Docket.: T-127-21
T-128-21
T-129-21
T-132-21

FEDERAL COURT

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 STRAIGHT ALLIANCE, LIVING OCEANS SOCIETY AND WATERSHED WATCH SALMON SOCIETY

Interveners

WRITTEN REPRESENTATIONS OF HOMALCO FIRST NATION AND TLA'AMIN NATION IN THEIR MOTION TO APPEAL THE ORDER OF PROTHONOTARY AYLEN DATED MARCH 18, 2021

April 14, 2021

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WRITTEN REPRESENTATIONS

I. INTRODUCTION

1. Homalco First Nation ("**Homalco**") and Tla'amin Nation ("**Tla'amin**", and collectively with Homalco, the "**Sister Nations**") request this Honourable Court allow the Sister Nations' appeal of Prothonotary Aylen's (the "**Prothonotary**") order of March 18, 2021 (the "**Order**").

2. On December 16, 2020, the Minister of Fisheries, Oceans and the Canadian Coast Guard (the "**Minister**"), in response to guidance and input from the Sister Nations which heavily informed her decision, amended longstanding Crown policy and decided to discontinue fish farming in the Discovery Islands.

3. The Minister's decision is rare and unusual in two respects:

   a) as a result of the Crown's duty to consult and accommodate Aboriginal peoples, the Crown decided to remove an entire industry from a geographical area; and

   b) in coming to the decision, the Crown accommodated the Sister Nations in exactly the manner they sought – decommissioning the fish farms without restocking them further.

4. The Applicants seek to overturn that decision through their consolidated applications for judicial review (the "**Application**"). The Sister Nations are directly affected by the remedy sought and are necessary to determine the Application. Had the Decision been different, the Sister Nations could have filed for judicial review. The interests of justice and Reconciliation require that the Sister Nations be added as respondents.

5. The Prothonotary dismissed the Sister Nations' motion for an order that: (i) each of the Sister Nations be added as a respondent to the Application, pursuant to Rules 104(1)(b) and 303(1) of the *Federal Courts Rules*;[1] or (ii) in the alternative, each of the Sister Nations be granted intervenor status in the Application, pursuant to Rule 109(1) of the *Federal Courts Rules*.

6. The Sister Nations submit that the Prothonotary erred in three material respects. First, the Prothonotary committed errors of law or mixed law and fact with respect to the law regarding the duty to consult and accommodate. Second, the Prothonotary committed errors of law or mixed law and fact in departing from the test for joinder as articulated in the Federal Court of Appeal's decision in *Forest Ethics Advocacy Association v. Canada (National Energy Board)*[2] ("***Forest Ethics***"), and failing to consider or apply this Court's decision in *'Namgis First Nation v.*

[1] SOR/98-106.
[2] 2014 FCA 245.

Minister of Fisheries, Oceans and the Canadian Coast Guard et al.[3] *("**'Namgis**"). Third, the Prothonotary committed an error of law in failing to consider and apply the correct test to the Sister Nations' motion for leave to intervene.

7. For these reasons, the Sister Nations respectfully request this Honourable Court: (1) allow their appeal of the Order; and (2) add each of the Sister Nations as respondents to the Application. In the alternative, the Sister Nations request this Honourable Court: (1) allow their appeal of the Order; and (2) grant each of the Sister Nations leave to intervene in the Application.

II. BACKGROUND

A. The Sister Nations

8. Each of the Sister Nations is a band under the *Indian Act*[4] and each Sister Nation is one of the "aboriginal peoples of Canada" within the meaning of section 35 of the *Constitution Act, 1982*.[5]

9. Homalco has unceded and un-surrendered Aboriginal title, rights and interests within and throughout its territory.[6] It exercises its Aboriginal right to fish within and throughout the Discovery Islands.[7] Homalco's continuing exercise of its Aboriginal rights, which include fishing, hunting, gathering and stewardship rights, is inextricably connected to its identity.[8] To implement its Aboriginal right to fish, Fisheries and Oceans Canada ("**DFO**"),[9] issues Homalco an Aboriginal communal fishing licence ("**ACFL**") to fish for food, social and ceremonial purposes,[10] pursuant to their Comprehensive Fisheries Agreement.

10. The Tla'amin Final Agreement (the "**Final Agreement**"),[11] a treaty between Tla'amin, the Government of Canada and the Government of British Columbia, recognizes and protects Tla'amin's Aboriginal rights. Under the Final Agreement, Tla'amin members have the right to: (i) harvest fish and aquatic plants for domestic purposes; and (ii) trade and barter fish and aquatic plants harvested amongst themselves or with other Aboriginal peoples of Canada (the "**Tla'amin**

[3] (July 16, 2020), Vancouver T-1798-19 (FC).
[4] RSC 1985, c I-5; Affidavit of Chief Darren Blaney affirmed on March 2, 2021 ("**Blaney Affidavit**"), para 41; Affidavit of Hegus John Hackett affirmed on March 2, 2021 ("**Hackett Affidavit**"), para 25.
[5] Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Blaney Affidavit, para 41; Hackett Affidavit, para 25.
[6] Blaney Affidavit, para 49; see also Written Representations of Homalco First Nation and Tla'amin Nation dated March 10, 2021 ("**WR**"), para 6.
[7] Blaney Affidavit, para 44, Ex. "G", page 19.
[8] Blaney Affidavit, paras 45 and 53; WR, paras 5 and 7.
[9] Blaney Affidavit, Ex. "J"; WR, para 8.
[10] Blaney Affidavit, Ex. "J"; WR, para 8.
[11] Hackett Affidavit, para 37, Ex. "I"; WR, para 9.

Fishing Right").[12] The Final Agreement provides for annual allocations of fish further to the Tla'amin Fishing Right.[13]

B. Impacts of Fish Farms on the Exercise of the Sister Nations' Rights

11. The populations of wild Pacific salmon the Sister Nations rely on to exercise their Aboriginal rights are nearly extinct.[14] The Sister Nations cannot meaningfully exercise their Aboriginal right to fish due to declines in populations of all species of wild Pacific salmon and other marine resources.[15]

12. Fish farms in the Discovery Islands (the "**Fish Farms**") have had serious, adverse impacts on populations of wild Pacific salmon and other marine resources that members of the Sister Nations rely on to exercise their Aboriginal rights.[16] Homalco is already unable to fish the allocations provided under its ACFL, and in many years is not able to harvest any fish of some species.[17] Tla'amin has not been able to meaningfully exercise its Tla'amin Fishing Right and has never been able to harvest up to its annual allocations.[18]

13. Due to their concerns that any additional stressors will drive imperiled populations of wild Pacific salmon to extinction, and thus extinguish their constitutionally protected rights,[19] the Sister Nations sought and obtained the Minister's commitment to: (a) remove the Fish Farms from their territories; and (b) prohibit the restocking of the Fish Farms during their decommissioning.

C. History behind the Accommodation

14. After a then record-low 1.4 to 1.6 million sockeye returned to the Fraser River in 2009,[20] the three-year Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (the "**Cohen Commission**")[21] recommended that:

> On September 30, 2020, the Minister of Fisheries and Oceans should prohibited 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.[22]

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[12] Hackett Affidavit, para 49, Ex. "I", page 101; WR, para 9.
[13] Hackett Affidavit, para 51, Ex. "I", pages 123-129; WR, para 9.
[14] Blaney Affidavit, para 87; Hackett Affidavit, para 71; WR, para 10.
[15] Blaney Affidavit, para 98; Hackett Affidavit, paras 52 and 79; WR, para 10.
[16] Blaney Affidavit, para 98; Hackett Affidavit, para 80; WR, para 11.
[17] Blaney Affidavit, paras 82 and 84; WR, para 12.
[18] Hackett Affidavit, paras 68 and 79; WR, para 12.
[19] Blaney Affidavit, para 93; Hackett Affidavit, para 77; WR, para 12.
[20] Blaney Affidavit, para 21; Hackett Affidavit, para 8; WR, para 13.
[21] Blaney Affidavit, para 21; Hackett Affidavit, para 8; WR, para 13.
[22] Blaney Affidavit, para 22, Ex. "A", page 25; Hackett Affidavit, para 8, Ex. "A", page 25; WR, para 14.

15. Justice Cohen was clear that "if, by that date [September 30, 2020], DFO cannot confidently say the risk of serious harm is minimal, it should prohibit all net-pen salmon farms from operating in the Discovery Islands"[23] (underlining added).

16. On September 28, 2020, the Minister announced that DFO would consult with seven First Nations, including the Sister Nations, about the Fish Farms,[24] and that consultation would inform her decision on licence renewals for the Fish Farms.[25] Between October 2 and December 4, 2020, the Sister Nations participated in consultations with DFO, the Minister and other First Nations whose territories include the Discovery Islands.[26] The Sister Nations reviewed DFO's documents and attended multiple meetings,[27] including two meetings with the Minister.[28]

17. On December 4, 2020, the Sister Nations and Klahoose First Nation provided DFO with submissions regarding the impact of the Fish Farms on their constitutionally protected Aboriginal rights (the "**Submissions**").[29] The Submissions identified numerous ways the Fish Farms adversely impact the wild salmon and marine resources the Sister Nations rely on, and explained that, to prevent extinguishing their constitutionally protected rights, the Fish Farms needed to harvest their remaining stocks and be decommissioned. The Submissions said the Sister Nations:

> …require that all 21 of the Fish Farms in the Discovery Islands area [be] immediately removed. Licences should only be renewed to allow for the current stocks of farmed fish to be removed and for those fish farms to be decommissioned.[30]

18. The Sister Nations described the requested accommodation as a "Harvest-and-Go Strategy".[31] The Submissions also contained other recommended accommodation measures, including First Nations co-management, First Nations monitoring and changes to the conditions of licences, among others.[32]

19. The Certified Tribunal Record ("**CTR**") summarised the Sister Nations' Harvest-and-Go Strategy as follows:

> Accommodation Measures
>
> - The Nations insist upon all 21 farms in the DI to be immediately removed, with

[23] Blaney Affidavit, para 23, Ex. "A", page 25; Hackett Affidavit, para 8, Ex. "A", page 25; WR, para 15.
[24] Blaney Affidavit, para 30, Ex. "E"; Hackett Affidavit, para 18, Ex. "F"; WR, para 16.
[25] Blaney Affidavit, para 128, Ex. "E"; Hackett Affidavit, para 18, Ex. "F"; WR, para 16.
[26] Blaney Affidavit, para 131; Hackett Affidavit, paras 19 and 91; WR, para 17.
[27] Blaney Affidavit, paras 133-134; Hackett Affidavit, paras 92 and 94; WR, para 17.
[28] Blaney Affidavit, paras 31, 134(v) and (ix); Hackett Affidavit, paras 92(iii) and (v) and 94; WR, para 17.
[29] Blaney Affidavit, para 33, Ex. "G"; Hackett Affidavit, paras 20 and 93, Ex. "G"; WR, para 18.
[30] Blaney Affidavit, para 34, Ex. "G", pp. 174-186; Hackett Affidavit, para 21, Ex. "G", pp. 174-186; WR, para 33.
[31] Blaney Affidavit, paras 34 and 38; Hackett Affidavit, paras 21 and 23.
[32] Blaney Affidavit, Ex. "G", pages 174-186; Hackett Affidavit, Ex. "G", pages 174-186.

> licences issue[d] only to permit the farming of current stocks before decommissioning.[33]

20. In his December 8, 2020 memorandum to the Minister, Deputy Minister Timothy Sargent expressly included three of the Sister Nations' proposed accommodations[34] in his recommendation, saying that "these measures will help address issues and specific accommodation measures raised by the First Nations."[35] Deputy Minister Sargent did not include the Sister Nations' Harvest-and-Go Strategy, as summarized above, in his recommendation.

21. On December 16, 2020, the Minister rejected the Deputy Minister's recommendation and instead incorporated the Harvest-and-Go Strategy in her decision. The Minister's decision, dated December 16, 2020, reads as follows:

- 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.[36]

22. The difference between the Deputy Minister's recommendation and the Minister's Decision are as follows:

a) The Minister did not include area-based management, changes to the conditions of licences and governance arrangements between DFO and the First Nations.

b) The Minister did include the Harvest-and-Go Strategy and First Nations monitoring during the phase out.

23. On December 17, 2020, the Minister:

a) met with the Sister Nations, promising them that the Fish Farms would be phased out over an 18-month period after harvesting their current stocks and confirming that First Nations monitoring would be part of the phasing out the Fish Farms;[37] and

b) publicly announced her decision to phase out open-net salmon farming in the Discovery

[33] CTR, page 54.
[34] Compare the three bullets on the top of page 8 of the CTR with the "Co-Management Accommodations", "Condition of Licence Accommodations" and "Monitoring Accommodations" on pages 179-181 and 183-186 of the Submissions (Blaney Affidavit, Ex. "G"; Hackett Affidavit, Ex. "G").
[35] CTR, page 8.
[36] CTR, page 8.
[37] Blaney Affidavit, paras 35 and 134(ix); Hackett Affidavit, para 94; WR, para 19(a).

Islands by June 30, 2022,[38] including:

(i) issuing 18-month finfish aquaculture licenses pursuant to section 7 of the *Fisheries Act* RSC 1985, c F-14 ("**Aquaculture Licences**") for the Fish Farms;[39]

(ii) prohibiting the issuance of new or replacement Aquaculture Licences to the Farm Farms;[40]

(iii) prohibiting the issuance of licences to restock the Fish Farms under section 56 of the *Fishery (General) Regulations* SOR/93-53 ("**Transfer Licenses**");[41] and

(iv) confirming First Nations monitoring would be part of the phasing out of the Fish Farms[42] (collectively, the "**Decision**").

24. On January 18, 2021, the Applicants filed their respective applications for judicial review of the Decision. While the relief each Applicant seeks is slightly different, the Applicants, in effect, seek to alter, suspend or quash the Decision. Altering, suspending or quashing the Decision would directly affect the Sister Nations' rights by:

a) nullifying an accommodation made by the Crown to protect and preserve their constitutionally protected rights;

b) exposing 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) prolonging intrusions in their territories that damage and prevent them from using traditional harvesting sites; and

d) putting their ability to obtain the same or similar accommodation to protect their Aboriginal and treaty rights in jeopardy.[43]

25. As a result, the Sister Nations requested the Applicants' consent to their addition as

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[38] Blaney Affidavit, para 36, Ex. "H"; Hackett Affidavit, para 22, Ex. "H"; WR, para 19(b).
[39] Blaney Affidavit, para 36(i), Ex. "H" (see "Measures to phase-out salmon farming in the Discovery Islands area: Backgrounder" page 2/3); Hackett Affidavit, para 22(i), Ex. "H" (see "Measures to phase-out salmon farming in the Discovery Islands area: Backgrounder" page 2/3).
[40] Blaney Affidavit, para 36(ii), Ex. "H" (see "Measures to phase-out salmon farming in the Discovery Islands area: Backgrounder" page 1/3); Hackett Affidavit, para 22(ii), Ex. "H" (see "Measures to phase-out salmon farming in the Discovery Islands area: Backgrounder" page 1/3).
[41] Blaney Affidavit, para 36(iii), Ex. "H" (see "Measures to phase-out salmon farming in the Discovery Islands area: Backgrounder" page 1/3); Hackett Affidavit, para 22(iii) (see "Measures to phase-out salmon farming in the Discovery Islands area: Backgrounder" page 1/3).
[42]Blaney Affidavit, para 134(ix), Ex. "H" (see "Measures to phase-out salmon farming in the Discovery Islands area: Backgrounder" page 2/3); Hackett Affidavit, para 94, Ex. "H" (see "Measures to phase-out salmon farming in the Discovery Islands area: Backgrounder" page 2/3).
[43] WR, paras 29-63.

respondents.[44] The Applicants opposed their addition as respondents, but agreed the Sister Nations should be added as intervenors.[45] The Minister supported each of the Sister Nations being added as a respondent.[46] Accordingly, the Sister Nations brought a motion requesting they each be added as a respondent to the Application, or, in the alternative, that they each be granted leave to intervene in the Application.

D. The Order

26. The Prothonotary dismissed the Sister Nations' motion in its entirety.[47] The Prothonotary was not satisfied that the relief sought in the Application would prejudicially affect the Sister Nations in a direct way. The Prothonotary found that the Decision was not an accommodation as it did not expressly grant a right to the Sister Nations. The Prothonotary further denied the Sister Nations' request for leave to intervene in the Application.

III. ISSUES

27. This motion raises the following issue:

a) Should this Court allow the Sister Nations' appeal because the Prothonotary:

(i) committed errors of law or fact with respect to the law regarding the duty to consult and accommodate;

(ii) committed errors of law or fact in departing from the test for joinder in *Forest Ethics* and failing to consider or apply this Court's decision in *'Namgis*; or

(iii) committed an error of law in failing to consider and apply the correct test to the Sister Nations' motion for leave to intervene.

IV. LAW AND SUBMISSIONS

A. Standard of Review

28. The Order is reviewable on the appellate standards of review from the Supreme Court of Canada's decision in *Housen v. Nikolaisen*.[48] In *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*,[49] the Federal Court of Appeal confirmed that the appellate standards of review govern the Federal Court's review of appeals of a prothonotary's order.[50] That is,

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[44] Affidavit of Won Drastil, paras 2-3, Ex. "A" and "B"; WR, para 21.
[45] Affidavit of Won Drastil, paras 6-9, Ex. "E", "F", "G" and "H"; WR, para 21.
[46] Affidavit of Won Drastil, para 10, Ex. "I"; WR, para 21.
[47] Reasons for Order dated March 25, 2021, para 5 ("**Reasons for Order**").
[48] 2002 SCC 33 [*Housen*].
[49] 2016 FCA 215 [*Hospira*].
[50] *Hospira*, paras 66-79.

questions of law and questions of mixed fact and law where there is an extricable legal principle are reviewed on a standard of correctness.[51] Questions of fact are reviewed on a standard of palpable and overriding error.[52]

B. The Law on Joinder and Intervention

29. Rule 303(1)(a) of the *Federal Courts Rules* requires an applicant for judicial review to name as a respondent every person "directly affected by the order sought in the application."

30. Under Rule 104(1)(b), parties may be added as respondents where:

a) they should have been respondents in the first place because they are directly affected by the relief sought; or

b) their presence before the Court is necessary.

31. Satisfaction of either of these requirements is sufficient, if had the tribunal's decision been different, the party seeking joinder could have brought an application for judicial review.[53]

32. In *Forest Ethics*, Mr. Justice Stratas described the test for "directly affected" as follows:

> [21] Translating this to Rule 303(1)(a), the question is whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way. If so, the party should be added as a respondent. If that party was not added as a respondent when the notice of application was issued, then, upon motion under Rule 104(1)(b), it should be added as a respondent[54] (underlining added).

33. In *Shubenacadie Indian Band v. Canada (Attorney General)*,[55] the Federal Court of Appeal endorsed the following passage from *Amon v. Raphael Tuck & Sons* as the test for when a party is a "necessary" party:

> The only reason which makes it *necessary* to make a person a *party* to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party (italics in original).[56]

34. Pursuant to Rule 109(1), the Court may grant leave to intervene to any person to intervene in any proceeding. The test for leave to intervene is flexible, and the ultimate question for the Court is whether the interests of justice require that intervention be granted or refused.[57]

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[51] *Housen*, paras 8, 37.
[52] *Housen*, para 10.
[53] *Forest Ethics,* paras 11 and 18.
[54] *Forest Ethics*, para 21.
[55] 2002 FCA 509 [*Shubenacadie*].
[56] *Shubenacadie*, para 8.
[57] *Sport Maska Inc. v Bauer Hockey Corp,* 2016 FCA 44, para 42 [*Sport Maska*].

C. The Prothonotary erred in Finding the Sister Nations were not Directly Affected

35. In finding the Sister Nations were not directly affected by the relief sought, the Prothonotary:

a) erred in law by misdirecting herself with respect to the law of accommodation and erred in relying on the misdirection with respect to the law of accommodation in finding that the Minister's Decision was not an accommodation; and

b) erred in law by not applying the test for joinder as articulated in *Forest Ethics* and failing to consider or apply this Court's decision in *'Namgis*.

36. The Prothonotary then compounded those errors of law when considering the materials and the evidence before her, including the CTR, the Sister Nations' affidavit evidence and the Notices of Application.

The Prothonotary Misdirected Herself with Respect to the Law of Accommodation

37. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. Section 35(1) did not create Aboriginal rights and does not create the power to grant Aboriginal rights; Aboriginal rights are inherent rights which do not depend on acts of government.[58] Aboriginal rights existed prior to European occupation of Canada[59] and may be proven according to the respective tests for Aboriginal rights or title or recognized and implemented through treaty. The duty to consult and accommodate is a legal and constitutional obligation owed by the Crown to Aboriginal peoples,[60] the purpose of which is to protect Aboriginal and treaty rights and the resources used by Aboriginal peoples to exercise those rights.[61] Meaningful consultation can oblige the Crown to change or amend Crown conduct or policy.[62] Accommodation requires balancing competing societal interests with Aboriginal rights[63] to "adapt, harmonize, or reconcile" those competing interests in a manner that adequately protects Aboriginal rights.[64] Adequate accommodation can take many forms, including amending policy,[65] disallowing a project,[66] imposing additional

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[58] Jack Woodward, *Native Law* (Toronto, Ont: Thomson Reuters, 2019) (loose-leaf updated 2021, release 1), 5§150.
[59] *R. v Van der Peet*, [1996] 2 SCR 507, para 43.
[60] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, para 10 [*Haida*]; *Behn v Moulton Contracting Ltd.,* 2013 SCC 26, para 28.
[61] *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43, paras 33-34, 41, 46, 50, 53 and 83.
[62] *Haida,* paras 46-67; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74, paras 25 and 42 [*Taku River*].
[63] *Haida,* paras 49-50.
[64] *Haida,* para 49.
[65] *Haida,* paras 46-67; *Taku River*, paras 25 and 42
[66] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*., 2017 SCC 40, para 32 [*Clyde River*]; *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561, paras 47 and 58-60; *West Moberly First Nations v British Columbia (Chief Inspector of Mines),* 2011 BCCA 247, para 149; *Homalco Indian Band v British Columbia (Minister of Agriculture, Food & Fisheries),* 2005 BCSC 283, para 127.

requirements for project approval,[67] or imposing specific terms and conditions in certificates or licences.[68] Such accommodations often limit a licensee's rights or operations.[69] The Crown does not need to label a measure designed to protect Aboriginal rights as an "accommodation" for it to be one. [70] Nor is the Crown required to argue a protective measure is an accommodation for the Court to find that it is.[71] However, such a protective measure must respond to a First Nation's concern for it to be an accommodation.[72]

DFO uses policy decisions to discharge the duty to consult and accommodate

38. DFO's policy decisions can attract the duty to consult and accommodate; consultation on a policy may discharge that duty for that policy and decisions that flow from it. In *Morton v. Canada (Fisheries and Oceans)*[73] ("***Morton 2019***"), the Federal Court confirmed that policy decisions can engage the duty to consult and accommodate.[74] In *'Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)*,[75] the Federal Court of Appeal confirmed that DFO's consultation and accommodation on policies can discharge the duty to consult and accommodate on subsequent decisions, including the issuance of Transfer Licences, provided (i) the subsequent

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[67] *Taku River,* para 2.
[68] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*., 2017 SCC 41, paras 20, 24, 51, 57 and 64 [*Chippewas*]; *Taku River,* paras 41 and 44; *Prophet River First Nation v British Columbia (Minister of the Environment),* 2017 BCCA 58, para 53 [*Prophet River*] (see also *Prophet River First Nation v British Columbia (Minister of the Environment)*, 2015 BCSC 1682, paras 80-87); *Nunatsiavut v Canada (Department of Fisheries and Oceans),* 2015 FC 492, paras 54 and 85; *Adam v Canada (Environment),* 2014 FC 1185, paras 44, 76, 91 [*Adam*]; *Halalt First Nation v British Columbia (Minister of Environment),* 2012 BCCA 472, para 170 [*Halalt BCCA*]; *Coldwater First Nation v Canada (Attorney General),* 2020 FCA 34, para 77; *William v British Columbia (Attorney General),* 2019 BCCA 74, para 46 [*William*]; *Bigstone Cree Nation v Nova Gas Transmissions Ltd.,* 2018 FCA 89, paras 37, 53-54, 72-75; *Martin v New Brunswick*, 2016 NBQB 138, para 174 [*Martin*]; *Liard First Nation v Yukon Territory (Minister of Energy, Mines & Resource*s), 2011 YKSC 55, paras 44-58 [*Liard*].
[69] *Prophet River First Nation v British Columbia (Minister of the Environment),* 2015 BCSC 1682 (affirmed by *Prophet River*), para 81 – the licensee was prohibited from building new works and required to modify and relocate other project works; *Halalt BCCA* (reversing 2011 BCSC 945 [*Halalt BCSC*]), paras 24 and 170 – project significantly scaled back and project restricted from pumping water in summer; *William v British Columbia (Attorney General),* 2018 BCSC 1425, para 44 (affirmed by *William*) – licensee prohibited from operating heavy machinery at specific times and locations, timber clearances limited; *Adam,* paras 1, 4, 19, 76, 91, 98, 102 and 105 – numerous binding conditions limited project operations.
[70] *Chippewas,* para 50 – the proponent, not the Crown successfully argued the conditions were accommodations; the Crown labelled them conditions that would "enhance [the] current and ongoing pipeline integrity, safety and environmental protection measures" (see *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*., 2015 FCA 222, para 17); *Martin,* para 174 – accommodation found adequate despite the Crown not arguing it had made accommodations; *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation),* 2013 ABCA 443 (reversing *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation),* 2012 ABQB 579), paras 42, 48-49 and 57 – the Crown refrained from calling the protective measures accommodation but said that the First Nation's concerns were integrated into the expansion plan.
[71] *Taku River*, paras 41 and 44 (see also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2002 BCCA 59, para 199 [*Taku River BCCA*]); *Chippewas,* para 50.
[72] *Halalt BCCA,* paras 169-170.
[73] 2019 FC 143.
[74] *Morton* 2019, paras 318, 330 and 334.
[75] 2020 FCA 122 [*'Namgis FCA*].

decision is consistent with the policy previously consulted on and (ii) no evidence of a novel adverse impact has emerged subsequent to the previous consultation.[76] DFO regularly takes the position that consultation on policies and aquaculture licences is sufficient to discharge the duty to consult and accommodate First Nations.[77]

The Prothonotary did not apply the law on the duty to consult and accommodate

39. The Decision flowed directly from consultation and implemented an accommodation measure requested by the Sister Nations. Regardless, the Prothonotary found that the Decision was not an accommodation:

> [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 (underlining added). [78]

40. The Prothonotary misapprehended the nature of the Decision and did not recognize it as a policy decision flowing from the duty to consult and accommodate. Additionally, the Prothonotary's reasons demonstrate three fundamental misunderstandings of the law on the duty to consult and accommodate:

a) Accommodations may take the form of changes to policies.[79]

b) Accommodations do not grant rights; accommodations are measures to avoid or mitigate impacts to *existing* asserted or established Aboriginal or treaty rights.

c) An action or inaction need not be expressly labelled an "accommodation" to be one.

[76] *'Namgis FCA,* paras 34-38.
[77] *Morton 2019*, paras 301 and 303.
[78] Reasons for Order, para 40.
[79] *Haida,* para 47; *Taku River,* para 25.

The Prothonotary misapprehended the nature of the Decision

41. The Prothonotary mischaracterizes the Decision as a "a denial of an aquaculture license to the Applicants on the terms sought and a pronouncement as to the future of the Applicants' operations" (underlining added) and as limiting the "rights" of the Applicants. However, other than extending their annual terms so they run for 18 months, the Minister did not change any conditions of the Applicants' aquaculture licences. [80] Further, the Applicants have no "right" to the renewal of Aquaculture Licences[81] or Transfer Licenses to stock their fish farms.[82] The Decision, properly characterized, did not change the conditions of Aquaculture Licences or the Applicants' "rights". It is a policy decision to discontinue fish farming in the Discovery Islands by not granting further Aquaculture Licences beyond June 2022 or Transfer Licences to stock the Fish Farms during that phase-out period. That policy Decision was not solely focused on the Applicants' interests, but was made through constitutionally required consultation, which reconciled the Sister Nations' Aboriginal rights with the fish farming industry's operations.

An Accommodation may serve Multiple Purposes and take Multiple Forms

42. Despite consultations with the Discovery Islands First Nations being "the only rationale provided" for the Decision,[83] the Prothonotary's misdirection on the law of the duty to consult and accommodate led her to err in finding that the Decision was not an accommodation.

43. The Prothonotary failed to consider or apply the case law on the duty to consult which has repeatedly found that limitations on the operations or rights of industry licensees contained in policies, decision statements, authorizations, certificates or licences are accommodations.[84] The Prothonotary gave no consideration to the fact that the Decision flowed from consultation with the Sister Nations or engaged the Crown's constitutional duty to protect Aboriginal rights and instead focused exclusively on its impact on the Applicants' "rights".

Accommodations need not "grant" rights

44. The Prothonotary erred in law in finding that the Decision was not an accommodation because it did not "grant" the Sister Nations any rights. An accommodation need not grant any

[80] Blaney Affidavit, Ex. "H"; Hackett Affidavit, Ex. "H".
[81] *Fisheries Act,* s. 7; *Morton v Canada (Fisheries and Oceans),* 2015 FC 575, paras 10 and 11 [*Morton 2015*]; *Anglehart v Canada,* 2016 FC 1159, para 120; *Area Twenty Three Snow Crab Fisher's Assn. v. Canada (Attorney General)*, 2005 FC 1190, para 44.
[82] *Fishery (General) Regulations*, s. 56; *Morton 2015*, paras 14-15, 54; *Barry Group Inc. v Canada,* 2017 FC 1144, para 45.
[83] See Cermaq's Notice of Application ("**Cermaq NOA**"), para 59.
[84] Please see case law cited above at footnotes 68 and 69.

right; it must be aimed at protecting existing or asserted Aboriginal rights. As the Supreme Court of Canada explained in *R. v. Van der Peet*,[85] section 35 of the *Constitution Act, 1982,* did not create Aboriginal rights – Aboriginal rights pre-date Crown sovereignty in Canada.[86] Accommodations need not grant any right, Aboriginal or otherwise, to an Aboriginal people.

45. The Prothonotary fundamentally misunderstood the Ontario Superior Court of Justice's decision in *Ontario Federation of Anglers and Hunters v. Ontario* [87] (*"**Ontario Federation***"). In *Ontario Federation*, the Crown did not grant the First Nation an Aboriginal right, but instead adopted an Interim Enforcement Policy for angling and hunting that excepted the First Nation from enforcement provisions so that the First Nation could exercise pre-existing rights while litigation regarding those rights unfolded. [88] Regardless, even if the Crown had granted the First Nation a right, that is not the only form an accommodation may take.

46. The Prothonotary's misdirection led her to err in finding that the Decision was not an accommodation because is did not grant the Sister Nations a right.

The Crown does not need to "expressly" label a protective measure an accommodation

47. The Prothonotary erred in law in finding that the Decision was not an accommodation because it was not "expressly" labelled as such. The Prothonotary did not cite any case law for her conclusion that changes in policy needed to be expressly labelled as "accommodations" for measures aimed at avoiding impacts to Aboriginal rights to be accommodations. Nor did the Prothonotary consider or apply any of the case law in which the Courts have found measures implemented by the Crown in response to Aboriginal concerns to be accommodations despite the Crown[89] or the affected First Nation not expressly labelling them as "accommodations".

48. The Supreme Court of Canada has repeatedly held that an administrative tribunal may accommodate Aboriginal interests by imposing licence conditions or refusing an approval, despite not labelling those protective measures as accommodations.[90] Courts routinely find that license conditions mitigating environmental impacts also accommodate First Nations, even if the impacted First Nation does not agree.[91] In *Taku River,* the Supreme Court of Canada found that the First Nation had been adequately accommodated, despite the Crown not labelling any of the responsive measures as accommodations.[92]

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[85] [1996] 2 SCR 507 [*Van der Peet*].
[86] *Van der Peet*, paras 28-31.
[87] 2015 ONSC 7969.
[88] *Ontario Federation*, paras 6 and 7.
[89] Please see case law cited above at footnote 70.
[90] *Clyde River,* para 32; see also *Chippewas,* paras 51 and 57; see also *Taku River,* paras 41 and 44.
[91] See e.g. *Halalt BCCA,* paras 142, 169-170 and *Halalt BCSC*, para 7; see also *Liard*.
[92] *Taku River,* paras 41 and 44 (see also *Taku River BCCA*, para 199).

The Prothonotary did not properly consider the materials and evidence before her – the CTR

49. Due to her misdirection on the duty to consult and accommodate, the Prothonotary did not properly consider the materials and evidence before her. By labouring under the error that the Crown must expressly label protective as "accommodations", the Prothonotary, in the words of Mr. Justice Rennie, failed to properly review the materials and evidence before her "to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn."[93] The dots were unmistakable:

a) The Sister Nations proposed their Harvest-and-Go strategy directly to the Minister[94] and to DFO in their Submissions.[95]

b) The CTR summarized their Harvest-and-Go strategy as the very first of the Sister Nations' "Accommodation Measures".[96]

c) The Deputy Minister did not include the Harvest-and-Go strategy in his list of recommended "specific accommodation measures raised by First Nations".[97]

d) The Minister rejected the Deputy Minister's recommended accommodation measures and instead adopted the Sister Nations' Harvest-and-Go strategy.[98]

e) The CTR's summary of the Sister Nations' Harvest-and-Go strategy is the only source in the CTR for phasing out the Fish Farms without re-stocking.

The Prothonotary did not properly consider the materials and evidence before her– the Sister Nations' Affidavits

50. The Prothonotary's reasons provide no indication she considered the affidavits of Chief Blaney of Homalco or Hegus Hackett of Tla'amin in which each affiant describes two meetings with the Minister.[99] In the first of those meetings, the Sister Nations expressly described the need for their Harvest-and-Go strategy to the Minister;[100] in the second meeting, the Minister confirmed her decision to discontinue fish farming in the Discovery Islands, integrating the prohibition on restocking the Fish Farms.[101] The Prothonotary did not consider how those

[93] *Komolafe v Canada (Citizenship and Immigration),* para 11. For examples of the Supreme Court of Canada citing this axiom with approval, please see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Delta Air Lines Inc v Lukacs*, 2018 SCC 2; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4.
[94] Blaney Affidavit, para 135; Hackett Affidavit, paras 92(iii) and 94.
[95] Blaney Affidavit, para 34, Ex. "G", pages 174-177; Hackett Affidavit, para 21, Ex. "G", pages 174-177.
[96] CTR, page 54.
[97] CTR, page 8.
[98] CTR, page 8.
[99] Blaney Affidavit, paras 35 and 134(ix); Hackett Affidavit, paras 92(v) and 94.
[100] Blaney Affidavit, para 134(v); Hackett Affidavit, para 92(iii).
[101] Blaney Affidavit, para 134(ix); Hackett Affidavit, para 94.

meetings engage significant principles of Aboriginal law, including how the honour of the Crown is the source of the duty to consult,[102] that the honour of the Crown is always at stake in dealings with Aboriginal peoples or that honourable negotiation through consultation is central to fulfilling the promise of s. 35 of the *Constitution Act, 1982*:

> Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, supra, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. 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. This, in turn, implies a duty to consult and, if appropriate, accommodate.[103]

51. Significantly, the Prothonotary gave no consideration to the exceptional circumstance of the Minister meeting directly with the Sister Nations, including the role such a meeting may play in Reconciliation, the weight First Nations would give to words spoken by the Minister, or the role those may have played in the Minister coming to her Decision.[104] It is an error of law to fail to consider material evidence.[105]

The Prothonotary did not properly consider the materials and evidence before her– the Notices of Application

52. In paragraph 40 of her reasons, the Prothonotary said that:

> 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.

53. This conclusion flows from the Prothonotary's misdirection on the law of the duty to consult and accommodate. First, the remedy sought will directly affect the Sister Nations: the Applicants seek to quash a Decision for which, in Cermaq Canada Ltd.'s ("**Cermaq**") words, the "only rationale" is consultations with the Discovery Islands First Nations. The Sister Nations' request for the decommissioning of the Fish Farms without re-stocking is the only rationale in the CTR for the Minister Decision.

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[102] *Haida,* para 16.
[103] *Haida,* para 20.
[104] Blaney Affidavit, paras 134(v) and (ix); Hackett Affidavit, para 94. See also *Fort McKay First Nation v Prosper Petroleum Ltd,* 2020 ABCA 163, paras 77 and 83 and WR, paras 39 and 60 for a discussion on the role of Crown promises in Reconciliation.
[105] *Van de Sype v Saskatchewan Government Insurance*, 2020 SKCA 18, para 68.

54. As *Haida* confirms, accommodations, such as amendments to policy, are "to avoid irreparable harm or to minimize the effects of infringement" to an Aboriginal right.[106] Quashing, suspending or altering the Decision will change or remove a protection for the Sister Nations' Aboriginal and treaty rights and thus directly affect the Sister Nations' Aboriginal rights.

55. Second, the Prothonotary failed to apprehend that the Notices of Application repeatedly raise issues directly related to the duty to consult and accommodate which go directly to the reasonableness and procedural fairness of the Decision:

a) 622335 British Columbia Ltd. raised at least four grounds which go directly to the duty to consult and accommodate:

(i) its lack of awareness of the consultation process, including its structure, topics, materials exchanged;[107]

(ii) "[p]rospects of meaningfully consulting and achieving reasonable accommodation with affected First Nations";[108]

(iii) the need for the "Applicant to know the case against it – including the case being made in the course of consultation with the First Nations" (underlining added);[109] and

(iv) echoing the language of the Supreme Court of Canada in its definition of "accommodation" in *Haida,*[110] with respect to why other interests could not be "reconciled with the concerns raised by the consulted First Nations";[111]

b) Cermaq raised three grounds which go directly to the duty to consult and accommodate:

(i) consultation being "the only rationale provided" for the Decision;[112]

(ii) the correctness of the record of consultation with the First Nations put before the Minister;[113] and

(iii) Cermaq's alleged opportunity to negotiate directly with the First Nations and enter into agreements with them;[114]

c) Grieg Seafood B.C. Ltd. raised one ground which goes directly to the duty to consult and accommodate:

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[106] *Haida,* para 47.
[107] 622335 British Columbia Ltd.'s Notice of Application ("**335 NOA**"), para 22.
[108] 335 NOA, para 37.
[109] 335 NOA, para 43.
[110] See *Haida* para 39.
[111] 335 NOA, para 40.
[112] Cermaq NOA, para 59.
[113] Cermaq NOA, para 67(p).
[114] Cermaq NOA, para 67(q).

(i) the Minister's reliance on consultation with the First Nations rather than scientific, social or economic factors;[115]and

d) Mowi Canada West Inc. ("**Mowi**") raised four grounds which go directly to the duty to consult and accommodate:

(i) the role of fish farming in Indigenous communities;[116]

(ii) Mowi's ability to meet directly with First Nations;[117]

(iii) the Minister's reliance on consultation with the First Nations rather than scientific, social or economic factors;[118] and

(iv) the Minister failed to provide the Applicants with the opportunity to respond to the case it had to meet.[119]

56. In their Notices of Application, all the Applicants specifically request that the Minister provide them with all records of consultation with the First Nations.[120]

57. In her reasons, the Prothonotary expressly summarized the Applicants' grounds as including: (i) the lost opportunity to come to agreements with First Nations;[121] (ii) the nature of the consultations and how the issues raised in consultations with the First Nations could not be reconciled with other interests;[122] and (iii) that the Applicants were not given the opportunity to know the case the First Nations made against them.[123]

58. These grounds go directly to the reasonableness of a decision based on the duty to consult and accommodate (Did the decision reasonably reconcile Aboriginal rights and competing interests?) and the interaction between the duty to consult and accommodate and the procedural fairness owed a proponent (What right does the proponent have to participate in consultation? When should a proponent have a right to review submissions from a First Nation? Is a proponent owed an opportunity to come to an agreement with an affected First Nation?).[124]

59. However, the Prothonotary failed to apprehend how these grounds challenging both the reasonableness and the procedural fairness of the Decision interacted with the duty to consult and

[115] Grieg Seafood B.C. Ltd.'s Notice of Application ("**Grieg NOA**"), para 23.
[116] Mowi Canada West Inc.'s Notice of Application ("**Mowi NOA**") paras 28-31.
[117] Mowi NOA, para 60.
[118] Mowi NOA, para 66.
[119] Mowi NOA, para 74(d).
[120] 335 NOA, page 18; Cermaq NOA, page 20; Mowi NOA, page 19; Grieg NOA, page 12.
[121] Reasons for Order, para 27(g).
[122] Reasons for Order, para 27(l).
[123] Reasons for Order, para 27(m).
[124] See *Taseko Mines Limited v. Canada (Environment),* 2017 FC 1100, paras 86-89, 95, 100.

accommodate and the role that duty played in the Minister making the Decision.

Conclusion on the duty to consult and accommodate

60. The Prothonotary, by misdirecting herself on the duty to consult and accommodate, failed to apprehend that the Decision was about more than the Applicants' rights and apprehend it for what it was – an amendment of Crown policy flowing from the constitutionally required reconciling of Aboriginal rights with competing interests. She compounded this error by failing to apprehend that the Applicants challenge the result of that constitutional reconciliation of adverse interests and by failing to see that the only rationale in the CTR for the Decision is the Sister Nations' proposed Harvest-and-Go Strategy. She further failed to consider the Sister Nations' evidence in light of the duty to consult and accommodate and further failed to recognise grounds in the Notices of Application that challenge the Decision on the basis of the duty to consult and accommodate.

The Prothonotary failed to Follow *Forest Ethics* and *'Namgis*

61. The Prothonotary found the Sister Nations were not directly affected because she committed errors of law by departing from the leading case on joinder – *Forest Ethics* – and not considering the case closest to the Sister Nations' motion on the facts - *'Namgis*.

The Prothonotary's Departure from Forest Ethics was an Error of Law

62. The Prothonotary was required to follow the Federal Court of Appeal's decision in *Forest Ethics* and erred in law in failing to do so. In *Forest Ethics,* two parties sought joinder: the project proponent, Enbridge Pipelines Inc. ("**Enbridge**"); and, one of its contractors, Valero Energy Inc. ("**Valero**"). Mr. Justice Stratas found Enbridge should be added as a respondent because it was directly affected, but found Valero was only indirectly affected and should not be joined. With respect to Enbridge, Mr. Justice Statas said:

> [24] In Enbridge's case, the prejudice is direct. The Board's proceeding is about whether Enbridge's project should be approved. If the relief sought in the judicial review is granted, the proceedings before the Board will have to be rerun to some extent, delaying Enbridge's project. Further, if the relief sought is granted, potentially many persons and organizations from different perspectives will have rights of participation where, before, they did not. The Board might accept some of the new participants' arguments, leading to the rejection of Enbridge's application for approval

> of its project. The risk of that happening directly affects Enbridge, the proponent of the project (underlining added).[125]

63. With respect to Valero, Mr. Justice Statas found that any remedy obtained in the judicial review would only have only indirect and consequential impacts on its commercial relationship as a sub-contractor to Enbridge.[126]

64. Mr. Justice Stratas' finding with respect to Enbridge is consistent with the remedies available for judicial review. As the Court cannot generally substitute its decision for a tribunal's decision, any applicant or respondent, other than the decision-maker itself, is unlikely to be directly affected by the Court's ruling itself and is likely only to be directly affected by the tribunal's subsequent reconsideration of a decision. Thus, Mr. Justice Stratas held that, for a party with a direct interest in a decision, a reconsideration of that decision directly and prejudicially affects that party sufficiently for it to be added as a party: the reconsideration puts the affected party's interest at risk. If, as the Prothonotary found, a reconsideration of a decision is insufficient to directly affect an interested party, it would be difficult, if not impossible, for any party other than the decision-maker itself to satisfy the directly affected test.

65. Consistent with Mr. Justice Stratas' findings regarding Enbridge, the Sister Nations submitted that if the Applicants obtained the relief they sought, then any reconsideration of the Decision:

a) would delay the implementation of the accommodation the Sister Nations sought and obtained from the Crown, thus prolonging the operations of the Fish Farms in their territories and thereby prolonging exposure of the fish they rely on to exercise their Aboriginal and treaty rights to harmful pathogens;[127] and

b) would put at risk their ability to again obtain the accommodation they had sought and obtained.[128]

66. In a clear departure from *Forest Ethics,* the Prothonotary found that if the Court granted the Applicants the relief sought, the Minister may or may not come to the same decision and thus any effect on the Sister Nations was speculative, consequential or indirect.[129]

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[125] *Forest Ethics,* para 24.
[126] *Forest Ethics,* paras 25 to 29.
[127] WR, para 29.
[128] WR, para 29.
[129] Reasons for Order, para 41.

The Prothonotary wrongly relied on distinguishable cases

67. Instead of *Forest Ethics*, the Prothonotary relied on *Gitxaala Nation v. Prince Rupert Port Authority*[130] (*"**Gitxaala***") and *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans*)[131] ("***Kwicksutaineuk/Ah-kwa-mish Tribes***") for her findings.

68. The Prothonotary erred in relying on *Kwicksutaineuk/Ah-kwa-mish Tribes*. It was an application for judicial review in which the Court held the applicant lacked standing because, having grounded its arguments in the Minister's decision being *ultra vires,* the applicant's allegations of infringement and breach of the Minister's "fiduciary duty to consult" had no bearing on whether the applicant was directly affected.[132] Furthermore, *Kwicksutaineuk/Ah-kwa-mish Tribes* should not be relied on: it was decided before *Haida* and *Forest Ethics.*

69. In *Gitxaala*, Prothonotary Ring found that the First Nations (the "**Moving Nations**") seeking joinder would only be indirectly affected for the following reasons:

a) Like Valero in *Forest Ethics,* impacts on the Moving Nations' commercial contracts with the project proponent could only be indirect.[133] The Sister Nations did not rely on potential impacts to commercial contracts in their original motion.[134]

b) The interests that were alleged to be put at risk from the reconsideration of the project approval did not "flow directly from consultation and accommodation of their asserted Aboriginal title and rights in the Project area."[135] The Sister Nations argued that an accommodation that flowed directly from consultation on their Aboriginal right to fish would be directly affected.[136]

c) The Moving Nations did not establish that, if they refused to re-engage in consultation on the reconsideration of the decision, they would be prejudicially affected in some direct way.[137] The Sister Nations never raised the prospect of not participating in subsequent consultation and focused on the result of any reconsideration, arguing that the reconsideration would put their accommodation at risk.[138]

d) Additional time and expense for the Moving Nations to participate in the process of

[130] 2020 CanLII 382.
[131] 2003 FCT 30.
[132] *Kwicksutaineuk/Ah-kwa-mish Tribes,* para 11.
[133] *Gitxaala*, paras 35-38.
[134] WR, para 29.
[135] *Gitxaala,* para 38.
[136] WR, paras 29-41.
[137] *Gitxaala,* para 34.
[138] WR, para 29.

additional consultation did not constitute a direct impact.[139] Again, the Sister Nations never raised or relied on this point.

70. Neither *Gitxaala* nor *Kwicksutaineuk/Ah-kwa-mish Tribes* provide any justification for the Prothonotary's error in law in departing from *Forest Ethics.*

The Prothonotary should have considered and applied 'Namgis

71. Further, the Prothonotary compounded this error by failing to consider and apply this Court's decision in *'Namgis* – a joinder decision which is not only consistent with *Forest Ethics,* but was also made in the context of a judicial review of an aquaculture policy.

72. In *'Namgis*, 'Namgis First Nation brought an application for judicial review of a DFO policy decision allowing the stocking of fish farms with fish infected with the *piscine orthoreovirus* ("**PRV**"). The policy governed the issuance of transfer licences under section 56 of the *Fishery (General) Regulations*[140] – the same licences required to stock the Fish Farms that the Decision currently prohibits. No particular transfer licences were at issue in the application for judicial review. 'Namgis First Nation named the Minister as the sole respondent. Mowi and Cermaq each brought a motion to be added as a respondent.

73. 'Namgis First Nation argued that the relief sought in the application would not directly affect Mowi or Cermaq because "neither their aquaculture licences nor their past Transfer Licences grant Mowi or Cermaq any legal rights that would be directly affected by the Court quashing the PRV Policy or by the Court ordering the Minister to reconsider it."[141] 'Namgis First Nation in effect argued that the reconsideration would only indirectly affect Mowi and Cermaq.

74. Prothonotary Ring rejected that argument and found that "[i]f the Applicant is successful on the application, and the reconsidered PRV Policy is declared unlawful, the validity of Mowi's and Cermaq's current Transfer Licences, and their ability to obtain future Transfer Licences, may be placed in jeopardy" and "Mowi and Cermaq would be prejudicially affected in a direct way by the relief sought on the present application" (underlining added). [142] In effect, in reasoning consistent with paragraph 24 of *Forest Ethics,* the Minister's reconsideration of the policy put Mowi's and Cermaq's ability to obtain the same result as the current policy at risk, thereby directly and prejudicially affecting Mowi and Cermaq sufficiently to be added as parties.

[139] *Gitxaala,* para 33.
[140] *'Namgis*, para 2.
[141] *'Namgis*, para 51.
[142] *'Namgis*, paras 50 and 52.

75. The Prothonotary failed to even consider *'Namgis*, despite the Sister Nations' express reliance on it and the obvious parallels:

a) Both *'Namgis* and the Application are applications for judicial review of policy decisions governing the issuance of licences required for fish farming.[143]

b) The PRV Policy did not grant Mowi or Cermaq any legal rights, but it protected their operations by allowing them to stock their fish farms with fish infected with PRV.[144] In the present Application, the Decision protects the Sister Nations' Aboriginal right by providing them the accommodation they expressly proposed to the Crown.[145]

c) In *'Namgis*, if the application was allowed, the PRV Policy would have been overturned and the Minister would have been required to reconsider it. Prothonotary Ring found that reconsideration would place Mowi and Cermaq's ability to obtain future transfer licences in jeopardy and that this risk was sufficient to demonstrate that they would be prejudicially and directly affected by the relief sought.[146] If the present Application is allowed, the Decision will be overturned and the Minister will be ordered to reconsider it, placing the Sister Nations' ability to obtain the accommodation they already sought and obtained at risk.

76. Despite the obvious applicability of *'Namgis,* the Prothonotary, without considering or distinguishing it, found that any effect of a reconsideration jeopardizing the Sister Nations' ability to obtain the same accommodation was "speculative and/or consequential and indirect."

77. The only distinguishing feature between *'Namgis* and the Sister Nations' motion for joinder is that the nature of the parties has been reversed. In *'Namgis*, the First Nation brought the application for judicial review and industry was joined as respondents. In the present Application, industry has brought the application for judicial review and the First Nations have been denied the opportunity to participate in the Application. This distinction between the parties should not constitute a ground for disqualifying the Sister Nations as respondents.

Forest Ethics and 'Namgis should have been applied and followed

78. The Sister Nations submit that *Forest Ethics* and *'Namgis* are determinative of the motion that was before the Prothonotary. In *Forest Ethics,* Mr. Justice Stratas found that the reconsideration of the decision directly and prejudicially affected Enbridge's interests in three ways: (i) delaying the approval, (ii) the risk of not obtaining the same result, and (iii) changes to the process the decision-maker uses for the reconsideration could lead to a different result.

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[143] *'Namgis*, para 2.
[144] *'Namgis,* para 15.
[145] Blaney Affidavit, para 34, Ex. "G", pages 174-186; Hackett Affidavit, para 21, Ex. "G", pages 174-186; WR, paras 18 and 33.
[146] *'Namgis,* paras 49-50.

79. All three of those elements are present in the current Application:

a) any reconsideration of the Decision will delay the implementation of the accommodation the Sister Nations sought and obtained, specifically, the decommissioning of the Fish Farms without re-stocking;

b) any reconsideration of the Decision will put the Sister Nations' ability to obtain the same accommodation that they already sought and obtained; and

c) the Court's determination of the Application may result in changes to the process the Minister uses for reconsidering the Decision, including:

(i) the way the Minister balances the Sister Nations' concerns with scientific, social or economic factors;[147]

(ii) reconciling the Sister Nations' interests and other interests in a different manner,[148] including different accommodation measures;[149] and

(iii) allowing the Applicants to have different rights of participation in the reconsideration, including:

1. input into the consultation process, including its structure, topics and materials exchanged;[150]
2. input into the correctness of the consultation record;[151]
3. the right to meet with the Sister Nations;[152]
4. the right to review the Sister Nations' submissions;[153] and
5. the right to negotiate agreements with the Sister Nations.[154]

80. Importantly, it is not the Sister Nations who raise these issues. The Applicants raise them in their Notices of Application. The Court's determination of those issues may directly change the process of any reconsideration of the Decision in the same manner that, in *Forest Ethics,* changes to the process for reconsidering Enbridge's project approval directly affected it. Notably, in *Morton 2019,* the last judicial review of a DFO aquaculture policy, the Federal Court expressly ordered the Minister to "reconsider the continuation of the PRV Policy taking these reasons into consideration" (underlining added).[155]

[147] Grieg NOA, para 23; Mowi NOA, para 66.
[148] See 335 NOA, para 40.
[149] 335 NOA, para 37.
[150] 335 NOA, para 22.
[151] Cermaq NOA, para 67(p).
[152] Cermaq NOA, para 67(q); Mowi NOA, para 60.
[153] Mowi NOA, para 74(d).
[154] Cermaq NOA, para 67(q).
[155] *Morton 2019*, Judgement (T-1710-16, bullet 2).

81. The Sister Nations submit that the Prothonotary's departure from *Forest Ethics* was an error of law. Further, the Sister Nations submit that, although the Protonotary was not required to follow *'Namgis*, judicial comity required her to give it considerable weight and "advance cogent reasons" for departing from it[156] in order to "provide for certainty and predictability in the law".[157]

Conclusion on the directly affected test

82. The Sister Nations submit they meet the test for joinder in *Forest Ethics.* Whether the Decision is an accommodation, or the Crown's "balancing of interests", it is the outcome the Sister Nations sought and obtained through consultation with the Crown. The Sister Nations have a direct interest in the Decision because it protects their Aboriginal rights. Any reconsideration of the Decision flowing from the remedies sought in the Application will directly and prejudicially affect the Sister Nations in the same manner the potential reconsideration of project approval in *Forest Ethics* directly affected Enbridge.

D. The Sister Nations are Necessary Parties

83. Because the Decision flowed from consultation with them, the Sister Nations are necessary so the Court can effectually and completely determine the reasonableness of the Decision and how the procedural fairness provided to the Applicants accords with the Minister's duty to consult and accommodate.

84. In dismissing the Sister Nations' submissions on why they are necessary parties, the Prothonotary found that:

> 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.[158]

85. The Sister Nations submit that this error flows from the Prothonotary's misapprehension of the Decision and her misdirection on the law of the duty to consult and accommodate.

86. First, the Prothonotary, with respect to the Sister Nations' participation, failed to apprehend the Decision as a change in policy with respect to fish farming in an entire geographical area that flowed from constitutionally required consultation between the Crown and Aboriginal peoples and which was "heavily informed" by the input of those Aboriginal peoples.

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[156] *Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10, para 35.
[157] *Stone v Canada (Attorney General),* 2012 FC 81, para 12
[158] Reasons for Order, para 43.

87. Second, as the Decision flowed from the duty to consult and accommodate, the Minister was required "to avoid irreparable harm or to minimize the effects of infringement"[159] on the Sister Nations' Aboriginal and treaty rights and to "balance competing societal interests"[160] when considering DFO's policy on fish farming in the Discovery Islands.[161] Any challenge to the reasonableness of an amendment of Crown policy which flowed from consultation will necessarily engage the reasonableness of how the Crown reconciled Aboriginal rights with the Applicants' interests.

88. Due to her misdirection on the duty to consult and accommodate, the Prothonotary failed to apprehend the grounds expressly identified in the Notices of Application challenging the reasonableness of how the Crown reconciled Aboriginal rights with the Applicants' interests:

a) the "prospects of meaningfully consulting and achieving reasonable accommodation with affected First Nations";[162]

b) echoing the definition of "accommodation" in *Haida,*[163] why other interests could not be "reconciled with the concerns raised by the consulted First Nations";[164]

c) the Minister's reliance on consultation with the First Nations rather than scientific, social or economic factors;[165]

d) the correctness of the record of consultation with the First Nations put before the Minister and the consistency of the Decision with that record;[166] and

e) consultation as the only rationale for the Decision.[167]

89. Each of the grounds above engage how the Decision reasonably balanced competing interests, including the Sister Nations' interests. The Sister Nations submitted that their participation in the Application was necessary to address how the Minister's balancing of those adverse interests was reasonable,[168] and how, as it was their rights at stake, only the Sister Nations could adduce evidence on how those rights were considered and would be impacted by the Application.[169] The Sister Nations also submitted that the Minister could not be relied on to

[159] *Haida,* para 47.
[160] *Haida*, para 50
[161] *Haida,* para 47.
[162] 335 NOA, para 37.
[163] See para 37.
[164] 335 NOA, para 40.
[165] Mowi NOA, para 66; Grieg NOA, para 23.
[166] Cermaq NOA, para 67(p).
[167] Cermaq NOA, para 59.
[168] WR, paras 66 and 69-70.
[169] WR, paras 72 and 76.

advocate on behalf of the Sister Nations' interests[170] or adduce all the evidence the Court would require.[171]

90. The Notices of Application expressly ground their challenge of the Decision in procedural fairness issues that directly engage the duty to consult and accommodate, including:

a) the consultation process including its structure, topics and materials exchanged;[172]

b) the correctness of the consultation record;[173]

c) the right to meet with the Sister Nations;[174]

d) the right to review the Sister Nations' submissions;[175] and

e) the right to negotiate agreements with the Sister Nations.[176]

91. The Sister Nations submitted that they were necessary to determine if the procedural fairness provided the Applicants was reasonable when balanced against the requirements of the duty consult.[177]

92. The Sister Nations further submit that as the Applicants dispute if the Decision included an accommodation of the Sister Nations' rights, then there are live questions before the Court for which the Sister Nations are necessary to effectually and completely determine, which are raised by the Notices of Application:

a) Was the Minister's reliance on consultation with the First Nations rather than scientific, social or economic factors reasonable?

b) Why other interests could not be reconciled with the concerns raised by the consulted First Nations?

93. The Sister Nations submit that they identified questions raised directly by the Applicants for which they must be added as respondents for the Court to effectually and completely determine and submit that the Prothonotary's misdirection on the duty to consult and her misapprehension of the Decision caused her to err when determining this issue.

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[170] WR, para 71.
[171] WR, para 70.
[172] 335 NOA, para 22.
[173] Cermaq NOA, para 67(p). See *Rapiscan Systems, Inc. v. Canada (Attorney General),* 2014 FC 68, paras 127-131 and *Canada (Attorney General) v. Rapiscan Systems, Inc.,* 2015 FCA 96, paras 57-62.
[174] Cermaq NOA, para 67(q); Mowi NOA, para 60.
[175] Mowi NOA, para 74(d).
[176] Cermaq NOA, para 67(q).
[177] Reasons for Order, para 74.

E. The Sister Nations' Materials Satisfied Rule 109(2)

94. The Prothonotary committed an error of law in failing to consider and apply the correct test to the Sister Nations' motion for leave to intervene. As the Federal Court of Appeal explained in *Sport Maska Inc. v. Bauer Hockey Corp.*, the test for leave to intervene is flexible.[178] The ultimate question for the Court is whether the interests of justice require that intervention be granted or refused.[179]

95. Instead of flexibly considering the test for leave to intervene and the relevant factors, the Prothonotary adopted a categorical approach, finding that the Sister Nations had not complied with Rule 109(2) and that the Sister Nations had failed to "explain 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"[180] (underlining in original).

96. The Notices of Application expressly raise issues directly related to the matters with respect to which the Sister Nation wished to intervene:

a) the Minister's Decision was unreasonable because DFO's determination regarding pathogen transfer from salmon farms meant that there was minimal risk of harm to First Nation interests in the well-being of salmon stocks;[181]

b) it was unreasonable for the Minister to adopt a Decision that foreclosed opportunities to meaningfully consult and accommodate impacted First Nations;[182]

c) the Decision does not provide adequate reasons to assess how other interests were taken into account and why those interests could not be reconciled with First Nation concerns;[183] and

d) the Decision was procedurally unfair in that the Applicants did not know the case against them, including the content of consultations with First Nations.[184]

97. The Sister Nations' written representations before the Prothonotary indicated that they wanted to make submissions regarding the consultation process with the Minister,[185] the balance of convenience,[186] and the impacts that the relief sought would have on their constitutionally

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[178] *Sport Maska*, para 42.
[179] *Sport Maska*, para 42.
[180] Reasons for Order, para 75; WR, paras 89-99.
[181] 335 NOA, para 35(a).
[182] 335 NOA, para 37(d); Cermaq NOA, para 67(q).
[183] 335 NOA, para 40(a) and (c). See also Cermaq NOA, para 67(p).
[184] 335 NOA, para 43. See also Cermaq NOA, paras 63, 65(c) and (f); Mowi NOA, para 74(d); Grieg NOA, para 28(b).
[185] WR, para 70.
[186] WR, paras 70 and 76.

protected rights.[187] Furthermore, the Sister Nations stated they wanted to speak to the issues regarding the reasonableness and lawfulness of the Decision.[188] At the hearing before the Prothonotary, the Sister Nations further detailed their proposed participation by explaining they wished to speak to the allegations of irreparable harm and the balance of convenience on the injunction[189] and to speak to the interactions of procedural fairness and the duty to consult.[190] The Sister Nations' submissions clearly met the legal requirements of Rule 109(2), and the Prothonotary erred in holding otherwise.

98. The Prothonotary also failed to consider and apply the factors that she found relevant to the Conservation Coalition's motion for leave to intervene to the Sister Nations' motion. In particular, the Prothonotary found that intervenors may assist the Court in addressing the policy or other larger implications associated with its decisions:

> [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] (underlining added).[191]

99. The Prothonotary relied on further relevant factors to find that the interests of justice warranted granting the Conservation Coalition leave to intervene:

a) "the Attorney General does not have a monopoly to represent all aspects of the public interest";[192]

[187] WR, paras 93, 94 and 95.
[188] WR, para 98.
[189] Reasons for Order, para 73.
[190] Reasons for Order, para 74.
[191] Reasons for Order, para 61.
[192] Reasons for Order, para 62.

b) "[t]he 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";[193]

c) "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";[194]

d) the precautionary principle "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";[195] and

e) "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."[196]

100. Similar factors support the Sister Nations being granted leave to intervene in the Application:

a) The Sister Nations also have relevant submissions to make regarding the public interest and expressly identified how the Minister, in balancing multiple interests, could not advocate for the perspective of Aboriginal peoples.[197]

b) The Sister Nations offer a different perspective from the regulator and industry.[198]

c) The fact that the Minister may be able to speak to consultation does not foreclose the Sister Nations from also making submissions on this issue.

d) The constitutional issues are relevant to any statutory or public interest analysis the Court may undertake.[199]

e) The Sister Nations play a unique role and are uniquely impacted by net-pen salmon farming in the Discovery Islands.[200]

[193] Reasons for Order, para 62.
[194] Reasons for Order, para 63.
[195] Reasons for Order, para 64.
[196] Reasons for Order, para 66.
[197] WR, paras 69-70.
[198] WR, paras 69-70 and 93.
[199] WR, paras 93-95.
[200] WR, paras 76, 93 and 95.

101. For the foregoing reasons, the Sister Nations submit the Prothonotary erred in law in finding that the Sister Nations had not satisfied Rule 109(2) and in applying a different test to her review of the Sister Nations' materials than that applied to the other parties.

V. CONCLUSION

102. By misdirecting herself on the law of the duty to consult and accommodate, and departing from *Forest Ethics,* the Prothonotary made reviewable errors causing her to find the Sister Nations were not directly affected. This error should be set aside and the Sister Nations should be added as respondents. Whether the Decision is an "accommodation" or the Crown's "balancing of interests", it is the result the Sister Nations sought and obtained through consultation with the Crown. The Sister Nations expect the Crown to honour that promised result; they have a direct interest in seeing that promise fulfilled. The Applicants' challenge to the Decision directly and prejudicially affects the Sister Nations by putting their ability to obtain that same result at risk.[201]

103. By misdirecting herself on the law of the duty to consult and accommodate, the Prothonotary erred in not finding the Sister Nations are necessary to effectually and completely determine the issues. She erred in not apprehending that the Notices of Applications contain numerous grounds (i) challenging the Decision as an unreasonable outcome from consultation with the Sister Nations and (ii) alleging that how the Crown consulted with the Sister Nations prevented them from receiving the procedural fairness they allege they were owed. This error should be set aside and the Sister Nations should be added as respondents.

104. In the alternative, the Sister Nations have satisfied the test for intervention and should be added as interveners.

VI. ORDER SOUGHT

105. The Sister Nations seek an order:

a) setting aside the Prothonotary's Order, dated March 18, 2021;

b) adding each of the Sister Nations as a party respondent and amending the style of cause accordingly; or

c) in the alternative, adding each of the Sister Nations as interveners.

[201] *Forest Ethics,* para 24.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, British Columbia, this 14th day of April, 2021.

Per: 

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LIST OF AUTHORITIES

LEGISLATION

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Fisheries Act, RSC, 1985, c F-14, s. 7

Fishery (General) Regulations, SOR/93-53, s. 56

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Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4

William v. British Columbia (Attorney General), 2018 BCSC 1425

William v. British Columbia (Attorney General), 2019 BCCA 74

SECONDARY SOURCES

Jack Woodard, *Native Law* (Toronto, Ont: Thomson Reuters, 2019) (loose-leaf updated 2021, release 1)

STATUTES, REGULATIONS, RULES AND OTHER SECONDARY SOURCES

Constitution Act, 1982, s. 35(1)

Section 35	
PART II - RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA **Recognition of existing aboriginal and treaty rights** 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	**PARTIE II - DROITS DES PEUPLES AUTOCHTONES DU CANADA** **Confirmation des droits existants des peuples autochtones** 35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Federal Courts Rules, SOR/98-106, Rules 104, 109 & 303 (Rule 104(1)(b), 109(1), 303(1)(a))

Rule 104	
Order for joinder or relief against joinder 104 (1) At any time, the Court may (a) order that a person who is not a proper or necessary party shall cease to be a party; or (b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order. **Directions** (2) An order made under subsection (1) shall contain directions as to amendment of the originating document and any other pleadings.	**Ordonnance de la Cour** 104(1) La Cour peut, à tout moment, ordonner (a) qu'une personne constituée erronément comme partie ou une partie dont la présence n'est pas nécessaire au règlement des questions en litige soit mise hors de cause; (b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne. **Directives de la Cour** (2) L'ordonnance rendue en vertu du paragraphe (1) contient des directives quant aux modifications à apporter à l'acte introductif d'instance et aux autres actes de procédure.
Rule 109	
Leave to intervene 109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding. **Contents of notice of motion** (2)Notice of a motion under subsection (1) shall (a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and (b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the	**Autorisation d'intervenir** 109 (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance. **Avis de requête** (2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir : (a) précise les nom et adresse de la personne qui desire intervenir et ceux de son avocat, le cas échéant; (b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une

determination of a factual or legal issue related to the proceeding. **Directions** (3) In granting a motion under subsection (1), the Court shall give directions regarding (a) the service of documents; and (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	décision sur toute question de fait et de droit se rapportant à l'instance. **Directives de la Cour** (3) La Cour assortit l'autorisation d'intervenir de directives concernant : (a) la signification de documents; (b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.
Rule 303	
Respondents 303 (1) Subject to subsection (2), an applicant shall name as a respondent every person (a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or (b) required to be named as a party under an Act of Parliament pursuant to which the application is brought. **Application for judicial review** (2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent. **Substitution for Attorney General** (3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.	**Défendeurs** 303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur : (a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande; (b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la presentation de la demande. **Défendeurs — demande de contrôle judiciaire** (2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre. **Remplaçant du procureur général** (3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

Fisheries Act, RSC, 1985, c F-14, s. 7

Section 7	
Fishery leases and 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. **Default of payment of fine** (1.1) The Minister may refuse to issue a lease or licence for fisheries or fishing to a person, if, among other things, they are in default of payment of a fine in relation to a contravention of the Act and the proceeds of the fine belong to Her Majesty in Right of Canada or of a province or to any other person or entity. **Restriction** (2) Except as otherwise provided in this Act or regulations made under it, leases or licences for any term of more than nine years shall be issued only under the authority of the Governor in Council. R.S., 1985, c. F-14, s. 7; 2019, c. 14, s. 10.	**Baux, permis et licences de pêche** 7 (1) En l'absence d'exclusivité du droit de pêche conferee par la loi, le ministre peut, à discrétion, délivrer des baux et permis de pêche ainsi que des licences d'exploitation de pêches — ou en permettre la délivrance —, indépendamment du lieu de l'exploitation ou de l'activité de pêche. **Défaut de paiement d'une amende** (1.1) Le ministre peut refuser de délivrer un bail, un permis ou une licence notamment à toute personne en défaut de paiement d'une amende infligée à l'égard d'une infraction à la présente loi et dont le produit est attribué à Sa Majesté du chef du Canada ou d'une province ou à toute autre personne ou entité. **Réserve** (2) Sous réserve des autres dispositions de la présente loi et des règlements, la délivrance de baux, de permis et de licences pour un terme supérieur à neuf ans est subordonnée à l'autorisation du gouverneur en conseil. L.R. (1985), ch. F-14, art. 7; 2019, ch. 14, art. 10.

Fishery (General) Regulations, SOR/93-53, s. 56

Section 56	
Licence to Release or Transfer Fish 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.	**Permis pour libérer ou transférer des poisons** 56 Le ministre peut délivrer un permis dans le cas où : a) la libération ou le transfert des poissons est en accord avec la gestion et la surveillance judicieuses des pêches; b) les poissons sont exempts de maladies et d'agents pathogènes qui pourraient nuire à la protection et à la conservation des espèces; c) la libération ou le transfert ne risque pas d'avoir un effet néfaste sur la taille du stock de poisson ou sur les caractéristiques génétiques du poisson ou des stocks de poisson.