Federal Court Cour fédérale

Date: 20210325

Docket: T-129-21

Ottawa, Ontario, March 25, 2021

PRESENT: Case Management Judge Mandy Aylen

BETWEEN:

MOWI CANADA WEST INC., CERMAQ CANADA LTD., GRIEG SEAFOOD B.C. LTD. AND 622335 BRITISH COLUMBIA LTD.

Applicants

and

THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD

Respondent

and

ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY and WATERSHED WATCH SALMON SOCIETY,

Interveners

REASON FOR ORDER

[1] The underlying consolidated proceeding involves four applications for judicial review brought by operators of salmon aquaculture sites located within the Discovery Islands, British

Columbia. The Applicants seek to review the decision of the Minister of Fisheries, Oceans and the Canadian Coast Guard to phase out existing salmon farming operation facilities in the Discovery Islands over an 18-month period between December 2020 and June 30, 2022 (while allowing temporary renewals of aquaculture licenses during the transition), together with the Minister's direction that no new fish of any size may be introduced into the Discovery Islands facilities during this time and that all fish farms are to be free of fish by June 30, 2022.

[2] The Applicants also seek to review the Minister's decision, in furtherance of the above, that fish transfer licenses would no longer be issued to the Applicants under Section 56 of the *Fishery (General) Regulations*.

[3] The Court had before it three motions brought by various entities to be added as interveners or respondents in the consolidated applications and the upcoming injunction motions.

[4] Alexandra Morton, David Suzuki Foundation, Georgia Strait Alliance, Living Oceans Society and Watershed Watch Salmon Society [collectively, the Conservation Coalition], have brought a motion for leave to intervene in the consolidated applications and in the upcoming injunction motions. Specifically, the Conservation Coalition seeks:

1. An order granting the Conservation Coalition leave to intervene in these consolidated applications on the following terms:

    a. The Conservation Coalition may file a memorandum of fact and law not exceeding 20 pages, to be served and filed in accordance with the timeline for filing the Respondent's record;

b. The Conservation Coalition may make oral submissions at the hearing of the consolidated applications of no more than 45 minutes;

c. The parties must serve on the Conservation Coalition any documents that are required to be served on another party;

d. No costs shall be awarded to or against the Conservation Coalition, on this motion or on the consolidated applications, regardless of the outcome of the motion for leave to intervene or the consolidated applications; and

e. Such further and other order as counsel may advise and this Court deems just;

2. An order granting the Conservation Coalition leave to intervene in the interlocutory injunction motions on the following terms:

a. The Conservation Coalition may file a motion record, including written representations of no more than 10 pages;

b. The Conservation Coalition may file the Proposed Affidavit of Alexandra Morton as part of their motion record;

c. The Conservation Coalition may make oral submissions of no more than 30 minutes at the hearing of the interlocutory injunction motions;

d. No costs shall be awarded to or against the Conservation Coalition, on this motion for leave to intervene or on the motions for the interlocutory injunction, regardless of the outcome of the motions; and

e. Such further and other order as counsel may advise and this Court deems just;

[5] Homalco First Nation and Tla'amin Nation [collectively, Sister Nations] have brought a motion to be added as respondents in the consolidated applications or alternatively, for leave to intervene in the consolidated applications and the injunction motions, with a right to file evidence in both the consolidated applications and the injunction motions.

[6] We Wai Kai Nation, Wei Wai Kum First Nation and Kwiakah First Nation [collectively, Laichkwiltach Nation] have brought a motion for leave to intervene in the consolidated applications and in the upcoming injunction motions. Laichkwiltach Nation seeks leave to adduce evidence in the consolidated applications in the event that leave is granted to the Sister Nations to adduce the evidence contained in their motion record filed March 10, 2021.

[7] The Applicants, Mowi Canada West Inc. [Mowi], Cermaq Canada Ltd. and Grieg Seafood B.C. Ltd.. (a) oppose the Sister Nations being added as respondents, but do not oppose leave being granted to the Sister Nations to intervene in the consolidated applications and the injunction motions, provided that the terms of intervention do not include the right to file evidence; (b) do not oppose the Laichkwiltach Nation being granted leave to intervene in the consolidated applications and the injunction motions, provided that the terms of intervention do not include the right to file evidence; and (c) oppose leave being granted to the Conservation Coalition to intervene in the consolidated applications and the injunction motions.

[8] The Applicant, 622335 British Columbia Ltd. [BC Ltd.]: (a) takes no position on the motion of the Conservation Coalition, other than to oppose their request to file evidence on the injunction motions; (b) opposes the Sister Nations being added as respondents, but does not

oppose leave being granted to the Sister Nations to intervene in the consolidated applications and the injunction motions, provided that the terms of intervention do not include the right to file evidence; and (c) does not oppose the participation of the Laichkwiltach Nation on the terms that they propose.

[9] The Crown supports the motion of the Sister Nations to be added as respondents, supports the motion of the Laichkwiltach Nation to be added as an intervener and takes no position on the motion of the Conservation Coalition to be added as interveners.

[10] By Order dated March 18, 2021, I dismissed the motions of the Sister Nations and the Laichkwilatch Nation and granted the motion of the Conservation Coalition, in part. These are my reasons for that Order.

Background

[11] In 2009, the federal government established the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River. The goal of the commission of inquiry was to investigate the decline of sockeye salmon stocks and provide recommendations. One area of focus of the commission of inquiry was the effect of fish farms along the migratory route. The commission's final report, which was issued in October 2012, included 75 recommendations, thirteen of which related to salmon aquaculture [Cohen Report].

[12] Recommendation 19 of the Cohen Report provided:

> On September 30, 2020, the minister of fisheries and oceans should prohibit net-pen salmon farming in the Discovery Islands (fish health sub-zone 3-2) unless he or she is satisfied that such farms pose at most a minimal risk of serious harm to the health of

> migrating Fraser River sockeye salmon. The minister's decision should summarize the information relied on and include detailed reasons. The decision should be published on the Department of Fisheries and Oceans' website.

[13] Recommendation 20 of the Cohen Report provided:

> To inform the decision under Recommendation 19, the minister and the Department of Fisheries and Oceans should take the following steps:
>
> - Conduct the research and analysis recommended in Recommendation 68 and publish the results of this research.
>
> - Assess any relationships between salmon farming variables compiled in the fish health database and Fraser River sockeye health or productivity.
>
> - Invite from the salmon-farming industry and from other interested parties written submissions respecting the risk that net-pen salmon farms pose to the health of migrating Fraser River sockeye salmon.
>
> - Publish on the DFO website the full text of all submissions received.
>
> - Provide to submitters a reasonable opportunity to respond in writing to other submissions and publish such responses on the DFO website.

[14] On September 28, 2020, Fisheries and Oceans Canada issued a statement regarding the results of the research contemplated by Recommendation 20. It stated:

> To respond to recommendation 19, the Department looked at the overall risk to Fraser River Sockeye salmon from diseases that can occur on Atlantic salmon farms. Fisheries and Oceans Canada (DFO) **completed nine risk assessments** on pathogens known to cause disease from aquaculture operations in the Discovery Islands area.
>
> ….

> All of the assessments concluded that the pathogens on Atlantic salmon farms in the Discovery Islands **pose no more than a minimal risk** to Fraser Valley Sockeye salmon abundance and diversity under the current fish health management practices.

[15] On September 28, 2020, Fisheries and Oceans Canada also announced a consultation process in relation to the Discovery Islands aquaculture licenses that were set to expire on December 18, 2020. It stated:

> Starting immediately, Fisheries and Oceans Canada will begin consultations with the Homalco, Klahoose, Komoks, Kwiakah, Tla'amin, We Wai Kai (Cape Mudge) and Wei Wai Kum (Campbell River) First Nations about the aquaculture sites in the Discovery Islands. The information exchanged will inform the government's decision on whether or not to renew aquaculture licenses in the area, prior to the December 2020 deadline.

[16] In 2020, the Minister was asked by the Applicants to issue replacement aquaculture licenses to permit their aquaculture facilities to continue operations, as their current licenses were set to expire on December 18, 2020.

[17] In December 2020, the Minister was provided with a memorandum for decision to seek a decision on the issuance of licenses for the aquaculture sites in the Discovery Islands and if the licenses were issued, what the terms of licenses should be [Memorandum]. The Memorandum now constitutes the certified tribunal record.

[18] The Memorandum details the consultations undertaken with the various First Nations. It provides:

> From October to December 2020, the Department undertook consultations with First Nations whose territories overlap aquaculture sites in the DI. The First Nations had a range of views regarding the ongoing licensing of these DI farms, but all expressed concern about potential impact of the farms on wild

> salmon stocks in their claimed territories. All of the First Nations shared in an interest in extending the consultation period and being engaged in the monitoring and/or management of the sites. Specific accommodation measures were requested to address potential infringement of Aboriginal rights to fish.

[19] More particularly, the Memorandum states:

> The seven First Nations had differences of views regarding the reissuance of licenses and on-going operation of farms in their territories. This ranged from tabling of a decommissioning plan for all farms and specific requests for detailed accommodation measures to interest in co-management opportunities for aquaculture operations. There were concerns raised that the policy and operational frameworks as well as the science relied on by DFO to manage the salmon farms in the DI were not consistent with the precautionary principle.
>
> First Nations also expressed concerns with the supporting science, citing that the risk assessments did not take local salmon stocks into account or evaluate sea lice, and raised issues that the CSAS process used to conduct the risk assessments does not involve a full engagement of Indigenous groups. Even after reviewing the performance data, there continued to be strong concern around sea lice management and piscine orthoreovirus (PRV) related impacts to wild salmon and potential infringement of their Aboriginal rights. [Redact] also provided information on site specific impacts of the DI farms.
>
> In terms of accommodations, First Nations asked for additional time for consultation, funding support for launching First Nations led monitoring and audit work focused on sea lice and PRV, requests for additional science, changes to conditions of licence, and wanting to explore the idea of ABM.

[20] The Memorandum presented various decision options and recommended that the Minister renew the licenses until June 30, 2022 and adopt additional complementary measures that would help address issues and specific accommodation measures raised by First Nations during the license renewal consultations. In making this recommendation, it was noted that it would provide

additional time for consultations with First Nations on the aquaculture licenses and longer-term decisions regarding aquaculture.

[21] The Minister did not concur with the recommendations. Rather, the Minister returned the Memorandum with a notation as follows:

> Instead, I affirm the direction as discussed in the December 11, 2020 bilateral meeting with the DM:
>
> My decision is for a temporary (18 month) renewal of aquaculture licenses for facilities operating in the Discovery Islands. All farms in this area must no longer have fish in pens by June 30th, 2022.
>
> - During the period between license renewal and June 30th, 2022, no hatchery smolts will be introduced.
>
> - The intent of allowing time to grow out and harvest fish already in pens is to avoid culling in order to meet timelines.

[22] On December 17, 2020, the Minister publicly announced her decision. The announcement stated:

> Today, the Honourable Bernadette Jordan, Minister of Fisheries, Oceans, and the Canadian Coast Guard, announced her intention:
>
> - To phase out existing salmon farming facilities in the Discovery Islands, with the upcoming 18-month period being the last time this area is licensed;
>
> - To stipulate that no new fish or any size may be introduced into Discovery Island facilities during this time;
>
> - To mandate that all farms be free of fish by June 30th, 2022, but that existing fish at the sites can complete their growth-cycle and be harvested.
>
> These facilities are some of the oldest sites on the West Coast and are located on the traditional territory of the Homalco, Klahoose, K'ómoks, Kwaikah, Tla'amin, We Wai Kai and Wei Wai Kum

> First Nations. Consultations with the seven First Nations in the Discovery Islands area provided importance guidance to the Minister and heavily informed the decision. This approach also aligns with the Province of British Columbia's land tenure commitment that all aquaculture licenses as of June 2022 require consent from local First Nations.
>
> In response to feedback heard from First Nations through consultations, DFO will ensure information is shared with the First Nations moving forward, and an invitation extended to participate and monitor progress as the farms harvest out the remaining fish on site.

[23] The public announcement of the Minister's decision was accompanied by a backgrounder elaborating on the measures to phase-out salmon farming in the Discovery Islands area. It stated:

> To implement the approach, issuance of Section 56 *Fishery (General) Regulations* (FGR) Introductions and Transfers licenses would cease moving forward. Farm operators have been informed that the intention is to no longer issue Section 56 FGR licences, and that the expectation is that the farms will not be licensed to operate after June 30, 2022. Restricting the issuance of these licenses for the 19 DI sites, would result in no further fish transferred in the DI farm sites. At this time, no changes to conditions of licence are contemplated.
>
> ….
>
> Ceasing the transfer of fish into the DI sites could result in instances where fish currently rearing in hatcheries or in smolt-entry sites would need to be accommodated at other farm sites or voluntarily culled by the operator.

[24] In or around December 19, 2020, each of the Applicants received their renewed licenses to continue to operate their facilities, but they were limited to a term of 18 months and subject to the conditions noted above.

[25] On January 18, 2021, each of the Applicants commenced an application for judicial review seeking review of the Minister's decision that: (a) the Discovery Island aquaculture

licenses would be issued for a limited 18-month period and that they would be the last licenses issued in the Discovery Islands; (b) no new fish of any size may be introduced into the Discovery Islands facilities during that 18-month period; and (c) mandated all fish farms be free of fish by June 30, 2022. The Applicants also seek to review the Minister's decision, in furtherance of the above, that fish transfer licenses would no longer be issued to the Applicants under Section 56 of the *Fishery (General) Regulations*. These four applications were subsequently consolidated by the Court.

[26] The relief sought on the consolidated applications varies from application to application, but taken together, includes:

a. An order quashing or setting aside the decision in whole or in part and referring the matter back to the Minister for redetermination in accordance with the Court's reasons;

b. A declaration that the decision was invalid, unreasonable and/or unlawful;

c. A declaration that the decision was made in a procedurally unfair manner, contrary to principles of natural justice; and

d. An order for an interim and interlocutory injunction suspending the application of the decisions in whole or in part, the policy to end net-pen salmon farming in the Discovery Islands by June 30, 2022 or both pending the hearing of the consolidated applications.

[27] The grounds of review include both substantive and procedural objections to the Minister's decision, framed differently in each application. By way of summary, the grounds are as follows:

a. The decision is beyond the Minister's jurisdiction, as the *Fisheries Act* does not permit the Minister to fetter her own discretion in the issuance of transfer licenses pursuant to Section 56 of the *Fisheries (General) Regulations*.

b. The Minister exceeded her jurisdiction or failed to properly exercise her jurisdiction by making the decision which is contrary to, and inconsistent with, the proper management and control of fisheries and the legislative regime.

c. The decision was made in an arbitrary manner and based exclusively on a single criterion. The Minister made the decision contrary to the applicable legislative scheme, relied on extraneous and irrelevant matters and failed to take into account or properly take into account relevant facts and factors, including scientific information regarding the impacts of the aquaculture industry on wild salmon populations, sustainability of the aquaculture industry and social, economic and cultural factors in the management of fisheries. The Minister based her decision on erroneous findings of fact that she made without regard for the material before her.

d. The decision is unreasonable in light of Fisheries and Ocean Canada's own determination that the pathogens on Atlantic salmon farms in the Discovery Islands pose no more than a minimal risk to Fraser Valley Sockeye salmon abundance and

diversity under the current fish health management practices and absent any finding of non-minimal risk of harm due to other salmon-farming related causes.

e. The Minister abused her discretion by improperly giving prominent consideration to irrelevant factors, namely the attempt to align with the Province of British Columbia's policy in relation to land tenures and reliance on a plan for orderly transition that does not exist.

f. The decision is contrary to, and inconsistent with, the stated purpose of aligning federal decision-making with British Columbia's 2018 policy regarding tenure renewals for aquaculture, as the Applicants' tenures in the Discovery Islands do not expire in 2022.

g. The decision did not consider and is inconsistent with British Columbia's 2018 policy in that it does not provide an opportunity for the Applicants to come to an agreement with local First Nations in order to continue operations.

h. The decision was unreasonable for the Minister to have adopted a blanket rule for the Discovery Islands, without regard for the particular circumstances of the individual sites and which is contrary to, and inconsistent with, the proper management and control of fisheries under the *Fisheries Act* and its regulations.

i. The decision which prohibits the transfer of any fish into the Discovery Island facilities renders the licenses issued in December 2020 useless and places unreasonable constraints on the licenses.

j. The decision is irrationally overbroad in that by targeting the facilities that farm salmon, it eliminates aquaculture activities unrelated to salmon, such as the cultivation of sablefish.

k. The Minister did not make the decision in good faith, having repeatedly represented to the Applicants that they would be consulted in respect of aquaculture policy, aquaculture management, new aquaculture legislation and the proposed transition of net-pen fish farming. The Minister stated that she consulted with the Applicants regarding the content of her decision, when she had not. The Minister knew or ought to have known that the industry relies on the predictable replacement of licenses, that the policy she adopted was a significant departure from past practice and that the decision would have a significant impact on the Applicants. Notwithstanding, the Minister did not disclose to the Applicants, even in the week before the decision was announced, that the Minister was considering the decision or the policy and instead led the Applicants to believe that they would be further consulted before a decision was made.

l. The decision lacks transparency, intelligibility and justification, which in the circumstances required reasons that, at a minimum, provided some description of the nature of the consultations that took place and the concerns raised, how the Minister reconciled any concerns that may have been raised in the consultations regarding harm to wild salmon with the research that informed her decision not to implement recommendation 19 of the Cohen Report, and some discussion of how other interests

at stake were taken into account and why those interests could not be reconciled with the concerns raised by the consulted First Nations.

m. The decision was made in a procedurally unfair manner. The central contention is that the decision was made without notice to the Applicants and without providing the Applicants with an opportunity to properly put forward their concerns, under circumstances where the Applicants had legitimate expectations as to both the process and its outcome. The Applicants were not given an opportunity to know the case against them – that is, the case being made in the course of consultation with the First Nations – and an opportunity to respond thereto. The Applicants assert that Recommendation 20 of the Cohen Report defined or shaped the content of the duty of fairness owed and that that duty was not met. The Applicants assert that the Minister misled the Applicants and the public regarding the true nature of the decision and failed to advise the Applicants of the scope of the decision.

n. Procedural fairness also mandated that the Minister provide reasons for her decision and the letters provided to the Applicants conveying the decision were so deficient as to be tantamount to no reasons having been provided.

[28] Two of the Applicants, BC Ltd. and Mowi, have brought interlocutory injunction/stay motions related to fish transfer licences under Section 56 of the *Fishery (General) Regulations* [Injunction Motions]. In early 2021, Mowi applied for a number of transfer licenses and was advised by Fisheries and Oceans Canada that the licences were either refused or that refusals were pending as a result of the Minister's decision.

[29] On the Injunction Motions, Mowi seeks: (a) an order enjoining the prohibition on transfers of fish into licensed aquaculture facilities set out in the decision in respect of an application to transfer fish into the Hardwicke site on or before August 31, 2021 and an application to transfer fish into the Phillips Arm site on or before July 31, 2021; and (b) an order enjoining the prohibition on the issuance of further aquaculture licenses set out in the decision in respect of any licence that may be necessary to permit the removal of Mowi's equipment from the Hardwicke site and the Philips site promptly after June 30, 2022. BC Ltd. seeks an order staying the implementation of the decision in respect of its upcoming application under Section 56 of the *Fishery (General) Regulations* to transfer smolts into the Doctor Bay Farm's saltwater pens, pending the determination of the consolidated applications.

[30] The Injunction Motions will be heard by the Court on March 24 and 25, 2021. As a result, the within motions have been brought and were heard on an expedited basis. As the deadline for service and filing of responding materials on the injunction motion was March 19, 2021, these motions were also determined on an expedited basis.

Analysis

(a) Motion by the Sister Nations to Be Added as Respondents

[31] Pursuant to Rule 104(1)(b) of the *Federal Courts Rules*, the Court may, at any time, order that a person be added as a respondent where: (i) they should have been a respondent in the first place; or (ii) their presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined. Satisfaction of either of these

requirements is sufficient to succeed on a Rule 104(1)(b) motion [see *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 at para 11].

[32] With respect to the first consideration, Rule 303(1)(a) of the *Rules* requires an applicant to name as a respondent every person "directly affected" by the order sought in the application. The words "directly affected" in Rule 303(1)(a) mirrors the language found in section 18.1(1) of the *Federal Courts Act*, which provides that only the Attorney General or anyone directly affected by the matter in respect of which relief sought may bring an application for judicial review. Rule 303(1)(a) restricts the category of parties who must be added as respondents to those who, if the tribunal's decision was different, could have brought an application for judicial review [see *Forest Ethics*, *supra* at para 18].

[33] A party will be directly affected when its legal rights are affected, legal obligations are imposed on it, or it is prejudicially affected in some direct way. It is important to note that the test for standing does not require that legal rights or obligations flow from the order sought. Rather, it is sufficient that the proposed respondent be prejudicially affected in a direct way [see *Forest Ethics*, *supra* at para 21; *Hospira Healthcare Corp v Canada (Minister of Health),* 2014 FC 179 at para 20].

[34] With respect to the second consideration, the only reason which makes it necessary to make a person a party to a proceeding is so that the person should be bound by the result of the proceeding and the question to be settled must be a question in the proceeding that cannot be effectually and completely settled unless the person is a party [see *Canada (Minister of Fisheries and Oceans) v Shubenacadie Indian Band*, 2002 FCA 509 at para 8; *Laboratories Servier v Apotex Inc*, 2007 FC 1210].

[35] The fact that an entity may be adversely affected by the outcome of the proceeding or has evidence relevant to the proceeding are not sufficient to make them a necessary respondent. Moreover, absent a specific legislative provision, when the proceeding seeks no relief against an entity and make no allegations against them, the entity will not be considered a necessary respondent [see *Shubenacadie*, *supra* at paras 6-7; *Laboratoires Servier*, *supra* at para 17].

[36] Accordingly, the questions to be asked on this motion are:

a. Whether the relief sought in the application for judicial review will directly affect the Sister Nations' rights, impose legal obligations upon them or prejudicially affect them in some direct way; and

b. .Whether the Sister Nations' participation as a respondent is necessary to ensure that all matters in dispute in the proceeding may be effectively and completely determined.

[37] If the answer is yes to either question, the Sister Nations should be added as respondents.

[38] The Sister Nations assert that the relief sought on the consolidated applications will both affect their legal rights and prejudicially affect them in a direct way. Specifically, the Sister Nations assert that, during the consultations, the Minister made an express accommodation to the Sister Nations, in the form of a promise, to shut down the salmon aquaculture operations in the Discovery Islands. This accommodation was made in furtherance of the Sister Nations' rights in the Discovery Islands territory. The Sister Nations assert that any order nullifying, quashing or suspending the Minister's decision directly affects their legal rights and prejudicially affects them in a direct way because:

a. The relief would nullify an accommodation made by the Crown to protect and preserve their constitutionally protected rights.

b. The relief would expose the imperilled populations of wild Pacific salmon and other marine resources the Sister Nations rely on for exercising their constitutionally protected rights to disease agents and parasites that cause population-level impacts.

c. The relief would prolong intrusions in their territories that damage and prevent them from using traditional harvesting sites.

d. The relief sought puts their ability to obtain the same or similar accommodation to protect their Aboriginal and treaty rights in jeopardy.

[39] The Sister Nations assert that in considering this first question, the Court should ask itself whether they could have brought an application for judicial review if the Minister had made a different decision. If the answer is yes, then the Sister Nations assert that they must be added as respondents. However, the Federal Court of Appeal's decision in *Forest Ethics* does not raise this consideration as a stand-alone test. Rather, it was raised as a means of explaining that the test for standing to commence an application for judicial review and the test for joinder mirror one another and both require that the relief sought will affect a party's legal rights, impose legal obligations upon it or prejudicially affect it in some direct way. The Sister Nations must therefore still demonstrate that the relief sought on this application directly affects its legal rights or will prejudicially affect it in some direct way.

[40] Turning to that issue, I am not satisfied that the relief sought by the Applicants affects the Sister Nations in a direct way. The decision to be reviewed by the Court is a denial of an

aquaculture license to the Applicants on the terms sought and a pronouncement as to the future of the Applicants' operations. The decision under review limits the rights of the Applicants and, as is evident from the decision itself and the accompanying press release, cannot be properly characterized as a grant of accommodation or a promise to the Sister Nations. Unlike the case of *Ontario Federation of Anglers and Hunters v. Ontario,* 2015 ONSC 7969, the decision at issue does not expressly grant a right to the Sister Nations. None of the relief sought by the Applicants would alter, affect or derogate from any duties owed by the Crown to the Sister Nations or any existing rights of the Sister Nations. Moreover, none of the Applicants have based their challenge to the decision on either the assertion or denial of Aboriginal title and rights or the Crown's duty to consult.

[41] It must be kept in mind that if the Applicants are successful and the Court quashes the decision, it will be remitted back to the Minister for a redetermination in accordance with any reasons provided by the Court. The Minister may ultimately come to the same decision or reach a different decision – that remains unknown. In the circumstances, to the extent that the Sister Nations' rights or interests may be affected by the relief sought by the Applicants (in the manner asserted above), I agree with the Applicants that any such effect is speculative and/or consequential and indirect, which does not meet the test for joinder [see *Gitxaala Nation v. Prince Rupert Port Authority*, 2020 CanLii 382 (FC); *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans*), 2003 FCT 30].

[42] Accordingly, I am not satisfied that the Sister Nations have demonstrated that the relief sought in the consolidated applications will directly affect the Sister Nations' rights or prejudicially affect them in some direct way.

[43] As to the issue of whether the participation of the Sister Nations as respondents in the judicial review is necessary, I find that the Sister Nations have not satisfied the demanding test set out in *Shubenacadie* and *Laboratoire Servier*. They have not pointed to a question that is actually raised in the consolidated applications that cannot be effectually and completed settled unless the Sister Nations are parties. Rather, the issues to which they seek to speak are not in fact raised by the pleadings. The grounds of review as framed by the notices of application do not invoke issues with respect to the Minister's duty to consult or accommodate the potentially impacted First Nations within the Discovery Islands or with respect to the Aboriginal or treaty rights and title of the potentially impacted First Nations within the Discovery Islands. Moreover, no relief is sought against the Sister Nations.

[44] Moreover, the fact that the Sister Nations participated in the consultation process and may have evidence that they seek to put forward regarding the consultation process, and the fact that the relief sought may have an adverse indirect effect on the rights and interests of the Sister Nations do not render the Sister Nations necessary parties. Much of the evidence that the Sister Nations seek to file is irrelevant to the issues raised on this proceeding. To the extent that the Sister Nations have relevant evidence to put forward, it can be advanced by the Minister.

[45] Having found that the Sister Nations have not demonstrated that they should have been a respondent in the first place or that their presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined, the motion of the Sister Nations to be added as respondents is dismissed.

(b) Motion to Intervene

[46] Pursuant to Rule 109(1) of the *Federal Courts Rules*, the Court may, on motion, grant leave to any person to intervene in a proceeding. Rule 109(2)(b) provides that any person seeking leave to intervene shall include in its notice of motion a description of how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding. Rule 109(2)(b) requires not just an assertion that a proposed intervener's participation will assist, but a demonstration of how it will assist [see *Forest Ethics*, *supra* at para 36.]. The Court then assesses and weighs these submissions against the factors as articulated in *Rothmans, Benson & Hedges Inc v Canada (AG),* [1990] 1 FC 84, 29 FTR 272 (TD), aff'd [1990] 1 FC 90 (CA). These factors are flexible and can include whether:

a. The proposed intervener is directly affected by the outcome;

b. There exist a justiciable issue and a veritable public interest;

c. There are other reasonable or efficient means to submit the question to the Court;

d. The position of the proposed intervener is adequately defended by one of the parties to the case;

e. The interests of justice are better served by the intervention of the proposed third party; and

f. The Court can hear and decide the cause on the merits without the proposed intervener.

> [see *Sport Maska Inc. v. Bauer Hockey Corp*., 2016 FCA; *Gordillo v. Canada (Attorney General)*, 2020 FCA 198; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102]

[47] Not all factors need to be present and some may weigh more heavily than others. There may also be new considerations, unique to a particular case, which are pertinent. For this reason, the criteria are not prescriptive, but rather must remain flexible. The over-arching test is whether the Court will be better served in its consideration of the issue with which it has to grapple by the presence of the intervener [see *Gordillo*, *supra* at para 9].

[48] In considering the factors listed above, the Court also has to consider the language of Rule 109, which provides that the proposed intervention will "assist the determination of a factual or legal issue related to the proceeding" – that is, the issues raised in the existing application for judicial review. In that regard, an applicant for intervention cannot make new legal arguments that are foreclosed by the evidentiary record. As was stated by Justice Stratas in *Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34 at para 19:

> ….notices of application for judicial review… serve to define the issues in a proceeding. Existing parties build their evidence and submissions around those carefully defined issues. An outsider seeking admission to the proceedings as an intervener has to take those issues as it finds them, not transform them or add to them. Thus, under Rule 109(2)(b) a proposed intervener must show its potential contribution to the advancement of the issues on the table, not how it will change the issues on the table.

[49] In *Canada* (*Minister of Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13, Justice Stratas (sitting alone) recently rearticulated the test for intervention, based on the same cases noted above, as follows:

1. The proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues. To determine usefulness, four questions need to be asked:

    a. What issues have the parties raised?

    b. What does the proposed intervener intend to submit concerning those issues?

    c. Are the proposed intervener's submissions doomed to fail?

    d. Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?

2. The proposed intervener must have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court; and

3. It is in the interests of justice that the intervention be permitted.

[50] In considering the interests of justice portion of the test, Justice Stratas stated in *Canadian Council for Refugees* that the Courts have developed a number of considerations that shed light on the meaning of the interests of justice, although noting that the list is not closed. These consideration include:

a. Is the intervention consistent with the imperatives in Rule 3? For example, will the orderly progression or the schedule of the proceedings be unduly disrupted?

b. Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?

c. Has the proposed intervener been involved in earlier proceedings in the matter?

d. Will the addition of multiple interveners create the reality or an appearance of an inequality of arms or imbalance on one side?

[51] While the description of the test for intervention articulated by Justice Stratas varies in terms of its language from that articled by previous panels of the Federal Court of Appeal, I am satisfied that the considerations at the heart of the test remain unchanged from that articulated in the earlier case law, such as *Sports Maska* and *Gordillo*.

[52] The Federal Court of Appeal has also clearly stated that acting under the guise of having a different perspective, an intervener cannot adduce fresh evidence or make submissions that are in reality fresh evidence. An intervener cannot transform the proceeding into something different, for example, by raising issues foreign to the application before the Court. A proposed intervener must rely on the same evidence in the record that others are relying upon and focus on how they can assist the Court's determination of the existing proceedings (see *Tsleil-Waututh Nation*, *supra* at para 48).

[53] As stated by Justice Stratas in *Ishaq v Canada (Citizenship and Immigration)* 2015 FCA 151, the first-instance decision-maker – in this case the Minister – is normally the only forum for fact-finding. New evidence is not admissible on an application for judicial review unless one of the very specific, narrow exceptions apply, as set out in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.

i. Conservation Coalition

[54] The Conservation Coalition's members have been actively involved in work focused on the conservation of wild salmon, particularly in the face of scientific uncertainty. They have individually or collectively participated in the Cohen Commission, worked towards implementation of the Cohen Commission recommendations through independent research and monitoring of salmon farms, commenced related legal proceedings, participated in Department of Fisheries and Oceans-led risk assessment of certain pathogens, assisted First Nations in the Discovery Islands during the consultation process with the Minister and engaged directly with the Minister and the Department of Fisheries and Oceans on the question of salmon farming in the Discovery Islands in 2020.

[55] The Conservation Coalition seeks to intervene on the consolidated applications to provide submissions on aspects of statutory interpretation that inform the reasonableness and fairness analysis, noting that the statutory context and constraints on the Minister's discretion to issue aquaculture and transfer licenses under the *Fisheries Act* scheme are fundamental to informing the reasonableness of the decision and the degree of procedural fairness owed to the Applicants. Specifically, they seek to make submissions as to how the Minister's pre-eminent duty to

conserve and protect fish and fish habitat and the precautionary principle inform the reasonableness and fairness of her decision.

[56] The Conservation Coalition submits that the Court's decision has the potential to impact how the Minister can protect wild salmon and take a precautionary approach in making other fisheries management decisions. The Conservation Coalition does not seek to file any evidence on the consolidated applications.

[57] With respect to the Injunction Motions, the Conservation Coalition seeks leave to provide submissions that will assist the Court in its evaluation of the balance of convenience prong of the injunction test. First, the Conservation Coalition seeks to make legal submissions on how the precautionary principle in the *Fisheries Act* informs the public interest, particularly in the issuance of transfer licenses under Section 56 of the *Fishery (General) Regulations*. They assert that, contrary to the submissions of Mowi, the Minister is not limited to only considering fish health concerns when issuing a transfer license and is under no obligation to issue a transfer license if the fish health criteria are met. Rather, the Minister must be satisfied that three criteria are met before exercising her discretion to issue a transfer license – namely, that: (i) the transfer would be in keeping with the proper management and conservation of fish; (ii) the transferred fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and (iii) the transfer of fish will not have an adverse effect on fish stock size or genetic characteristics. The Conservation Coalition seeks to speak to the adverse impact on the Minister's ability to protect and conserve wild salmon in the face of scientific uncertainty if the Court were to limit her authority to consider factors relevant to the management and conservation of fish.

[58] Second, the Conservation Coalition seeks to make factual submission that wild salmon smolts migrating in 2021 and 2022 are particularly vulnerable to an injunction decision that would increase the number of fish or operating farms in the Discovery Islands this year and the next. The Conservation Coalition seeks to file the proposed affidavit of Ms. Morton in support of these submissions.

[59] The Applicants oppose the Conservation Coalition's request to intervene in both the consolidated applications and the Injunction Motions and oppose their request to file the proposed affidavit of Ms. Morton. The Applicants assert that:

a. The Conservation Coalition improperly seeks to raise new issues as the notices of application do not raise the issue of the precautionary principle or the conservation priority and thus improperly transform the proceedings into a broad and general inquiry into salmon aquaculture at large.

b. The Conservation Coalition seeks to speak to issues that the Minister will speak to and thus will duplicate her submissions and improperly usurp her role.

c. The Conservation Coalition has no genuine interest in the proceeding but rather only a jurisprudential interest.

d. The Conservation Coalition is improperly attempting to turn the proceedings into an academy of science and improperly seek to file untested scientific evidence on the Injunction Motions and evidence that was not before the Minister when she made her decision.

[60] I have carefully considered and weighed the various factors, as well as considered Rule 109.

[61] In considering the terms of the proposed intervention requested by the Conservation Coalition, it is critical to keep in mind that proposed interveners can assist the Court in a number of ways. The assistance may come in the form of addressing the broader social or economic context within which a particular case is situated or by addressing the policy implications of a decision, which may not be apparent on the face of the record or which may not have been raised by the parties. In cases involving the interpretation and application of legislation, the Court frequently welcomes those who are well-placed to offer insights into the legislation's genuine purpose. Proposed interveners may be well-placed to help the Court assess the likely effects or results of rival interpretations of a legislative provision because of their experience analyzing and working with it. Some of that experience may be in the field, on the ground and practical in nature. They can also assist in acquainting the Court with the larger implications associated with its ruling [see *Atlas Tube*, *supra* at paras 7 and 11; *Tsleil-Waututh, supra* at para 49; *Gordillo, supra* at para 15].

[62] I am satisfied that the assistance that the Conservation Coalition seeks to provide falls within these categories, given their experience as noted above and as set out in their supporting affidavits. While the Minister is no doubt well-positioned to speak to the considerations within the legislative regime that must inform her decision-making, the Attorney General does not have a monopoly to represent all aspects of the public interest [see *Rothmans*, *supra* at paras 15 and 20]. The Conservation Coalition is neither a user nor a regulator of marine resources and thus

bring a different perspective to the issues from that of the parties. I am satisfied that their perspective will be of assistance to the Court.

[63] Moreover, the mere fact that the Minister could advance at least some of the submissions that the Conservation Coalition seeks to make does not close the door to leave being granted to the Conservation Coalition, particularly where it is far from certain as to whether these submissions will be well-handled by the parties [see *Canadian Council of Refugees*, *supra* at para 33]. In that regard, the Crown has chosen to make no substantive submissions on this motion and the Court has no clarity as to what submissions the Crown may ultimately make to defend the reasonableness and fairness of the Minister's decision.

[64] While the Applicants assert that the precautionary principle is a new issue not raised in the pleadings, it is an existing principle of statutory interpretation and thus is already relevant to any statutory analysis that this Court may undertake, regardless of whether expressly referenced in the notices of application.

[65] I reject the assertion of the Applicants that the interest of the Conservation Coalition is purely jurisprudential. While they no doubt have a jurisprudential interest, I am satisfied that their interests go beyond being purely jurisprudential and are in fact genuine given their activities in the field and their previous involvement in legal and policy matters.

[66] I find that the interests of justice weigh in favour of granting the Conservation Coalition's motion to intervene on both the consolidated applications and the Injunction Motions. The Conservation Coalition brought their motion to intervene in a timely manner, their intervention complies with Rule 3 and the requirements of Rule 109(2) (particularly given that the Coalition

members have united to speak with one voice), the Conservation Coalition has been actively involved in the issues raised in the consolidated applications in both prior legal proceedings and in the lead-up to the Minister's decision and the addition of the Conservation Coalition will not create an inequality of arms. To the contrary, granting leave to the Conservation Coalition will bring a more balanced appearance to the proceeding given that there are presently four Applicants and only one respondent. In addition and importantly, it is clear that the issue of the continuation of net-pen salmon farming in the Discovery Islands is a complex matter of significant public interest and importance, as is evident from the Cohen Report and the public announcement of the Minister's decision, and that the Court will certainly benefit from the exposure to the Conservation Coalition's perspective.

[67] Accordingly, I find that it is appropriate that the Conservation Coalition be granted leave to intervene on the issues proposed in relation to both the consolidated applications and the Injunction Motions.

[68] However, I am not prepared to grant leave to the Conservation Coalition to file the proposed affidavit of Ms. Morton on the Injunction Motions. I agree with the Applicants that Ms. Morton's proposed affidavit contains untested hearsay evidence, contains improper opinion evidence under the guise of being factual evidence, constitutes an attack on the science presented by the Department of Fisheries and Oceans and goes far beyond providing general background information. Accordingly, the Conservation Coalition must take the record as they find it on the Injunction Motions and make their submissions on the balance of convenience on that record alone.

[69] Moreover, I am not prepared to grant the Conservation Coalition leave to file a 20 page factum on the consolidated applications. Fifteen pages is sufficient for the purpose of the limited issues they are permitted to address.

ii. Sister Nations

[70] As stated by Justice Stratas in *Atlas Tube Canada ULC v Minister of National Revenue*, 2019 FCA 120 at para 2, when considering a motion for leave to intervene, "the parties' consent does not tie the Court's hands". The Court must still evaluate whether the proposed intervener's intervention in the consolidated applications is supported by the criteria in Rule 109 and the associated jurisprudence.

[71] Rule 109(2) requires that the Sister Nations describe, in their notice of motion, how they wish to participate and how their participation will assist the determination of a factual or legal issue related to the consolidated applications and the Injunction Motions. This requires more than just a bare assertion, but an actual demonstration of how they will assist.

[72] Notwithstanding the clear requirements of Rule 109(2), the Sister Nations' notice of motion contains no such particulars and this deficiency was not remedied in their written representations. At the hearing of the motion, I asked counsel for the Sister Nations to provide the Court with the information and submissions required by Rule 109(2).

[73] Counsel indicated that the Sister Nations seek to intervene on the Injunction Motions to contest Mowi's claim of irreparable harm and to address the balance of convenience. With respect to the latter, they seek to address the accommodation granted to the Sister Nations and

the impact of the aquaculture industry on their Aboriginal and treaty rights. The Sister Nations seek to file eight affidavits on the injunction motion, as included in their motion materials.

[74] On the consolidated applications, counsel indicated that the Sister Nations seek to intervene to address how procedural fairness interests have to be balanced as between the Applicants and the Sister Nations and to speak to the consultations that occurred between the Sister Nations and the Department of Fisheries and Oceans. The Sister Nations seek leave to file evidence that will respond to the procedural fairness evidence that the Applicants will ultimately file.

[75] It is clear that the Sister Nations did not comply with the obligation set out in Rule 109(2), as the necessary information and submissions were not set out in their notice of motion. On that basis alone, their motion to intervene should be dismissed. Even if I were prepared to consider their attempt to remedy this omission by way of their oral submissions at the hearing, the Sister Nations have at best only described how they wish to participate on the Injunction Motions and the consolidated applications. The Sister Nations have not provided the Court with an explanation as to how their participation will assist the determination of the issues that the Sister Nations seek to address on either of the Injunction Motions or the consolidated applications. For that additional reason, their motion for leave to intervene is dismissed.

[76] I would note that, as recognized by Justice Stratas in *Canadian Council for Refugees*, intervention is not the only way for the Sister Nations to participate. They may offer their views, insights and other forms of assistance to the Crown or the Conservation Coalition, the latter of which I note has already been working with First Nations groups on these issues.

iii. Laichkwiltach Nation

[77] During its oral submissions, the Laichkwiltach Nation acknowledged that they largely have no interest in the consolidated applications and only sought leave to intervene given the Sister Nations' submission that a promise or accommodation was given to them by the Minister. The Laichkwiltach Nation confirmed that if the Court found that any alleged promise or accommodation given to the Sister Nations and any rights or title to the Discovery Islands are not in issue in this proceeding, then the Laichkwiltach Nation does not need to be granted intervener status in the consolidated applications or on the Injunction Motions. In light of my findings above, the Laichkwiltach Nation will accordingly not be granted intervener status on either the consolidated applications or the Injunction Motions.

Reply Submissions on the Injunction Motions

[78] The Applicants requested that they be granted leave to serve and file reply written representations on the Injunction Motions in the event that any of the moving parties were granted intervener status. In light of my determination regarding the Conservation Coalition, I am satisfied that it would be of assistance for the hearing judge to receive brief reply written representations from the Applicants in advance of the hearing of the Injunction Motions.

Costs

[79] At the hearing of the motions, the parties agreed to attempt to resolve the issue of costs of these motions following the release of the Court's determination. I have ordered the parties to provide the Court with a status update on this issue by April 1, 2021 and in the event that they

are unable to reach an agreement, the status update shall include a jointly-proposed schedule for the delivery of brief written cost submissions.

"Mandy Aylen"
Case Management Judge