to consult with ‘Namgis or other First Nations, nor that the PRV Policy Decision was a strategic high level decision (*Fort Nelson First Nation v British Columbia (Environmental Assessment Office)*, 2016 BCCA 500 at paras 122, 124–125; *Rio Tinto* at para 44).

[332] I also recognize that the PRV Policy Decision represents a discrete question of science surrounding fish health. Such narrow issues would not, in the normal course, be likely to attract a duty to consult. Here, however, the contemplated Crown action, the continuation of the PRV Policy, has the potential to adversely affect ‘Namgis’ claimed Aboriginal rights. ‘Namgis raised its concerns with the continuation of the PRV Policy based on what it perceived to be novel science which had not been captured in prior general consultations concerning fish health and aquaculture licencing. Further, the Minister’s Interpretation, upon which the PRV Policy

Decision is founded, is unreasonable. In these particular factual circumstances, I am satisfied, regardless of DFO's current view that the risk posed to wild salmon by HSMI is low, that the third branch of the test has been met and that DFO's acknowledged ongoing duty to consult concerning aquaculture licencing and related aquaculture management was breached with respect to the PRV Policy Decision.

[333] I would add that when 'Namgis raised its concerns in September 2017, it may well have been sufficient for DFO to have provided 'Namgis with the scientific information that underlay the PRV Policy, and hence the transfer of fish without testing, to offer to discuss this with 'Namgis and to consider and respond to any information submitted by 'Namgis. This would have been consistent with the approach to ongoing consultation that DFO has taken since 2010. However, DFO did not do this, nor did it engage in any meaningful discussion with 'Namgis about DFO's subsequent reconsideration of the PRV Policy. Thus, an issue that could have been dealt with effectively by way of an existing, ongoing consultation process and communication has instead become the subject of two judicial reviews.

[334] Finally, I feel that I must also note that it is also apparent from the above evidence that 'Namgis is fundamentally opposed to all open-net-pen fish farming within its asserted territory. This is also apparent from its communications with Marine Harvest, attached as exhibits to the affidavit of Mr. Vincent Erenst, Managing Director of Marine Harvest, sworn on July 5, 2018 and filed in T-430-18. These illustrate that in response to offers by Marine Harvest to meet to discuss its operations, 'Namgis expressed its view that that it was not interested in meeting unless it was to discuss the removal of open-net fish farms from the Broughton Archipelago, and

that all wild salmon habitats should be cleared of such farms. ‘Namgis has also expressed the view that it has never been consulted concerning the Swanson Island facility. I note that, even if this were the case, it would be a past breach of the duty to consult, which does not in and if itself give rise to a duty to consult. Here, it is the current government conduct, the PRV Policy reconsideration, that gives rise to a novel potential adverse impact on ‘Namgis’ s 35 rights and, therefore, the duty to consult with respect to ‘Namgis’ concerns in that regard. That duty does not relate to the existence of the open-net fish farms generally. And, even if going forward, DFO was to meaningfully consult, on a general level, concerning the application of the PRV Policy as it relates to the authorization and issuance of transfer licences in accordance with that Policy, DFO may ultimately still maintain its view that the risk to ‘Namgis’ rights remains low and that accommodation beyond minimisation of that risk by way of regulatory controls is not warranted. There is no obligation on the Minister to reach agreement with ‘Namgis, and the obligation to consult in good faith is a two way street.

C. Issue 3: Was the decision to issue the Marine Harvest transfer licence reasonable (T-744-18)?

[335] In T-744-18, ‘Namgis challenges the specific decision by the Minister, made pursuant to s 56 of the FGRs, to issue on March 23, 2018, a Salmonid Introductions & Transfer Licence (application number S176) to Marine Harvest. That licence authorizes Marine Harvest, subject to the listed terms and conditions, to transfer up to 1,000,000 live Atlantic salmon smolts from its Ocean Falls hatchery (Aquaculture Facility Reference #1689) to its Swanson Island open-net fish farm (Aquaculture Facility Reference # 456). The licence is stated to be valid for the period

March 23, 2018–June 21, 2018 (“Swanson Island Transfer Licence”). The basis for ‘Namgis’ challenge is that the Minister’s decision to issue the Swanson Island Transfer Licence fails to comply with s 56(b) and (c) of the FGRs; the Minster breached the duty to consult; and, the Minister breached the duty of procedural fairness.

[336] As a preliminary point, I note that on April 12, 2018, the Minister transmitted a Supplemental CTR in T-430-18 (“T-430-18 Supplemental CTR”) certifying the record before the ITC and the Delegate in relation to the March 23, 2018 Swanson Island Transfer Licence decision. In this matter, the Minister indicates in its written submissions that the T-430-18 Supplemental CTR was not transmitted in T-744-18 because ‘Namgis had that record in its possession and did not make a Rule 317 request in T-744-18. In the result, the T-430-18 Supplemental CTR is also the CTR in T-744-18.

[337] Further, there are two outstanding motions in this matter. However, for the reasons that follow, I have concluded that this application can be dealt with summarily. It is, therefore, more efficient to first respond to the application and to then address the motions.

i) ***Did the Minister breach the duty to consult?***

[338] As I have addressed above in T-430-18, the duty to consult with respect to the PRV Policy Decision arises from DFO’s practice of ongoing consultations concerning aquaculture licences and management, ‘Namgis’ request for consultation concerning fish health arising from new science pertaining to PRV and HSMI, DFO’s failure to respond to that request, and its subsequent reconsideration of the PRV Policy. However, in my view, and as I have stated

above, the Minister was not required to consult with respect to every individual transfer licence. Accordingly, the duty to consult was not breached with respect to the Swanson Island Transfer Licence.

ii) ***Was the Swanson Island Transfer Licence issued in contravention of s 56 of the FGRs?***

[339] As 'Namgis' arguments concerning s 56 of the FGRs largely mirror those dealt with above in T-1710-16 and T-430-18, in which I have concluded that the Minister's Interpretation of s 56 is unreasonable, and as the Swanson Island Transfer licence has expired, I need not address them further here, other than the assertion that DFO merely transplanted the impugned language of aquaculture licence condition 3.1(b)(ii) addressed in Morton 2015, concerning the absence of signs of clinical disease, into a new fish health attestation form. In that regard, I note that the evidence of DFO is that the attestation form has, subsequent to the issuance of the impugned Swanson Island Transfer Licence, been changed. In particular, that the aspect of the form to which 'Namgis most specifically objects, being that a party applying for a transfer licence must certify that "the stock to be moved from the source facility shows no signs of clinical disease…", has been removed. In my view, given this change, there is nothing to be gained by the Court reviewing the reasonableness of the prior process.

[340] Did the Minister breach the duty of procedural fairness?

a) Standard of Review

[341] Issues of procedural fairness are reviewable on the correctness standard (*Mission Institute v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration v Khosa*, 2009 SCC 12 at para 43.

b) Analysis

[342] Here the alleged breach of procedural fairness arises in connection with 'Namgis' motion for an injunction in T-430-18 seeking to prevent the issuance of the Swanson Island Transfer Licence.

[343] By way of background, when 'Namgis originally filed its application for judicial review in T-430-18 on March 6, 2018, it challenged both the PRV Policy Decision and any decisions made by DFO or the Minister's delegate pursuant to the Policy, to issue transfer licences under s 56 of the FGRs with respect to the Swanson Island facility. Subsequently, 'Namgis sought to amend its Notice of Application, which the Case Management Judge permitted by Order dated May 4, 2018. 'Namgis filed an Amended Notice of Application in T-430-18 on May 7, 2018, removing the challenge to any transfer licence issued to Swanson Island facility. On April 20, 2018, it filed its Notice of Application in T-744-18, challenging the March 23, 2018 Swanson Island Transfer Licence decision. In essence, 'Namgis split its case.

[344] In support of its application in T-744-18, 'Namgis filed an affidavit of Won Drastil, legal assistant at Gowlings WLG (Canada) LLP, affirmed on April 20, 2018 ("Drastil Affidavit #2").

Included as exhibits to Drastil Affidavit #2 are five affidavits that ‘Namgis filed in support of its injunction motion brought in T-430-18:

> -Affidavit of Chief Don Svanvik affirmed on March 7, 2018, (defined above as the Svanvik Affidavit);
>
> -Affidavit of Dr. Fred Kibenge affirmed on March 6, 2018;
>
> -Reply Affidavit of Dr. Fred Kibenge affirmed on March 19, 2018 (made in response to an affidavit of Diane Morrison filed on behalf of Marine Harvest);
>
> -Affidavit of Dr. Richard Routledge affirmed on February 27, 2018; and
>
> -Affidavit of Dr. Martin Krkosek affirmed on March 7, 2018.

[345] Other than the Svanvik Affidavit, those affidavits are not filed in the application for judicial review in T-430-18, although, as noted above, other affidavits of these persons are filed in that matter.

[346] Mr. Drastil deposes that, due to a limited ability to transmit large files electronically, ‘Namgis instructed Gowlings, its counsel, to deliver, on its behalf, submissions and evidence to the ITC in connection with ‘Namgis’ concerns about the potential impacts on its constitutionally protected Aboriginal title and rights, arising from a transfer of Atlantic salmon smolts into the Swanson Island facility. Mr. Drastil does not say when these instructions were received.

[347] Mr. Drastil also deposes that on March 22, 2018, Mr. Sean Jones, a lawyer at Gowlings, using Gowlings software, transmitted a covering letter and the above described affidavits to the Minister, and to the ITC at its email contact address found on its website (FAMITC@dfo-mpo.ca). The covering letter from Chief Svanvik, attached as Exhibit B to Drastil Affidavit #2,

is addressed to the Minister and copied to ITC. It states that the Crown must consult with ‘Namgis before issuing a licence under s 56 of the FGRs with respect to the Swanson Island aquaculture facility and encloses the affidavits filed in the injunction motion for the consideration of the Minister. By letter of same date, attached as Exhibit C to Drastil Affidavit #2, Ms. Lisa Nevens, Department of Justice counsel for DFO in these judicial reviews, wrote to Mr. Jones noting that counsel for ‘Namgis had transmitted the correspondence directly to the Minister and asking that such communications, which appeared to deal squarely with the subject matter of ‘Namgis lawsuit against DFO, be directed to DFO litigation counsel.

[348] Drastil Affidavit #2 also references and attaches, as Exhibit D, a March 30, 2018 letter from Mr. Paul Seaman, of Gowlings, responding to Ms. Nevens. The letter states that the March 22, 2018 communication was not an instance of legal counsel communicating with the ITC or the DFO. Rather, Gowlings was simply forwarding the documents, on ‘Namgis’ behalf, to the ITC in its capacity as a regulatory body and in connection with the then pending Swanson Island transfer licence decision. As to Ms. Nevens’ requests that communication to counsel for DFO be by way of email attachments, Mr. Seaman states that ‘Namgis does not have direct access to software such as that used by Gowlings to transmit the information and was simply utilizing Gowlings specialized software to ensure that the ITC had its submissions and evidence prior to the issuance of a transfer licence relating to Swanson Island.

[349] Drastil Affidavit #2 also states that by email of April 11, 2018, counsel for DFO attached a letter from Mr. Postman, delivering the CTR in connection with the Minister’s March 23, 2018 decision to issue a transfer licence in connection with Swanson Island, attached as Exhibit E of

that affidavit. Mr. Drastil states that he has reviewed the CTR but has been unable to locate within it the materials transmitted by Mr. Jones on behalf of 'Namgis on March 22, 2018. Further, he is advised by Mr. Jones that at a case management conference held on April 12, 2018, Mr. Postman took the position that these materials did not form a part of the CTR because 'Namgis was not a party to the decision to issue a transfer licence for the Swanson Island facility.

[350] I note here that, in fact, Exhibit E does not attach a letter from Mr. Postman. It attaches a letter from Ms. Lauren Lavine, Regional Manager, Aquaculture Programs, DFO Pacific Region, attaching the T-430-18 Supplemental CTR and certifying that it contained copies of the materials that were before the ITC and Minister's delegate relating to the decision to issue the Swanson Island Transfer Licence.

[351] In its written submissions made in support of its application for judicial review in T-744-18, 'Namgis asserts that it provided a submission "to the Minister (directly and on its own behalf; not through counsel). The Minister's legal counsel actively acted to intercept and prevent 'Namgis' submission from reaching the Minister on the basis that 'it should be directed to DOJ Litigation counsel." 'Namgis asserts that this "tactic" does not admit of upholding the Crown's honour and that reconciliation cannot be achieved when decision-makers are blinded to Indigenous concerns. As the Minister could not receive and consider the views of 'Namgis, his apprehension of the duty to consult was erroneous and even minimal procedural fairness requirements were not met, thus running afoul of the correctness standard that is applicable to both the duty to consult and procedural fairness.

[352] In my view, this submission cannot succeed. ‘Namgis caused this information to be prepared and submitted it in support of its injunction application brought in T-430-18. That motion was heard on March 20–21, 2018. The decision was reserved and then issued on March 23, 2018. Mr. Drastil does not depose as to the date ‘Namgis instructed its counsel to send the information to the Minister and ITC. However, its counsel complied on March 22, 2018 and there is no suggestion or evidence that its counsel did not send the information as soon as he was requested to do so.

[353] Both ‘Namgis and its counsel knew that the injunction decision was imminent. Both also knew that the application for the transfer licence had been submitted on February 27, 2018 and that a decision on the transfer was anticipated to be issued within 10 days of the application being made and, if not prohibited by the injunction decision, that it would be issued immediately thereafter. Ultimately, the injunction was denied by Justice Manson, as the balance of convenience favoured Marine Harvest. Justice Manson referenced the affidavit evidence before him of Mr. Erenst, Managing Director of Marine Harvest, as to the potential availability, at that late stage, of another site to receive the smolts then awaiting transfer to Swanson Island facility and the damages that would be associated with that possibility. Further, as to the lack of an option to prepare another site, that this would take several weeks and that the smolts were then ready and must immediately be transferred to avoid the described adverse effects. Justice Manson stated that the urgent need for a decision was largely due to ‘Namgis’ unexplained delay in bringing the injunction motion. In that regard, he noted that the affidavit of Chief Svanvik clearly stated that ‘Namgis had met with representatives of Marine Harvest on December 21, 2017, and were told that Marine Harvest planned to restock the Swanson Island facility in March

or April of 2018. However, the motion for interlocutory relief was not filed until March 9, 2018, mere days before the transfer was set to begin. In that regard, Justice Manson stated as follows:

> [109] While I accept that there has been a distinct lack of consultation on the part of the Minister, which harms Aboriginal rights and the public interest in reconciliation, I note that Aboriginal groups should not frustrate good faith attempts at consultation (*Haida Nation v British Columbia (Minister of Forests*), 2004 SCC 73 at para 42). Marine Harvest has maintained dialogue with the Applicant throughout, except for providing certain information requested by the Applicant such as its Transfer Licence application and PRV testing methods. It was not given any warning of an impending motion for interlocutory relief. Had the motion been filed shortly after the December 21 meeting, or Marine Harvest otherwise been informed that the Applicant would seek an injunction, other options may have been available with respect to finding a home for the impugned smolts.
>
> [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.

[354] Similarly, I find that conveying the injunction evidence to the Minister and ITC on the eve of the anticipated injunction decision does not demonstrate 'Namgis' adherence to its side of the two-way good-faith consultation street. 'Namgis could have requested DFO's counsel to place the materials before the ITC as soon as they became available to it. Sending such large (approximately 1200 pages) and substantive submission on the eve of the ITC decision ensured that the ITC could not possibly have time to consider it as the Swanson Island transfer decision had to be made immediately, as demonstrated by Justice Manson's decision. The failure of the ITC or the Minister to consider these materials in these circumstances does not amount to either a breach of the duty to consult or a breach of any duty of procedural fairness.

iii) ***Minister's Motion to Strike the Notice of Application***

[355] On May 24, 2018, the Minister filed a preliminary motion seeking to strike out the Notice of Application filed by 'Namgis in T-744-18. By Order dated June 8, 2018, Case Management Judge dismissed the motion. Before me, the Minister, in reliance on Rules 4 and 221, brought a fresh motion seeking to strike out the Notice of Application filed by 'Namgis in T-744-18 and dismissing the application for judicial review.

[356] The Minister notes that 'Namgis' Notice of Application was filed on April 20, 2018. It asserts that the Swanson Island Transfer Licence decision was not made in accordance with the legal requirements of s 56 of the FGRs. In particular, that the requirement within the attestation form that Marine Harvest certify that the fish to be transferred show no signs of clinical disease is a lower legal standard than that which is required by s 56(b) of the FGRs. The Notice of Application also asserts that there was a breach of the duty to consult and a breach of the requirements of procedural fairness.

[357] As to the attestation form, Thomson Affidavit #2 establishes that on May 4, 2018, DFO implemented a changed transfer process. In the result, the transfer process challenged by 'Namgis no longer exists. The current process includes a new attestation form that replaces the previous form used in the impugned Swanson Island Transfer Licence decision. The new attestation form must now be completed by a licenced veterinarian, requires different information, establishes a new set of responsibilities for the veterinarian, and no longer includes the requirement, challenged by 'Namgis, that a party applying for a transfer licence must certify

that “the stock to be moved from the source facility shows no signs of clinical disease…”. Moreover, the Swanson Island Transfer Licence expired on June 21, 2018.

[358] The Minister asserts that ‘Namgis’ application should be struck out as it is so clearly improper as to be bereft of any possibility of success. Here the matters raised by ‘Namgis are moot (the attestation form and the Swanson Island Transfer Licence) or have been captured in T-430-18 (the duty to consult and the breach of procedural fairness).

[359] I have also reviewed ‘Namgis’ responding motion materials, which assert, amongst other things, that the new process associated with the transfer licences has been concocted and demonstrates an obvious *mea culpa*, and that the record before the Delegate when the Swanson Island Transfer Licence was issued was the prior attestation form and process, thus the revised process post-dates the decision and is not relevant or admissible. Further, that the Minster is attempting to paper over the error of law arising from reliance on the attestation form that required Marine Harvest to confirm that the fish showed no clinical signs of disease, which was contrary to Justice Rennie’s findings in *Morton 2015*. Moreover, the smolts transferred pursuant to the Swanson Island Transfer Licence will remain in their pens for between 19 and 21 months. Thus, the factual substratum of the dispute remains.

[360] I have concluded that the Minister’s motion to strike is denied as, in addition to the reasons above, I am not persuaded that, overall, the application meets the test of being so clearly improper as to be bereft of any possibility of success (*JP Morgan* at para 47). That said, as my reasons in determining T-744-18 largely reflect the Minister’s submissions and because, in my

view, there was no valid reason for ‘Namgis to bifurcate its case and bring a second application in T-744-18 when all of these issues could have been addressed and were originally addressed in T-430-18, the Minister’s remedy lies in costs.

iv) ***Marine Harvest’s Motion to strike Drastil Affidavit #2***

[361] Marine Harvest brought a preliminary motion in T-744-18 seeking an order striking out Drastil Affidavit #2 excepting Exhibit “E” (being the T-430-18 Supplemental CTR). By her Order of June 8, 2018, Case Management Judge dismissed the motion without prejudice to the ability of Marine Harvest to have the impugned evidence struck at the hearing of the application for judicial review.

[362] Here Marine Harvest asserts that ‘Namgis delivered Drastil Affidavit #2, with the attached affidavits described above, to the ITC on the day before the Swanson Island Transfer Licence decision was made. This improperly attacks the merits of the decision under review. The evidence shows that ‘Namgis is attempting to have this Court reassess the facts before the decision-maker to argue that the decision is wrong. As such, the evidence is not admissible on judicial review. It also constitutes an abuse of process as it is improper for an applicant in an ongoing application for judicial review to send materials directly to a decision-maker knowing that a decision is imminent and must be made urgently, and then tender the material as evidence in order to attack the decision and/or to shape the record. ‘Namgis’ conduct is particularly abusive as the decision under review was the subject of a refused injunction motion, and ‘Namgis now seeks to circumvent the effect of the adverse decision. To admit Drastil Affidavit #2 would be to condone ‘Namgis’ conduct.

[363] In response, ‘Namgis makes various submissions, including that the impugned evidence does not go to the merits of the decision under review but properly goes to ‘Namgis’ assertion of the existence of a duty to consult and the scope of that duty. As such, it fits within the recognized procedural fairness and duty to consult exceptions to the rule against the admissibility of materials that were not on the record before the decision-maker. Further, that in its abuse of process argument, Marine Harvest does not explain why ‘Namgis ought to have been precluded from even attempting to make submissions or how it was seeking to circumvent the record given that Justice Manson’s decision had not been made when the materials were submitted. Nor is there a prescribed process for making submissions, and the allegation of mischief cannot stand in the absence of supporting case law or evidence.

[364] In my view, given my reasons above, the body of Drastil Affidavit #2 itself, the covering email letter that forms a part of Exhibits B, and Exhibits C and D are admissible solely for the purpose of establishing the facts surrounding the submission of the materials to the Minister and to the ITC, and to permit the Court to assess the allegation of a breach of procedural fairness in that regard. The remainder of Exhibit B, which comprises of the five injunction affidavits, is inadmissible as these documents were not before the Delegate when she issued the Swanson Island Transfer Licence and are not otherwise admissible. Accordingly, Marine Harvest’s motion is granted in part.

D. Issue 4: Remedies

i) *T-1710-18*

[365] In T-1710-18, Ms. Morton seeks, by way of remedy, an order declaring the PRV Policy to be unlawful; an order that the Minister shall require testing for PRV as part of applications to licence the transfer of fish; an order restricting the transfer of PRV positive salmon; an order for costs; and, an order that Ms. Morton shall not be required to pay costs to the Defendants in the event that the application is dismissed.

[366] As I have found that the PRV Policy Decision is not reasonable, it is appropriate to quash the June 28, 2018 PRV Policy Decision of the Delegate, which continues the PRV Policy, and to require the Minister or his delegate to take these reasons into consideration when the Policy is reconsidered. However, I do not agree that this Court should otherwise grant the requested declaratory relief. Ms. Morton submits that this relief is necessary because, without it, there is a risk that the Minister will again adopt a new, slightly modified, yet still unlawful PRV Policy, necessitating further litigation.

[367] The basis on which I have found the PRV Policy Decision to be unreasonable is that the Minister's Interpretation of s 56 of the FGRs is unreasonable, the PRV Policy Decision derogates from the precautionary principal, and fails to consider the health of wild Pacific salmon. It is not the role of this Court to make scientific findings, which, in essence, is what would be required to ground the additional declaratory relief sought by Ms. Morton.

[368] And, although the PRV Policy Decision will be quashed, because there are many aquaculture facilities now in operation that will likely require and apply for transfer licences while the PRV Policy is being reconsidered, it is appropriate to suspend my judgment for a four (4) month period from the date of its issue to permit DFO time to complete its outstanding risk assessment concerning PRV and HSMI, as described in Thomson Affidavit #2, which presumably will include a comprehensive review of the current science concerning PRV and HSMI.

ii) ***T-430-18***

[369] ‘Namgis seeks the following declarations:

> (a) the PRV Policy is unlawful and/or unreasonable because it fails to satisfy the legal requirements associated with s 56 of the FGRs; fails to apply the precautionary principle; fails to consider the role the decision to adopt the PRV Policy could play for ‘Namgis in the ongoing process of reconciliation; was made in bad faith and/or for an improper purpose; and, is based on findings of fact made in a perverse and capricious manner, or without regard to the material before DFO;
>
> (b) Canada was required, but failed, to consult and accommodate ‘Namgis prior to adopting or implementing the PRV Policy;
>
> (c) Canada’s duty to consult and accommodate ‘Namgis in relation to the PRV Policy is at the “high” or “deep” end of the *Haida Spectrum*;
>
> (d) Canada is, accordingly, required to consult with ‘Namgis with a view to obtaining its consent in relation to the PRV Policy and, if that is not possible, to directly engage in “deep consultation” with ‘Namgis and to seek to significantly accommodate ‘Namgis Aboriginal title and rights, but failed to meet its duty in that regard;
>
> (e) in the alternative to (d), if Canada’s duty to consult and accommodate ‘Namgis about the PRV Policy is at the lower

end of the *Haida* spectrum, Canada nevertheless failed to discharge its duty;

(f) in adopting the PRV Policy Canada failed to consider the role the decision could play for ‘Namgis in its ongoing process of reconciliation between ‘Namgis and Canada;

(g) farmed Atlantic salmon must be tested for PRV prior to the issuance of a transfer licence by the Minister; and

(h) farmed salmon that test positive for PRV must not be authorized for transfer.

[370] ‘Namgis also seeks an order quashing the PRV Policy and,

(a) requiring Canada to consult with ‘Namgis in relation to the PRV Policy; and

(b) directing that this Court shall retain jurisdiction to resolve issues that may arise in the course of Canada’s consultation with ‘Namgis in connection with the PRV Policy.

[371] ‘Namgis also seeks costs.

[372] For the same reasons as in T-1710-16, I have concluded that the PRV Policy Decision is unreasonable and must be quashed. The further declarations sought by ‘Namgis related to PRV, such as testing, are unnecessary and, in these circumstances, are not appropriate to the Court’s role.

[373] I have also found that the Minister breached the duty to consult. Again, however, I do not think it necessary, or advisable, at this stage for this Court to go further and make the additional declarations ‘Namgis seeks in this regard. DFO’s evidence is that, while implementing the aquaculture licence regime, it assessed ‘Namgis’ claim, and potential adverse

impacts. DFO's preliminary assessment regarding the level of consultation required concerning the then-proposed aquaculture licencing regime and related decisions was in the middle range of the *Haida* spectrum. DFO in its ongoing consultations, has also consulted within that range. Further, DFO's evidence is that it intends to revisit how it consults with First Nations with respect to fish health issues. Moreover, because I have found the PRV Policy Decision to be unreasonable, the science underlying it, and therefore the risk of adverse impact on 'Namgis' claimed rights, will be indirectly reassessed in the context of the reconsideration of the PRV Policy more generally.

iii) *T-744-18*

[374] In T-744-18, 'Namgis seeks the following declarations:

> (a) the Swanson Island Transfer Licence is unlawful because the legal requirements of s 56 of the FGRs were not complied with, as follows:
>
> (i) the Minister's statutory responsibility was not carried out in accordance with the dictates of s 56 because he improperly relied upon an "attestation form" submitted by Marine Harvest which only required that Marine Harvest itself certify that the fish "show no sign of clinical disease";
>
> (ii) the requirement within in the "attestation form" that the fish to be transferred "show no sign of clinical disease" is a lower legal standard than that which is required by s 56(b); and
>
> (iii) in order to be able to rely on any attestation from Marine Harvest relating to the requirements of s 56(b) being met, the Minister's regulatory responsibility minimally required him to:
>
> (A) provide Marine Harvest with objective standards or criteria directed to determining whether the fish to be transferred had "any diseases or disease agents

which may be harmful to the protection and conservation of fish"; and

(B) verify such criteria had been properly applied by Marine Harvest;

(b) Canada was required, but failed, to consult and accommodate 'Namgis prior to issuing the Transfer Licence;

(c) Canada breached the requirements of procedural fairness and/or the honour of the Crown preventing 'Namgis from making submissions and providing evidence to the Minister respecting the Transfer Licence;

(d) Canada's duty to consult and accommodate 'Namgis in relation to the Transfer Licence lay at the "high" or "deep" end of the *Haida* spectrum;

(e) Canada was, accordingly, required to consult with 'Namgis with a view to obtaining its consent in relation to the Transfer Licence and, if that was not possible, to directly engage in "deep consultation" with 'Namgis and to seek to significantly accommodate 'Namgis Aboriginal title and rights, but failed to meet its duty in this regard;

(f) In the alternative to (e), if Canada's duty to consult and accommodate 'Namgis about the potential issuance of the Transfer Licence was at the lower end of the *Haida* spectrum, Canada nevertheless failed to discharge that duty; and

(g) The Minister was required, but failed, to consider the role the decision could play for 'Namgis in the ongoing process of reconciliation between 'Namgis and Canada.

[375] 'Namgis also seeks an order:

(a) quashing the Swanson Island Transfer Licence;

(b) requiring Canada to consult 'Namgis in relation to the Swanson Island Transfer Licence and take such remedial steps as are necessary to remove any fish already transferred by Marine Harvest pursuant to the Transfer Licence; and

(c) directing that this Court shall retain jurisdiction to resolve issues that may arise in the course of Canada's consultation with 'Namgis in connection with the Transfer Licence.

[376] ‘Namgis also seeks its costs.

[377] I have found above that it is not necessary to address ‘Namgis’ submissions on the attestation form given that I have found the PRV Policy Decision to be unreasonable and that the attestation form has subsequently been revised by DFO. Accordingly, the declaratory relief that ‘Namgis seeks above with respect to the attestation form is neither necessary nor appropriate. That said, when reconsidering the PRV Policy Decision, the Minister or his Delegate must consider the findings in *Morton 2015* and the current science pertaining to the diagnosis of HSMI, which must also be reflected in any revised attestation form.

[378] I have also found above that there was no duty to consult with respect to individual transfer licence decisions, such as the Swanson Island Transfer Licence decision. Further, that there was no breach of the duty of procedural fairness with respect to the Swanson Island Transfer Licence decision.

[379] As to ‘Namgis’ request for an order that the Swanson Island Transfer Licence be quashed, because that transfer licence expired on June 21, 2018, subsequent to the completion of the transfer of the smolts to Swanson Island facility that it authorized, the Court will not quash a licence that is no longer of any force or effect. Particularly as this Court has previously denied ‘Namgis’ request for injunctive relief with regard that transfer licence.

[380] However, ‘Namgis also requests that the Court order such remedial steps as are necessary to remove the fish already transferred pursuant to that licence. In its written submissions,

'Namgis asserts that orders in the nature of *mandamus* will often issue in of aid of *certiorari* in appropriate circumstances, to allow the Court to fashion an appropriate remedy, even in instances when *mandamus* is not specifically sought (*Brown* at 1:3300). 'Namgis sets out four reasons why it is of the view that *mandamus* is appropriate in these circumstances.

[381] The Minister submits that he is not without recourse in circumstances when a fish farm presents a serious risk to wild salmon populations and that this Court has no jurisdiction to grant the *mandamus* order as framed by 'Namgis. 'Namgis has not pointed to a basis to properly justify *mandamus* in this case or a positive duty on the Minister to take remedial steps to cause fish to be removed from the Swanson Island facility. The underlying legislation is permissive, not mandatory, and the Court cannot by law dictate the result of the Minister's discretion (*Apotex Inc. v Canada (Attorney General*), [1994] 1 FC 742 at para 45 (CA) ("*Apotex*"); *Rocky Mountain Ecosystem Coalition v Canada (National Energy Board)*, (1999) CanLII 8615 (FC) at para 16 ("*Rocky Mountain*")).

[382] Marine Harvest submits that the smolts were lawfully transferred by way of the Swanson Island Transfer Licence, which has now expired, and *mandamus* does not lie to undo that which has already been done, even if in contravention of statute (*Vardy v Scott et al.*, [1977] 1 SCR 293 at p 301). Further, the writ of *mandamus* lies to compel the performance of a public duty, which a public authority refused or neglected to perform although duly called upon to do so (*Magalong v Canada (Citizenship and Immigration)*, 2014 FC 966 at para 21) ("*Magalong*"). Here the Minister's Delegate had the discretion as to whether or not to issue, or to cancel the issuance of, a licence. The Court cannot dictate the result of the Minister's discretion. In the circumstances

of this matter, the *Apotex* criteria cannot be met for the reasons Marine Harvest sets out, and it submits that the relief should not be granted.

[383] On this point, I note that the eight criteria that must be met for an order to be issued granting *mandamus* are set out in *Apotex* (at p 18) and can be stated as follows:

1. There must be a public legal duty to act;

2. The duty must be owed to the applicant;

3. There is a clear right to performance of that duty, in particular:

    a. the applicant has satisfied all conditions precedent giving rise to the duty;

    b. there was a prior demand for performance of the duty; a reasonable time to comply with the demand unless refused outright; and a subsequent refusal which can be either expressed or implied;

4. Where the duty sought to be enforced is discretionary, the following rules apply:

    a. in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

    b. *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

    c. in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant" considerations;

    d. *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

    e. *mandamus* is only available when the decision-maker's discretion is "spent", i.e., the applicant has a vested right to the performance of the duty;

5. No other adequate remedy is available to the applicant;

6. The order sought will be of some practical value or effect;

7. The Court in the exercise of its discretion finds no equitable bar to the relief sought; and

8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

[384] *Mandamus* is a prerogative remedy, which may be granted when a person who is delegated with a public duty is in breach of that duty (*Rocky Mountain* at paras 14, 16). Put otherwise, *mandamus* is a discretionary equitable remedy; it lies to compel the performance of a public legal duty which a public authority refuses or neglects to perform although called upon to do so (*Magalong* at para 21). Further it "is an extraordinary, discretionary remedy and it is trite law that while it will be issued to compel the performance of a legal duty, it cannot dictate the result to be reached" (*Farhadi v Canada (Citizenship and Immigration)*, 2014 FC 926 at paras 28–29; *Chief Electoral Officer of Canada v Callaghan*, 2011 FCA 74 at para 126). The criteria for the test for *mandamus* are cumulative and must be strictly met.

[385] 'Namgis asserts that the legal duty in this case arises from s 56 of the FGRs. While I agree that s 56 limits the Minister's discretion to issue transfer licences, I am not persuaded that it creates a duty to remove transferred fish even if the transfer licence was improperly issued. 'Namgis also asserts that the Minister has a legal public duty to consult, again, however, there is no specific legal duty to remove transferred fish as a result of that duty.

[386] Moreover, removal of the transferred fish is not the only available remedy as the Minister can impose further steps, such as testing the transferred salmon for PRV or the destruction of

those fish. Additionally, upon his reconsideration of his interpretation of s 56 and the PRV Policy Decision, taking into account these reasons, it is possible that the Minister will still conclude that it is appropriate to maintain the PRV Policy.

[387] And, considering Justice Manson's refusal to grant 'Namgis' injunction motion, nor am I persuaded that the balance of convenience favours 'Namgis' request for *mandamus* in this application.

[388] Viewed in whole, the test for *mandamus* has not been met.

E. Issue 5: Costs

[389] At the hearing of these applications, I advised the parties that, to the extent that they deemed it necessary, they could make brief written submissions, not to exceed five pages in length, concerning costs. The parties duly made written submissions and provided books of authorities in support of same. I have reviewed and considered these submissions, however, it is not necessary to address them in depth in these reasons.

i) *T-1710-16*

[390] The parties agree that Ms. Morton is a public interest litigant, as do I. Attached as an Appendix to Ms. Morton's submissions on costs is a cost agreement between Ms. Morton, the Minister, Marine Harvest and Cermaq. Therein it was agreed that if Ms. Morton was successful in her application, she would be entitled to costs of $22,000.00, divided between each of the

three Respondents ($7,333.00 each). The Respondents' respective contributions to this figure being offset by any outstanding costs arising from interlocutory motions awarded to the Respondents in any event. This agreed amount is inclusive of fees, disbursements and taxes.

[391] In his written submissions, the Minister indicates that on November 16, 2017, the Minister reached an agreement on costs with Ms. Morton regarding the November 8, 2017 Order of Case Management Judge, determining various motions, including the Minister's motion for an order striking out portions of Ms. Morton's affidavit and her motion seeking leave to file supplementary affidavits. The Minister states that Ms. Morton agreed to pay the Minister $500.00 in costs in relation to the Minister's motion to strike her affidavit and $1000.00 in relation to her motion to file supplemental affidavits, both sets of costs being payable in any event of the cause and at the conclusion of this proceeding and any appeals thereof.

[392] Marine Harvest identifies no outstanding costs payable to it by Ms. Morton arising from interlocutory motions.

[393] Cermaq has attempted to file an affidavit of Ms. Jemma Louise Redmond, legal assistant, Fasken Martineau DuMoulin LLP, sworn on September 28, 2018, with exhibits "A" to "E" being correspondence concerning proposed changes by DFO to the fish transfer system including amendments to s 56 of the FGRs. In that correspondence, DFO suggests that this may render the application for judicial review moot and requests that Ms. Morton consider putting her application in abeyance pending the pre-publication of such amendments.

[394] This affidavit is not admissible. My direction permitted written representations only. Moreover, DFO did not raise or argue this issue and, in any event, the issue is moot as I have granted the application and Cermaq has agreed to contribute to the proposed lump sum cost figure of $22,000.00. Cermaq also seeks a further order of costs of $1500.00 with respect to Ms. Morton's Rule 312 application seeking to file the Valenzuela Affidavit. However, as I found that motion to be successful in part, I decline to award the requested further costs in favour of Cermaq in connection the Morton Rule 312 motion or to offset this from the agreed costs.

[395] In conclusion, Ms. Morton is granted lump sum costs in the amount of $22,000.00 as agreed by the parties, payable and offset as follows:

(a) DFO shall pay to Ms. Morton the sum of $7,333.00, offset by $1,500.00 for a total payment of $5,833.00 inclusive of all fees, disbursements and taxes;

(b) Marine Harvest shall pay to Ms. Morton the sum of $7,333.00, inclusive of all fees, disbursements and taxes;

(c) Cermaq shall pay to Ms. Morton the sum of $7,333.00, inclusive of all fees, disbursements and taxes.

ii) ***T-430-18 and T-744-18***

[396] 'Namgis submits that it should be awarded costs in any event of the cause in T-430-18 and T-744-18 as against the Minister. Further, should the Court make a finding of bad faith or that the Minister did not follow *Morton 2015*, or both, that it 'Namgis should be awarded solicitor-and-client costs. Even if the Court does not make such findings, 'Namgis submits that it should be awarded 50% of its actual costs plus disbursements to prosecute both applications.

‘Namgis claims that its actual costs for both applications are approximately $1,142,685.95, plus disbursements of approximately $203,813.68. ‘Namgis also includes a bill of costs on the basis of both Column III and V of Tariff B. Its Column III calculation for fees being $36,423.00 and its Column V calculation being $69,426.00, plus disbursements of $139,632.62. The total amount claimed by ‘Namgis being $176,055.62 under Column III, or $209,058.62 under Column V.

[397] In his submissions, the Minister seeks party-to-party costs in accordance with Column V of Tariff B, or, alternatively, any award that the Court may deem appropriate. The basis for the proposed departure from the ordinary rule that costs are to be assessed in accordance with Column III of Tariff B being that ‘Namgis advanced speculative allegations of bad faith, leading to the unnecessary expense of having extensive expert witness evidence in T-430-18 and T-744-18. Further, ‘Namgis’ allegation of breach of procedural fairness stemmed from a simple request by counsel for the Minister to counsel for ‘Namgis to communicate with her, rather than directly with her client, while the matters were in litigation. The Minister submits that allegations of unlawfulness are improper and, in these circumstances deterrence, by way of cost consequences, is appropriate.

[398] The Minister provides a bill of costs in T-430-18 claiming fees under Column III in the amount of $27,600.00, or under Column V in the amount of $49,200.00, plus disbursements of $19,650.18. The total costs claimed being $47,250.18 under Column III, or $68,850.18 under Column V. The Minister also provides a bill of costs in T-744-18 seeking fees under Column III in the amount of $9,750.00, or under Column V in the amount of $17,400.00, plus disbursements

of $6,668.76. The total amount of costs claimed in that application being $16,418.76 or $24,068.76.

[399] Cermaq also submits that ‘Namgis brought unsubstantiated claims of bad faith and improper purpose against the Minister and attempted to rely on inadmissible extrinsic evidence, including three expert affidavits that did not include evidence of bad faith. This added substantial time to the preparation required for the hearing and to the hearing itself and unreasonably complicated the proceedings. Cermaq submits that the expenses associated with the expert evidence were not justified. Cermaq submits that these circumstances support increased costs award against ‘Namgis, at the upper end of Column V of Tariff B, to be assessed.

[400] Marine Harvest seeks lump sum ordinary costs in accordance with Column III of Tariff B in T-430-18 in the amount of $70,041.32 and provides a bill of costs in that regard being fees of $25,351.20, plus disbursements of $44,690.12. It similarly seeks costs in T-744-18 in the amount of $12,432.00 for fees, disbursements of $819.00, for a total of $13,251.00.

[401] I have found that ‘Namgis’ claim that the PRV Policy Decision is unreasonable is successful on the grounds I have set out in these reasons. However, although I have considered ‘Namgis’ submissions, I agree with the Minister that this is not a circumstance where solicitor-client or increased costs are warranted. The burden is on the party seeking increased costs to demonstrate why the particular circumstances warrant an increased award (*Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 13) and in my view, ‘Namgis has failed to do so.

[402] I also agree with the Minister that, in essence, 'Namgis made unfounded allegations of unethical behaviour on the part of counsel for the Minister to ground a claim of breach of procedural fairness, which claim I have found to lack merit. I have also found that the 'Namgis Expert Affidavits, which it submits demonstrate the Minister's bad faith, to be inadmissible and, even if they were admissible, that they do not establish bad faith. I agree with the Minister and Cermaq that those bad faith allegations added significant procedural steps and costs to the applications. However, while this approach by 'Namgis may have been ill advised, it was open to it. That said, it is not apparent to me why 'Namgis required three expert affidavits which are based on the same instructions and largely cover the same ground. Finally, I would note that, as I have observed above, the bifurcation of 'Namgis' case between T-430-18 and T-744-18 was unnecessary.

[403] Rule 400(1) states that this Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they shall be paid. Rule 400(3) sets out factors the Court may consider in exercising its discretion. Pursuant to Rule 400(4), the Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

[404] Having considered the parties' written submissions, 'Namgis' mixed success on the grounds it asserted, the bills of costs submitted by each of the parties, as well as the Rule 400(3) factors that I consider to be applicable to this matter, I am inclined to address costs on a lump sum basis. However, I am concerned that 'Namgis' bill of costs has not been broken down into the separate applications (T-430-18 and T-744-18) and that the costs for its expert witnesses

($71,836.43) and certain other costs (such as $53,141.00 for photocopying) are not sufficiently detailed and may not be reasonable. It is also of concern that ‘Namgis has claimed costs significantly higher those of the other parties.

[405] Accordingly, I have concluded that ‘Namgis shall have its costs assessed pursuant to Rule 400(3) and, in that regard, direct as follows:

(a) All costs in T-430-18 shall be assessed in accordance with Tariff B, Column III;

(b) The assessed costs in T-430-18 shall be payable by the Minister to ‘Namgis;

(c) No costs shall be awarded with respect to T-744-18. For greater certainty, ‘Namgis shall separate its costs in T-430-18 and T-744-18. Only those costs incurred with respect to T-430-18 shall be assessed and awarded. ‘Namgis is not awarded costs in T-744-18.

JUDGMENT

THIS COURT'S JUDGMENT is that

T-1710-16

1. The application for judicial review is granted;

2. The June 28, 2018 decision of the Minister's Delegate continuing the PRV Policy is quashed. The Minister or his Delegate shall reconsider the continuation of the PRV Policy taking these reasons into consideration;

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

4. Ms. Morton shall have her costs in the amount of $22,000.00, as agreed by the parties in the event of her success, payable as follows:

   (a) DFO shall pay to Ms. Morton the sum of $7,333.00, offset by $1,500.00 for a total payment of $5,833.00 inclusive of all fees, disbursements and taxes;

   (b) Marine Harvest shall pay to Ms. Morton the sum of $7,333.00, inclusive of all fees, disbursements and taxes;

   (c) Cermaq shall pay to Ms. Morton the sum of $7,333.00, inclusive of all fees, disbursements and taxes.

5. A copy of these reasons will be placed in the files of T-430-18 and T-744-18.

T-430-18

1. The application for judicial review is granted;

2. The June 28, 2018 decision of the Minister's Delegate continuing the PRV Policy is quashed. The Minister or his Delegate shall reconsider the continuation of the PRV Policy taking these reasons into consideration;

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

4. The duty to consult with ‘Namgis concerning the PRV Policy Decision was breached. The duty arises from the Minister’s refusal, contrary to his ongoing consultation practice with respect to aquaculture licencing and management, to respond to ‘Namgis’ request for consultation concerning the the PRV Policy and was breached when the Minister failed to consult with ‘Namgis prior to making the June 28, 2018 PRV Policy Decision;

5. ‘Namgis shall have its costs assessed pursuant to Rule 400(5) subject to this Court’s direction that:

   (a) All costs shall be assessed in accordance with Tariff B, Column III;

   (b) The assessed costs shall be payable by the Minister to ‘Namgis.

   (c) All costs pertaining to T-744-18 shall be excluded.

6. A copy of these reasons shall be placed in the files of T-1710-16 and T-744-18.

T-744-18

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. A copy of these reasons shall be placed in the files of T-1710-16 and T-430-18.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1710-16 T-430-18 T-744-18
STYLE OF CAUSE:	ALEXANDER MORTON v MINISTER OF FISHERIES & OCEANS, MARINE HARVEST CANADA INC. AND CERMAQ CANADA LTD. 'NAMGIS FIRST NATION v MINISTER OF FISHERIES AND THE CANADIAN COAST GUARD, MARINE HARVEST CANADA INC. and CERMAQ CANADA LTD. 'NAMGIS FIRST NATION v MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD, MARINE HARVEST INC.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 10-14, 2018
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	FEBRUARY 4, 2019

APPEARANCES:

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Sean Jones Aaron Christoff Maxime Faille	FOR THE APPLICANT ('NAMGIS FIRST NATION)
Paul Seaman Scott Smith Sean Jones	FOR THE APPLICANT ('NAMGIS FIRST NATION)
Kevin O'Callaghan Dani Bryant	FOR THE RESPONDENT (CERMAQ CANADA LTD.)

Tim Timberg Lisa McDonald Gwen McIsaac	FOR THE RESPONDENT (MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD)
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