Federal Court  Cour fédérale

Date: 20220422

Docket: T-129-21

Citation: 2022 FC 588

St. John's, Newfoundland and Labrador, April 22, 2022

PRESENT: The Honourable Madam Justice Heneghan

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

ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY AND WATERSHED WATCH SALMON SOCIETY, FIRST NATIONS FISHERIES COUNCIL OF BRITISH COLUMBIA, THE BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS, THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS AND THE FIRST NATIONS SUMMIT

Interveners

REASONS AND JUDGMENT

I. INTRODUCTION

[1] By a News Release (the "News Release") issued on December 17, 2020, the Minister of Fisheries, Oceans and the Canadian Coast Guard (the "Minister") announced her "intention" to do the following:

- To phase out existing salmon farming facilities in the Discovery Islands, with the upcoming 18-month period being the last time this area is licenced;
- To stipulate that no new fish of any size may be introduced into Discovery Islands 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.

[2] In response, four participants in the salmon fish farming industry in the Discovery Islands, British Columbia filed applications for Judicial Review, within 30 days of the date of the News Release. In those applications, they asked for the production of the Certified Tribunal Record (the "CTR"), pursuant to Rule 318(1)(a) of the *Federal Courts Rules*, S.O.R./98-106 (the "Rules").

[3] In the CTR, they found a Memorandum written by Mr. Timothy Sargent, the Deputy Minister, dated December 8, 2020 to the Minister, containing a recommendation to the Minister. The last page of the Memorandum presented the Minister with the choice to either to concur with the recommendation or to not concur with the recommendation.

[4] The Minister ticked the box indicating that she did not concur with the recommendation and added the following comments:

> 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.

[5] The Memorandum and the Minister's decision only came to the attention of the Applicants upon their receipt of the CTR.

[6] The two documents, that is the News Release and the Minister's notation, as contained in the CTR, were issued on different dates.

[7] For the purposes of this application for Judicial Review, the two documents are considered to be the decision (the "Decision") under review.

[8] This is consistent with the view taken by Justice Pamel upon a motion for an injunction in *Mowi Canada West Inc., Cermaq Canada Ltd., Grieg Seafood B.C. Ltd., and 622335 British Columbia Ltd. v. The Minister of Fisheries, Oceans and the Canadian Coast Guard,* 2021 FC 293 ("*Mowi No. 1*"), see paragraphs 25 and 26.

II. BACKGROUND

A. *Procedural History*

[9] By a Notice of Application issued on January 18, 2021, Mowi Canada West Inc. ("Mowi"), in cause number T-129-21, seeks judicial review of the Decision. Mowi refers to the Decision in the following terms:

> (a) issue finfish aquaculture licences to Mowi Canada West Inc. for aquaculture sites located within the Discovery Islands, BC;
>
> (b) prohibit the issuance of new or replacement aquaculture licences for aquaculture sites located within the Discovery Islands; and
>
> (c) prohibit further fish being transferred into aquaculture sites within the Discovery Islands.

[10] Mowi seeks the following relief:

> 1. An order quashing or setting aside in whole or in part (as specified below), the Decisions and referring the matter back to the Minister for determination in accordance with the Court's reasons.
>
> 2. In the alternative, a declaration that the Decisions were unreasonable.
>
> 3. In the further alternative, a declaration that the Decisions were made in a procedurally unfair manner.
>
> 4. An order for an interim and interlocutory injunction suspending the application of the Decisions in whole or in part (as specified below), the Policy, or both pending the hearing of this Application.
>
> 5. An order for costs in favour of the Applicant.
>
> 6. Such further and other relief as counsel may advise and this Honourable Court may permit.

[11] By a Notice of Application issued on January 18, 2021, Cermaq Canada Ltd. (“Cermaq”), in cause number T-128-21, seeks judicial review of the Decision of the Minister, dated December 17, 2020, that:

> 1. The Discovery Islands aquaculture licences, which would be reissued the following day for a period of 18 months, would be “the last time” aquaculture licences would be issued in the Discovery Islands;
>
> 2. No new fish of any size may be introduced into Discovery Islands facilities, despite these renewed aquaculture licences; and
>
> 3. Mandated that all farms be free of fish by June 30th, 2022 (the “Constraining Decision”).

[12] In its Notice of Application, Cermaq seeks the following relief:

> 1. A declaration that the Constraining Decision was unreasonable, or both unreasonable and unlawful;
>
> 2. In the alternative, if the Licence Decision and the Constraining Decision are considered a single decision, then a declaration that the Constraining Decision aspect of the single licencing decision was unreasonable, or both unreasonable and unlawful;
>
> 3. A declaration that the Constraining Decision was made in a manner contrary to the principles of natural justice and procedural fairness;
>
> 4. In the alternative, if the Licence Decision and the Constraining Decision are considered a single decision, then a declaration that the decision was made in a manner contrary to the principles of natural justice and procedural fairness;
>
> 5. An order quashing or setting aside the Constraining Decision;
>
> 6. An interim or interlocutory injunction prohibiting the applicability of the Constraining Decision until a decision in this judicial review is rendered;
>
> 7. Costs; and
>
> 8. Such further and other relief as counsel may advise and this Court deems just.

[13] By a Notice of Application issued on January 18, 2021, Grieg Seafood B.C. Ltd. ("Grieg") seeks judicial review of:

> 1. The Decision of the Minister of Fisheries, Oceans and Canadian Coast Guard (the "Minister") announced December 17, 2020 that resulted in the issuance, pursuant to section 7 of the *Fisheries Act*, R.S.C. 1985, c. F-14 ("*Fisheries Act*"), of Finfish Aquaculture Licence No. AQFF 122912 for an aquaculture site located within the Discovery Islands, British Columbia (the "Licence") to Grieg Seafood B.C. Ltd. ("Grieg Seafood"), subject to the following conditions:
>
> > (a) that existing salmon farming facilities in the Discovery Islands will be phased out, with the upcoming 18-month period being the last time this area is licensed;
> >
> > (b) that no new fish of any size may be introduced into Discovery Islands facilities during this time; and
> >
> > (c) that all farms be free of fish by June 30, 2022 but that existing fish at the sites can complete their growth-cycle and be harvested (collectively, the "Conditions").

[14] In its Notice of Application, Grieg seeks the following relief:

> 1. A declaration that the Decision to issue the Licence subject to the Conditions is invalid and unlawful;
>
> 2. In the alternative, a declaration that the Decision to issue the Licence subject to the Conditions is unreasonable;
>
> 3. In the alternative, a declaration that the Decision to issue the Licence subject to the Conditions was made in a manner contrary to the principles of natural justice and procedural fairness;
>
> 4. An order that the Decision to issue the Licence subject to the Conditions be quashed or set aside in whole or in part;
>
> 5. An order that the Conditions be struck or removed from the Licence;

> 6. An interim and interlocutory injunction prohibiting the applicability of the Decision to issue the Licence subject to the Conditions until a decision in this judicial review is rendered;
>
> 7. Costs of this Application; and
>
> 8. Such other relief as counsel may advise and this Honourable Court deems just.

[15] By a Notice of Application issued on January 18, 2021, 622335 British Columbia Ltd. ("BC Ltd."), in cause number T-127-21, seeks judicial review of the Decision of the Minister, dated December 17, 2020, to:

> 1. Phase out existing salmon farming facilities in the Discovery Islands, with the upcoming 18-month period being the last time this area is licensed;
>
> 2. Stipulate that no new fish of any size may be introduced into the Discovery Islands facilities during this time; and
>
> 3. Mandate that all farms be free of fish by June 30, 2022, but that existing fish at the sites can complete their growth-cycle and be harvested.

[16] In its Notice of Application, BC Ltd. seeks the following relief:

> 1. An order quashing or setting aside the Decision;
>
> 2. An order for an interim and interlocutory injunction prohibiting the implementation of the Decision pending the determination of this application;
>
> 3. Costs of the application; and
>
> 4. Such further and other relief as counsel may advise and this Court may deem appropriate and just.

[17] By Order dated February 2, 2021, the foregoing Applications were consolidated with the Mowi proceeding designated as the "lead" case.

[18] By Order dated March 18, 2021, Alexandra Morton, David Suzuki Foundation, Georgia Strait Alliance, Living Oceans Society and Watershed Watch Salmon Society (collectively, the "Conservation Coalition") were granted leave to intervene in the consolidated applications for judicial review.

[19] By Order dated August 18, 2021, the First Nations Fisheries Council of British Columbia, the British Columbia Assembly of First Nations, the Union of British Columbia Indian Chiefs, and the First Nations Summit (collectively, the "First Nations Coalition") were granted leave to intervene in the consolidated applications for judicial review.

B. *The Parties*

[20] Mowi, Cermaq, Grieg and BC Ltd. operate salmon fish farms in the Discovery Islands, which are a group of islands lying between East coast of Vancouver Island and mainland British Columbia.

[21] Mowi, Cermaq and Grieg farm Atlantic salmon. BC Ltd. farms Chinook salmon.

[22] The Minister is responsible for the management and control of the fisheries in Canada, including the conservation and protection of fish and fish habitat.

[23] Mowi has ten licenced aquaculture sites in the Discovery Islands. It also operates a site at Hardwicke.

[24] Cermaq has three aquaculture sites in the Discovery Islands.

[25] Grieg has one aquaculture site in the Discovery Islands.

[26] BC Ltd. has one salmon farming facility and one fish hatchery located in the Discovery Islands, at Doctor Bay and Doctor Bay Farm, respectively.

C. *The Fish Farming Process*

[27] The evidence shows that the Province of British Columbia grants a licence for the area of the fish farms, pursuant to the *Land Act*, R.S.B.C. 1996, c. 245. The Minister grants the licence for operation of the fish farms pursuant to section 3 of the *Pacific Aquaculture Regulations*, S.O.R./2010-270, enacted pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14 (the "Act").

[28] The paragraphs below generally describe the fish farming process followed by the Applicants.

[29] The fish farming process begins with the collection of eggs from broodstock, that is salmon selected to breed future generations of fish. The eggs are transferred to hatcheries where they are kept in incubators until they hatch.

[30] Recently hatched eggs are called "fry". Fry are transferred to freshwater tanks while they grow into small fish. The small fish are called "parr".

[31] The parr remain in the hatcheries for twelve to fourteen months when the smoltification begins. “Smoltification” is the process by which parr go through the physical and physiological changes required to allow them to transition to salt water. Once the transition is complete, the fish are called “smolts”.

[32] The smolts are transferred from the fresh water hatcheries into salt water pens or nursery farms. This must happen within one week of smoltification.

[33] The transfer of smolts from the salt water pens into a nursery farm helps control the spread of parasites. These smolts would stay in the nursery farm for six to eight months before being transferred into the regular salt water pen.

[34] Smolts transferred into a nursery farm stay in the farm for six to eight months and are then transferred into the regular salt water pen for the remaining months, with the total time lasting eighteen to twenty-four months.

[35] Smolts transferred directly into the salt water pen stay in the pen for eighteen to twenty-four months.

[36] After this eighteen to twenty-four month period, the smolts will have reached optimal market size at which point they are ready for harvest, and transported from the fish farms.

[37] After fish are harvested, there is a four to five month “fallow” period before the next crop of fish is transferred into the site to begin the process over again. If an aquaculture site is “fallow”, it is without any fish. Fallowing is an environmental “best practice”.

D. *The Cohen Commission*

[38] Pursuant to an Order in Council issued by the Governor in Council on November 5, 2009, the Terms of Reference were issued for a Commission of Inquiry formally called “The Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River”. The Honourable Bruce Cohen was appointed as the Commissioner. Following public consultations, review of written reports and submissions, the Commission delivered its Report in October 2019.

[39] The Report consisted of three volumes. Volume 1 provided the background to the Fraser River sockeye fishery, including an overview of the organizational structure of DFO. Volume 2 focused on the causes of the decline of the sockeye fishery in the Fraser River. Volume 3 contained seventy-five recommendations. In the course of submissions, the Applicants referred to several of those recommendations.

[40] Recommendations 14 to 19 were specific to the Discovery Islands region, a region defined as fish health zone (“FHZ”) 3-2.

[41] In response to the recommendations of the Cohen Commission, the Canadian Science Advisory Secretariat produced nine scientific reports. One report was released in 2017, five reports were released in 2019 and three reports were released in 2020.

[42] The aquaculture industry was involved in the preparation of these reports. According to the affidavit of Ms. Parker, the reports relied, to some degree, upon data generated from the fish farms.

[43] Dr. Morrison, the Managing Director of Mowi, was involved in the preparation of one of the reports.

[44] The Cohen Commission was addressed by all parties to this proceeding. The fish produced in the Applicants' facilities migrate through the same waters as the wild salmon. Some of the First Nations express fear that the presence of farmed salmon in the waters of the Fraser River presents a risk to wild salmon population, particularly the risk of disease. Submissions were made about sea lice and the piscine orthoreo virus ("PRV").

[45] By September 2020, the common conclusion of the nine reports was that aquaculture in the Discovery Islands poses no more than a minimal risk of harm to the Fraser River Sockeye salmon. The reports were available to the Minister and DFO. DFO does not dispute this conclusion.

[46] According to the evidence tendered by the Applicants, including the affidavit of Ms. Parker, the Minister was mandated to develop a plan by 2025 to transition the net pen farms on the West Coast to closed containment systems. This plan was addressed by Parliamentary Secretary Beech in November 2020. The intended plan is to include the full aquaculture sector in British Columbia, including the Discovery Islands.

III. THE CERTIFIED TRIBUNAL RECORD

[47] The Minister's Decision was based upon her review of the documents contained in the Certified Tribunal Record (the "CTR") that was produced pursuant to Rule 318 of the *Federal Courts Rules*, S.O.R./98-106 (the "Rules").

[48] The CTR was prepared by Ms. Judy Proctor, Chief of Staff to the Deputy Minister of DFO. The CTR includes the following certificate that was signed on February 16, 2021:

> I, Jody Proctor, Chief of Staff of the Deputy Minister of Fisheries and Oceans Canada, Department of Fisheries and Oceans Canada, of Ottawa, in the Province of Ontario, hereby certify that the documents attached to this certificate are true copies of the documents that were before the Honourable Bernadette Jordan, Minister of Fisheries, Oceans and the Canadian Coast Guard when she made her decision in respect of aquaculture licencing and operations in the Discovery Islands region of British Columbia on December 16, 2020.

[49] The CTR, 58 pages in length, consists of the following documents:

- Memorandum for the Minister – Licensing of Marine Finfish Aquaculture in the Discovery Islands, dated December 16, 2020;
    - The Memorandum is an eight page document that was composed with the purpose of seeking a decision from the Minister on the issuance of licences for aquaculture sites in the Discovery Islands. To inform the recommendation, DFO considered nine peer-reviewed risk assessments, data collected by DFO's BC Aquaculture Regulatory Program from 2011-2020 and consultations with First Nations and industry.
    - The Memorandum detailed the options available for the decision, including: (1) non-renewal of licences, (2) renewal of licences for six years, (3) renew licences for one year, and (4) renew licences until June 2022.

    - The Memorandum recommended that the Minister issue the licences for the aquaculture sites with an expiration date of June 30, 2022.

- A list of aquaculture sites in the Discovery Islands;

- Summaries of the risk assessments for the Discovery Islands area;

    - Each assessment was in relation to a pathogen known to cause disease from aquaculture operations in the Discovery Islands.

- Discovery Islands, 2011-2019/2020 Compliance and Performance Report; and

    - This document is described as follows: "This report provides an overview of the environmental and fish health performance of marine finfish facilities in the geographical region of the Discovery Islands, based on industry-submitted Conditions of Licence reports."

- Record of Consultations: Licence of Aquaculture Sites in the Discovery Islands Expiring December 18, 2020, dated December 7, 2020.

    - This Record includes summaries of consultations between DFO and First Nations in the Discovery Islands, First Nations outside the Discovery Islands, and the Applicants.

IV. THE "DECISION"

[50] As noted above, the Decision was made by the Minister on December 16, 2020. The Notices of Application that were filed by the Applicants refer to December 16, 2020 and December 17, 2020 as the date of the Minister's "decision".

[51] This is not a mistake.

[52] The Applicants were unaware of the Decision of December 16, 2020 until the production of the CTR, after the judicial review process was invoked. They first became aware of a

"decision" after the issuance of a News Release from Fisheries and Oceans Canada on December 17, 2020. The News Release was issued under the following title:

> Government of Canada moves to phase out salmon farming licences in Discovery Islands following consultations with First Nations

[53] In its submissions, Mowi refers to December 16, 2020 as the date of the Decision.

[54] Likewise, in its submissions, Grieg refers to December 16, 2020 as the date of the Decision. However, it also says that the News Release of December 17, 2020 reflects what was implemented by the Minister, and that the News Release must be taken into account.

[55] Cermaq and BC Ltd. refer to December 17, 2020 as the date of Decision.

[56] The Minister refers to both December 16, 2020 and December 17, 2020 as the date of the Decision. In oral submissions, she argued that December 17, 2020 was a "clarification" of the Decision made on December 16, 2020, although the December 16, 2020 Decision had not yet been released or distributed.

V. THE EVIDENCE

[57] The facts and details below are taken from the CTR and the affidavits filed by the parties.

A. *The Affidavits*

[58] Each party filed affidavits in their respective Application Records.

[59] Mowi filed thirteen affidavits as follows:

- Dr. Diane Morrison, sworn on May 31, 2021;
- Ms. Mia Parker, affirmed on May 31, 2021;
- Ms. Mia Parker, affirmed on June 2, 2021;
- Mr. Richard Opala, affirmed on May 28, 2021;
- Ms. Allison Webb, affirmed on July 9, 2021;
- Ms. Tracey Sandgathe, affirmed on July 12, 2021;
- Mr. Harold Sewid, sworn on March 5, 2021;
- Ms. Heather Clarke, sworn on March 5, 2021;
- Mr. James Walkus, sworn on March 1, 2021;
- Mr. Ryan Brush, affirmed on March 5, 2021;
- Mr. Ryan Early, sworn on March 4, 2021;
- Mr. John Brown, affirmed on March 3, 2021; and
- Mr. Andrew Adams, affirmed on March 5, 2021.

[60] Cermaq filed two affidavits as follows:

- Mr. David Kiemele, sworn on May 31, 2021; and
- Mr. Tom Foulds, sworn on May 31, 2021.

[61] Grieg filed two affidavits as follows:

- Mr. Marvin Boschman, sworn May 31, 2021; and
- Ms. Kristin Storry, sworn on May 31, 2021.

[62] BC Ltd. filed two affidavits as follows:

- Mr. Robert Smeal, affirmed on March 15, 2021; and
- Mr. Robert Smeal, affirmed on May 28, 2021.

[63] The Minister filed two affidavits as follows:

- Ms. Allison Webb, affirmed on July 9, 2021; and
- Ms. Tracey Sandgathe, affirmed on July 12, 2021.

[64] In her record, the Minister also included the following affidavits that were produced in the records of Mowi and Cermaq:

- Mr. Tom Foulds, sworn on May 31, 2021;

- Mr. David Kiemele, sworn on May 31, 2021;
- Ms. Mia Parker, affirmed on May 31, 2021;
- Dr. Diane Morrison, sworn on May 31, 2021; and
- Mr. Richard Opala, affirmed on May 28, 2021.

[65] The Conservation Coalition did not file any affidavits, but relied on the following affidavits filed by other parties in this consolidated proceeding:

- Ms. Allison Webb, affirmed on July 9, 2021;
- Dr. Diane Morrison, sworn on May 31, 2021;
- Mr. Robert Smeal, affirmed on March 15, 2021;
- Ms. Mia Parker, affirmed on May 31, 2021; and
- Ms. Tracey Sandgathe, affirmed July 12, 2021.

[66] Neither did the First Nations Coalition file any affidavits, but relied on the following affidavits, filed by other parties in this consolidated proceeding:

- Ms. Allison Webb, affirmed on July 9, 2021; and
- Ms. Mia Parker, affirmed on May 31, 2021.

B. *The Deponents*

[67] Dr. Morrison is the Managing Director of Mowi. She provided an overview of Mowi's business operations and outlined Mowi's production planning and farming processes. She addressed the negative impact of the Decision upon Mowi's operation.

[68] As well, Dr. Morrison provided a timeline of events, including meetings, phone calls, emails and an announcement, pursued by Mowi in its efforts to communicate with the Minister about the proposed changes in the licencing process for the Discovery Islands. She deposed that Mowi continuously promoted interest-based negotiations.

[69] Ms. Parker is the Director of Environmental Performance and Certification for Mowi. In this position, she ensures that Mowi has obtained all necessary permits and authorizations, that it maintains appropriate certifications, and that the aquaculture operations meet or exceed environmental requirements.

[70] Ms. Parker also commented on examples of industry consultation with the Department of Fisheries and Oceans in the past, to illustrate how the process leading up to the Minister's 2020 Decision differs from previous processes.

[71] Ms. Parker also described examples of her attempts to speak with the Minister and her staff, in order to discuss potential decisions about the Discovery Islands operations. She deposed that the only meeting between Mowi and the Minister, about the Discovery Islands operations, was a 30-minute meeting on December 10, 2020. She expressed the view that the Minister's Decision was a shock to industry and to the DFO, and that the Decision seemed to have been made abruptly.

[72] Ms. Parker noted that the CTR does not contain an agenda or minutes from the meeting of December 11, 2020, a meeting between the Minister and the Deputy Minister that the Minister referenced in making her decision. She also noted that the record of consultation with industry in the CTR is dated December 7, 2020, a date prior to the December 10, 2020 meeting referenced above.

[73] Mr. Opala is the Regulatory Affairs Manager for Mowi. He is responsible for the regulatory process for Mowi's sites in British Columbia. He explains the process for obtaining the annual licences, and how the process in 2020 differed from those followed in prior years.

[74] Mr. Opala also provided general information about Mowi's sites in the Discovery Islands. He commented about his attendance at several meetings leading up to the Minister's Decision where he expressed concern about consequences if the anticipated changes occurred with aquaculture in the Discovery Islands.

[75] Mr. Opala referred to the Hardwicke site operated by Mowi in an area outside the Discovery Islands and said that it is affected by the Decision.

[76] Mr. Opala discussed the denial of four transfer licence applications that were submitted after the Decision was made. He noted the Minister's reference to "social acceptability" as a factor in denying the applications and said that these words had never been used before as a criterion for denying a transfer licence application; see paragraph 68 of his affidavit.

[77] Ms. Webb is the Regional Director of Environmental Services and Contaminated Sites Management with the federal Department of Public Services and Procurement Canada, Pacific region. Mowi included her affidavit in its Application Record.

[78] Ms. Webb provided general background information on marine finfish aquaculture in British Columbia. She referenced the Cohen Commission Report and how its recommendations impacted aquaculture in the Discovery Islands.

[79] Ms. Webb referred to the mandate letter given to the Minister on December 13, 2019. She said the mandate letter "emphasized the importance of Canada's relationship with Indigenous peoples." She detailed the consultations that occurred among the Minister, the Department and the Discovery Islands First Nations before the Decision was made. She also referred to consultation with industry, including with the Applicants in this consolidated proceeding. She had attended most of these meetings.

[80] Ms. Webb also addressed the contents of the Memorandum of the Decision that was submitted to the Minister, to inform the Decision. She said the Minister issued licences for the salmon farms in the Discovery Islands on December 18, 2020, with an effective date of December 19, 2020.

[81] Ms. Sandgathe, when she swore her affidavit on July 12, 2021, was the Director of the Aquaculture Management Division with the Department. Although her affidavit was filed on behalf of the Minister, Mowi included it in its Application Record. She joined DFO in 2009 and according to her affidavit, she held a "number of positions" from 2009 to 2021.

[82] Ms. Sandgathe is responsible for the regulation of the aquaculture sector in British Columbia. In her affidavit, she described continuing consultations with participants in the aquaculture industry. Mowi, Cermaq and Grieg attended many meetings with the Department.

[83] Ms. Sandgathe provided general information about fish transfer licences and about the applications submitted by Mowi, Cermaq and BC Ltd. after the Decision, for transfer licences.

[84] Ms. Sandgathe further deposed that since the December 17, 2020 decision, that is the News Release, DFO implemented two changes to the process by which decisions are made to issue transfer licences.

[85] One of those changes is to allow First Nations, whose territory overlaps the area of the requested transfer, to make submissions on the proposed transfer licences.

[86] The second change relates to the identity of the decision maker on a transfer application. Prior to December 17, 2020, transfer licence applications were decided by DFO's Regional Director of Fisheries Management. After December 17, 2020, final decisions on transfer licence applications are made by the Minister, and not one of her delegates.

[87] Mowi included affidavits in its Record from individuals with whom it has contracts related to its salmon fish farms.

[88] Mr. Sewid is the Clan Chief of the WiumasgumQwe'Qwa'Sot'Enox, and the owner of Qwe'Qwa'Sot'em Faith Aquaculture Ltd., with which Mowi does business.

[89] Mr. Sewid described the negative effects the Decision will have on his business since the business is tied to Mowi's aquaculture industry. He said that he did not have the opportunity to participate in consultations and that the Decision was a shock to him and his community.

[90] Ms. Clark is the co-founder and Chief Financial Officer of Poseidon Ocean System, a company that supplies sustainable technologies to Mowi, Cermaq and Grieg to reduce the carbon footprint of salmon farming.

[91] Ms. Clark described how the Decision negatively affected her business, that it took away the opportunity to locally engineer solutions for the aquaculture industry.

[92] Ms. Clark deposed that she was not asked to participate in any consultations with the Minister or DFO.

[93] Mr. Walkus owns James Walkus Fishing Company, a contractor for Mowi. He is a First Nations commercial fisherman who primarily employs Indigenous people. His company transports fish from the farms to processing plants; this transportation comprises approximately 30% of his company's business.

[94] In his affidavit, Mr. Walkus described the implications of the Decision on his business, his family and the community. He said his First Nation and other affected communities were not included in the Minister's consultations.

[95] Mr. Brush is the General Manager for Aquatrans Distributors Ltd., a contractor for Mowi. The company provides refrigerated freight transport and supply management services to Mowi, Cermaq and Grieg.

[96] Mr. Brush deposed that he followed reports issued by the Department over a number of years leading up to the Decision. He said that he was not involved in any consultations and was "blindsided" by the Decision and his business is now suffering financially.

[97] Mr. Early is the co-owner of Way West Taxi Ltd. He described how the Decision to end fish farming in the Discovery Islands has contributed to the decline of his business and the layoff of some employees.

[98] Mr. Brown is the President of Allpen Diving Limited, a contractor for both Mowi and Grieg. His business sets up underwater systems in the Discovery Islands and contributes to the environmentally clean underwater programs used by Mowi.

[99] Mr. Brown deposed that he was not asked to participate in any consultation and the Decision will severely impact his business.

[100] Mr. Adams is the Mayor of Campbell River. He deposed that his city relies greatly on Mowi's business and will suffer from the loss of jobs and contributions to the economy.

[101] Mr. Adams deposed that the Minister did not engage in consultations with any of the North Island governments and no warning was given that termination of the fish farming industry was in contemplation.

[102] Mr. Boschman is the Managing Director of Grieg. He has worked in the aquaculture industry for approximately 30 years.

[103] In his affidavit, Mr. Boschman described Grieg's role in the surrounding communities, its relationships with First Nations, the site affected by the Decision, the planning and salmon farming processes, and the timeline leading up to the Decision by the Minister.

[104] As well, Mr. Boschman referred to some of the discussions that took place before the Decision was announced, as well as references to Grieg's past experiences in consultations with the Department. He presented these examples to illustrate a difference in the consultation and decision making processes relative to the Decision, in comparison with other decisions made by DFO.

[105] Ms. Storry is the Certification and Regulatory Manager of Grieg. In her affidavit, she outlined the meetings and communications between Grieg and the Department that preceded the

grant of a new aquaculture licence for Grieg's operations at the Barnes Bay site, on December 18, 2020.

[106] Mr. Smeal is the President, Secretary and sole Director of BC Ltd. In his first affidavit, he set out the history of the establishment of the salmon fish farm at Doctor Bay, located in the Discovery Islands. He also reviewed the history of his company's relationships with surrounding First Nations communities.

[107] Mr. Smeal gave a detailed description of the company's fish farming operation which deals only with the production of Chinook salmon. He provided details about his operation and the difference between Chinook and Atlantic salmon. He deposed that the hatchery has been free of disease, including sea lice, since its inception.

[108] Mr. Smeal also described his experience during the consultation process and expressed his opinion that the process was insufficient. He addressed the impact of the Decision upon his company, as well as upon the fish currently in the production cycle.

[109] In his second affidavit, Mr. Smeal responded to the contents of the affidavit of Chief Darren Blaney. The affidavit of Chief Blaney was filed by Homalco First Nation in support of its motion to be added as a respondent, or in the alternative, intervener. Mr. Smeal disputed the assertions of Chief Blaney that the Doctor Bay Farm is a "source of pathogens, sea lice or other contaminants".

[110] Mr. Kiemele is the Managing Director of Cermaq. As such, he is responsible for the oversight of the company's business operations. In his affidavit, he outlined the company's history and production cycles as well as its agreement with neighbouring First Nations.

[111] Mr. Kiemele discussed Cermaq's involvement in conversations leading up to the Decision and commented on the difference between that process and the one followed for the Broughton Process.

[112] As well, Mr. Kiemele described the impact of the Decision upon Cermaq's Discovery Islands operations, including job losses, financial impacts, culling of fish, and relationships with community partners.

[113] Mr. Foulds is the Sustainable Development and Environmental Manager for Cermaq. He provided an overview of the aquaculture licencing process in British Columbia, as well as a history of individual licencing processes in which Cermaq had been involved. He also commented on his participation, on behalf of Cermaq, in past consultation processes and how the 2020 process differed from earlier ones.

[114] The following deponents were cross-examined upon their affidavits:

- Ms. Webb, on behalf of the Minister;
- Ms. Sandgathe, on behalf of the Minister;
- Dr. Morrison, on behalf of Mowi;
- Ms. Parker, on behalf of Mowi;
- Mr. Opala, on behalf of Mowi;
- Mr. Kiemele, on behalf of Cermaq;
- Mr. Foulds, on behalf of Cermaq;
- Mr. Boschman, on behalf of Grieg; and

- Mr. Smeal, on behalf of BC Ltd.

[115] The transcripts of all cross-examinations were filed and constitute evidence on the part of the examining party.

VI. SUBMISSIONS

A. *The Applicants' Submissions*

[116] Counsel for the Applicants addressed, both generally and with specific arguments, the nature of the Decision, that is a licencing decision that attracts the elements of procedural fairness, and its unreasonableness, beginning with the lack of reasons.

[117] The Applicants submit that according to the CTR, the Minister herself refers to a "licencing" decision. They argue that as such, the basic elements of procedural fairness are due, that they were entitled to know what was under consideration, that they were given no notice of a plan to stop transfers into the fish farms, and that they were denied the opportunity to be heard. Among other authorities, they rely on the decisions in *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69 (*Canadian Pacific FCA)*, *Keating v. Canada* (2002), 224 F.T.R. 98, *Comeau's Sea Foods v. Canada*, [1997] 1 S.C.R. 12, and *Taseko Mines Limited v. Canada* (2019), 32 C.E.L.R. (4th) 18 (*Taseko FCA*).

[118] The Applicants rely upon the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 to highlight the elements of procedural fairness to which they were entitled. Among other things, they plead the doctrine of legitimate expectations, relying on

the decisions in *Canadian Pacific Railway Company v. Canada (Attorney General)*, [2019] 1 F.C.R. 121 (*Canadian Pacific FC)*, *Baker*, *supra* and *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559.

[119] As part of their submissions about legitimate expectations, the Applicants submit that the Decision was made without regard to past practices of consultations between DFO and industry.

[120] BC Ltd. argues that the Minister failed to appreciate the facts that differentiate its operation from the larger industrial operations of Mowi, Cermaq, and Grieg.

[121] The Applicants submit that the Minister erroneously fettered her discretion with regard to the issuance of licences.

[122] Further, the Applicants contend that the lack of reasons for the Decision is a breach of procedural fairness.

[123] All Applicants rely on the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.) in support of their arguments that the Decision is unreasonable.

B. *The Minister's Submissions*

[124] The Minister submits that the Decision is a policy decision, made in the exercise of her statutory powers to manage the fisheries, in the interests of the people of Canada, with special attention to the interests of First Nations.

[125] The Minister argues that no procedural fairness is owed in making a policy decision but should any procedural fairness be due, it is at the low end of the scale.

[126] The Minister submits that the Applicants were not entitled to know about the concerns of First Nations nor to have the opportunity to respond to those concerns. She argues that insofar as the Applicants had any legitimate expectations about the process, those expectations were satisfied.

[127] The Minister says that the Applicants knew what was under consideration since she had engaged in discussions with industry and the First Nations. She says that each Applicant had the opportunity to raise their concerns, including the strength of the science relied on by DFO, sea lice, relationships with First Nations, and the socio-economic impacts of the Decision.

[128] The Minister, in describing the Decision as one of policy, relies on the decisions in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, *Barry Group Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2017 FC 1144, and *Barry Seafoods NB Inc. v. Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 725 (*Barry Seafoods 2021*).

[129] Further, the Minister argues that the Applicants not only had constructive knowledge of the plan to close down the salmon fish farms, they had actual knowledge of the pending plan, as the result of their participation in meetings with the Finfish Aquaculture Industry Advisory Panel (the "FAIAP"), in particular in October and November 2020.

[130] The Minister submits that the Decision meets the test in *Vavilov, supra*. She contends that adequate reasons were provided and in any event, the reasons can be "discerned" from the CTR.

[131] The Minister argues that the Decision was reasonable, relative to its nature, as a policy decision. She relies on the broad discretion conferred by section 7 of the Act and also notes recent amendments to the Act that specifically refer to consideration of the interests of First Nations, that is the addition of sections 2.3, 2.4 and 2.5.

C. *The Interveners' Submissions*

[132] The group of Interveners known as the First Nations Coalition, in oral submissions, addressed the issue of "how Canada's Constitutional obligations to Indigenous people informs and affirms the reasonableness of this decision".

[133] The First Nations Coalition submits that the decision is reasonable, considering Canada's constitutional obligations to Indigenous people. It refers to the honour of the Crown and the duty to consult and accommodate the concerns of First Nations. It argues that the 2019 amendments to the Act requires the Minister to consider any adverse effects that her decisions may have on the

rights conferred by section 35 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

[134] The group of Interveners known as the Conservation Coalition, in oral submissions, addressed how "from a statutory interpretation perspective, the conservation priority and the precautionary principle should inform the court's consideration of whether this decision was reasonable and fair".

[135] The Conservation Coalition focused on the precautionary principle. This principle provides that a lack of scientific certainty should not be a reason to postpone measures designed to protect the environment.

[136] The Conservation Coalition observes that the 2019 amendments to the Act included the precautionary principle in section 2.5. It relies on the decisions in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 and *Morton v. Canada (Fisheries and Oceans)* (2015), 95 C.E.L.R. (3d) 47 to argue that in applying the precautionary principle, the Minister must be able to consider more than the scientific information generated by DFO.

[137] The Conservation Coalition submits that there is no need to reweigh the Minister's risk assessment as long as she had evidence about continuing uncertainty and risk, and such evidence exists in this case.

VII. DISCUSSION AND DISPOSITION

[138] Often the first issue to be addressed in an application for judicial review is the standard of review. The standard of review is determined by the nature of the decision. However, in the present case, the circumstances invite, first, a discussion as to "what" the decision is.

A. *The Nature of the Decision*

[139] By means of a News Release issued by DFO on December 17, 2020, the Applicants, and others, were advised that the Minister intended to end salmon fish farming in the Discovery Islands at the end of the upcoming eighteen month period for which licences would be issued; to prohibit the introduction of new fish of "any size" to those fish farms during this period; and to "mandate" that all fish farms would "be free" of fish by June 30, 2022 and that the existing fish at these sites could complete their growth cycles and be harvested.

[140] The News Release was a public announcement and led to the commencement of the within judicial review Applications.

[141] The notices of application included a request for the production of the tribunal record. When the CTR was provided, the Applicants became aware of the Minister's response to the recommendations of her staff about the salmon fish farms in the Discovery Islands.

[142] The Applicants note significant differences between the News Release of December 17, 2020 and the Minister's notes, as contained in the CTR. While these differences will be addressed below, the immediate question is to identify the "decision" and its character.

[143] In Reasons referred to earlier as *Mowi No. 1*, upon the motion for an injunction brought by Mowi and BC Ltd., Justice Pamel said the following at paragraphs 25 and 26:

> Where multiple aspects of a decision concern the same parties and arise from the same facts and decision-maker, the Court will usually consider them as a single decision (*Barry Group Inc. v Canada (Fisheries, Oceans and Coast Guard)*, 2017 FC 1144 at para 28), and treat them together in the same application for judicial review, notwithstanding Rule 302 of the *Federal Courts Rules* (*Lessard-Gauvin v Canada (Attorney General)*, 2016 FC 227 at para 6).
>
> The Minister states that the Note, which recorded her expressed decision on December 16, 2020 is the document that is used by her and her Deputy Minister to communicate the internal decision, while the December 17, 2020 press release is the operational decision. It is common ground between the parties that both should be considered together for the purposes of the present motions and underlying proceedings [collectively, the Minister's Decision or Decision].

[144] I see no reason to depart from Justice Pamel's view that the "decision" consists of both the News Release and the notation in the CTR.

[145] The Decision affects both the continuing operation of the fish farms after June 30, 2022 and the transfer of fish into the farms.

[146] The nature of the Decision will determine whether the Applicants are entitled to procedural fairness and if so, the extent and content of procedural fairness.

[147] The position of the main parties is clear: the Applicants argue that the Decision is an administrative, licencing decision that attracts the "usual" safeguards of procedural fairness, that is notice of the decision in contemplation and the opportunity to be heard. They submit that past practice of consultations gave rise to legitimate expectations that they would be informed and have the opportunity to raise their concerns, including the impact upon their planning and production cycles, as well as about the significant economic consequences flowing from a complete shut-down.

[148] On the other hand, the Minister submits that her Decision is one of high policy, made in the exercise of her authority to manage the fisheries. She argues that the Act does not impose a duty of procedural fairness in respect of such decisions and she refers to jurisprudence that support her view that the Applicants are not entitled to procedural fairness; see *Canadian Assn of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247, leave to appeal dismissed [1994] 2 S.C.R. vi, and *Martineau v. Matsqui Disciplinary Bd*, [1980] 1 S.C.R. 602.

[149] The Minister, however, advances an alternate argument in the event that the Court recognizes a duty of procedural fairness. In those circumstances, she submits that any duty of procedural fairness falls on the low end of the spectrum, relying on the decision in *Taseko Mines Limited v. Canada (Environment)* (2017), 15 C.E.L.R. (4th) 53, aff'd in *Taseko FCA*, leave to appeal to the SCC dismissed 39066 (14 May 2020).

[150] The Decision is both the News Release and the notation of the Minister made on December 16, 2020 on the Memorandum submitted to her by the Deputy Minister. The

Memorandum forms the first eight pages of the CTR and concludes with four options for the Minister as follows:

- Non-renewal of Licences
- Renew Licences for Six Years
- Renew Licences for One Year
- Renew Licences until June 2022

[151] Following the fourth option, the Memorandum to the Minister includes a recommendation as follows:

> It is recommended that the licences be issued to existing licensed facilities in the DI with an expiration date of June 30, 2022. The recommended approach is informed and aligned with DFO's Framework for Aquaculture Risk Management (FARM) which incorporates the precautionary approach in its assessment of risks.
>
> It is also recommended that complementary additional measures outlined below be implemented and announced concurrently with an announcement on the licence renewal.

[152] The Summary in the Memorandum refers to a "licencing" decision, as per its first sentence: "The purpose of this note is to seek a decision on the issuance of licences for 19 finfish aquaculture sites…"

[153] Considering the focus of the News Release and the Minister's own words, as well as the content of the Memorandum from the Deputy Minister, as well as the interests of the Applicants, I am satisfied that the Minister made a licencing decision, affecting individuals and not a fishery.

[154] I agree with the submissions of the Applicants that a “licencing” decision attracts the protection of procedural fairness.

B. *Standard of Review*

[155] It is now appropriate to address the applicable standards of review.

[156] It is accepted that issues of procedural fairness are reviewable on the standard of correctness. I refer to the decisions in *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)* (2020), 76 Imm. L.R. (4th) and *Canadian Pacific FC, supra*.

[157] The merits of the Decision are reviewable on the standard of reasonableness, following and applying the teachings of the decision of the Supreme Court of Canada in *Vavilov, supra.*

[158] The Applicants also refer and rely on the decisions in *Portnov v. Canada (Attorney General)* (2021), 461 D.L.R. (4th) 130 and *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)* (2021), 185 C.P.R. (4th) 83.

[159] According to the decision in *Vavilov, supra,* the standard of reasonableness requires the Court to ask if the decision under review “bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on that decision.”

C. *Procedural Fairness*

[160] In *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, the Supreme Court of Canada considered the duty of procedural fairness arising under a particular regulatory regime, that is the *Penitentiary Service Regulations*. However, at paragraph 14 it acknowledged the general common law principle that there is "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."

[161] In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, the Supreme Court of Canada commented on the circumstances when the duty of fairness arises. At paragraph 50:

> Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.
>
> …
>
> This was underlined again very recently by this court in *Syndicat des employés de production du Qué. & de l'Acadie v. Can. (Can. Human Rights Comm.), supra*, where Sopinka J. was writing for the majority at pp. 895-96:
>
> > *Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided.* The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or

> executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates. [emphasis added]

[162] I refer to the decision in *Baker, supra* at paragraphs 21 to 28, where the Supreme Court presented a non-exhaustive list of factors that affect the content of procedural fairness. The Supreme Court identified the following factors:

1. The nature of the decision and the process followed in making it;
2. The nature of the statutory scheme and the statutory terms under which the decision maker operates;
3. The importance of the decision to the person or persons affected;
4. The legitimate expectations of the individuals challenging the decision; and
5. The choices of procedure made by the decision maker.

[163] The Applicants focus on the third and fourth factors, although reference was also made to the fifth factor.

i. Importance of the Decision

[164] The importance of the Decision to the Applicants cannot be overstated.

[165] Without transfer licences, the fish farms cannot operate. Denial of the transfer licences means the end of the fish farms in the Discovery Islands.

[166] The affidavit evidence submitted describes the investments made by the Applicants in their fish farms. The Applicants have been engaged in fish farming in the Discovery Islands for many years. They made significant investments with the planning involved. Dr. Morrison, at paragraph 50 of her affidavit, describes the planning in terms of:

> …organizing external contractors, placing vaccine orders (all fish are vaccinated before undergoing smoltification; broodstock receive additional vaccinations), well-boat planning, and ensuring the required farm facilities are available and ready to receive fish at the appropriate time.

[167] The evidence from the Minister does not rebut the evidence about significant investment and detailed planning, for the rearing and harvesting of the farmed fish stock.

[168] The Applicants' evidence also addresses the economic consequences of the abrupt and unanticipated closure of their operation. Those consequences flow into the communities for which the Applicants provide employment. The affidavits of Mr. Adams, Mayor of Campbell River, and Mr. Early, co-owner of Way West Water Taxi Ltd., among others, provide examples of loss of employment related to the Decision.

[169] The Applicants' evidence also addresses their potential losses resulting from the Decision.

[170] Mowi provided evidence that as a result of the Decision, thirty percent of its operations would be terminated within eighteen months. Cermaq provided evidence that its Discovery Island sites represent thirty-five percent and twelve percent of its annual harvest volume. Grieg

provided evidence that the Decision will result in a loss of approximately five percent of its annual production, in addition to other financial losses.

[171] Mr. Smeal, on behalf of BC Ltd., testified that its business will be lost.

[172] In *Morton v. British Columbia (Agriculture and Lands)* (2010), 2 B.C.L.R. (5th) 306 ("*Morton 2010*"), the Supreme Court of British Columbia ruled that regulation of aquaculture in the waters off British Columbia, lay within federal jurisdiction. While the Applicants acknowledge the common property nature of the fisheries resource for the people of Canada, including the wild salmon fishery, they say that their fish farms and the salmon they produce are private property, the result of their investments and labour.

[173] There is an obvious interplay between the wild salmon and the farmed salmon. They swim in the same waters, the potential deleterious effects of the farmed salmon upon the wild salmon was the focus of the Cohen Commission. The submissions of the Minister and of the Interveners were directed to this issue, with the latter emphasizing the need for further consultations and adherence to the precautionary principle.

[174] I agree with the Applicants, that they hold property interests in the fish they grow. In these circumstances, there can be no doubt that the Decision is of great importance to the Applicants. I refer to the decision in *Morton v. British Columbia (Agriculture and Lands)*, 2009 BCSC 136 (*Morton 2009*) where Justice Hinkson, as he then was, did not reject the idea that aquaculture was a private fishery.

ii. Legitimate Expectations

[175] The Applicants plead that they held legitimate expectations about the process to be followed by the Minister in making a decision about renewal of the aquaculture licences. At paragraph 26 of *Baker, supra*, the Supreme Court of Canada said the following about legitimate expectations:

> Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; Reference re *Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.) at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57 (Fed. T.D.); *Mercier-Néron v. Canada (Minister of National Health & Welfare)* (1995), 98 F.T.R. 36 (Fed. T.D.); *Bendahmane v. Canada (Minister of Employment & Immigration)*, [1989] 3 F.C. 16 (Fed. C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D.J. Mullan, Administrative Law (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 J.L. & Soc. Pol'y 282, at p. 297; *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1 (Fed. T.D.). Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[176] In the present case, the Applicants provided evidence that in the past, when licences were up for issuance or renewal, there were consultations between them and the Minister and DFO. I refer to the affidavits of Dr. Morrison, Mr. Foulds and Mr. Boschman.

[177] There is evidence that in the past, no aquaculture licence renewal had been refused, and that DFO considered transfers “routine”. There is evidence to show that following the Decision, no application for a transfer licence has been granted. I refer to the cross-examination transcripts of Ms. Webb and Ms. Sandgathe.

[178] The Applicants also provided evidence of past engagement between the Government of British Columbia, First Nations communities and industry representatives, that is in the “Broughton process”.

[179] This “process” resulted in a series of recommendations addressing the protection and restoration of wild salmon stocks, open-pen fish farms in the Broughton Archipelago area, and the future of sustainability for industry. All participants in the “process” agreed to the recommendations.

[180] Cermaq provided evidence that this previous engagement process, which was also in the context of salmon aquaculture, albeit in the Broughton area, created legitimate expectations as to how the present Discovery Islands decision-making process would advance.

[181] Mowi, in reply submissions, referred to the decision in *Canadian Pacific FCA, supra,* in respect of legitimate expectations. In that decision, the Federal Court of Appeal said the following at paragraphs 57 to 58:

> Legitimate expectations can only arise as a result of an administrative tribunal's conduct or its representations:
>
> > ...If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. ...
> >
> > *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 S.C.R. 559at para. 94
>
> This Court has explained the interests underlying the legitimate expectations doctrine as follows:
>
> > The interests underlying the legitimate expectations doctrine are the non-discriminatory application in public administration of the procedural norms established by past practice or published guidelines, and the protection of the individual from an abuse of power through the breach of an undertaking. These are among the traditional core concerns of public law.
> >
> > *Apotex Inc. v. Canada (Attorney General),* [2000] 4 F.C. 264, 188 D.L.R. (4th) 145 at para. 123

[182] The procedural fairness due to the Applicants included respect for their legitimate expectations. As discussed below, those expectations included notice about the pending Decision, the opportunity to make submissions and to know the “case to meet”, that is to know the concerns of other parties that may affect the Decision and the opportunity to respond.

[183] Upon consideration of the submissions made by the parties, I agree with the arguments advanced by the Applicants. In the factual circumstances, including the history of interactions between the Applicants and DFO, the Applicants had legitimate expectations, as referenced in *Baker, supra* above.

iii. Lack of Notice and of the Opportunity to Respond

[184] The Applicants say that the Minister and DFO talk about the development of a transition plan to transition aquaculture by 2025. They say that if closure of the fish farms was an option for the Minister, they could reasonably expect that this option would be addressed in the context of the transition plan, not in a short ten week process, beginning with the news release of September 28, 2020.

[185] The Applicants argue that the Decision was presented as a licencing decision in the news release of September 28, 2020. They submit that they were not given notice of the scope of the Decision nor notice that transfer licences would be banned. Without notice, they were deprived of an opportunity to make submissions, including submissions in response to the concerns of First Nations. They note that the Minister consulted with some First Nations on a confidential basis.

[186] The Applicants argued that the Minister imputed “constructive knowledge” of the scope of the Decision to them.

[187] As well, the Applicants point out that the scope of the Decision was unknown even to the Minister's employees. Ms. Webb, then the Director of Aquaculture Management for DFO Pacific Region, testified upon cross-examination that she was "surprised" by the Decision. Ms. Webb wrote the Memorandum including the recommendations that the Minister declined to accept.

[188] The Applicants claim that they were denied the opportunity for meaningful participation in consultation.

[189] BC Ltd. addresses the Minister's failure to take into account its specific circumstances, that is as a small, family owned business in which Mr. Smeal had invested his whole life and financial resource. He deposed in his affidavit that the operation has been disease free since 1986. It operates on a much smaller scale than Mowi, Cermaq and Grieg, and the impact of the Decision upon it is significantly greater.

[190] BC Ltd. submits that the duty to consult, which lay upon the Minister, did not replace the duty of fairness. It argues that consultation is procedurally unfair when it did not have the opportunity to respond to the concerns of First Nation, particularly the concerns about disease.

[191] For her part, the Minister said that the Applicants had actual knowledge of the possibility of closure, as a result of their communications with DFO and their participation with industry, for example with FAIAP.

[192] The submissions of the Minister are not persuasive. She, not FAIAP, makes the decision about the licences for the operation of the fish farms. While the industry association meetings certainly would have provided the opportunity to the Applicants to speculate about a potential decision, those meetings were not the forum in which such a decision would be made.

[193] I do not agree with the Minister's position that the Applicants had either constructive or actual notice of her Decision regarding renewal of the fish farm licences.

[194] I agree with the submissions of the Applicants about the lack of notice about the Decision that was eventually made.

[195] There was a lack of notice that transfer licence applications could be refused. The fish farms could not operate without transfer licences and if transfer licences were to be denied, as a practical matter, the fish farms would close.

[196] I refer to the Reasons of Justice Pamel in *Mowi No. 1, supra* at paragraph 106 where he said the following about the transfer licence aspect of the Decision:

> …In short, there was nothing to suggest that Mowi and Saltstream should have been on notice that there may have been an overnight prohibition on the issuance of transfer licences.

[197] I also agree with the Applicants that they were denied the opportunity to meaningfully respond to concerns.

[198] Although the Cohen Commission may be regarded as the “major” backdrop to the events of the fall of December 2020, for practical purposes the “effective” backdrop is the news release of September 28, 2020.

[199] That news release spoke about the renewal of aquaculture licences and led to consultations with the following First Nations: We Wai Kai, Wei Wai Kum, Kwiakah, Homalco, Klahoose and Tla’amin. Although the news release also said that DFO would consult with the K’omoks First Nation, the CTR records that this First Nation chose not to participate in meetings with the Homalco, Klahoose and Tla’amin First Nations. The news release of September 28, 2020 did not speak about transfer licences.

[200] The CTR contains a summary of consultations with the above noted First Nations.

[201] The Applicants were not privy to the concerns raised by several First Nations, as described in the summary of consultations. They were not apprised of the risk that the fish farms would not be licenced. The fact that a senior employee of DFO was not aware of that possibility underscores the degree of the breach of procedural fairness, relative to the Applicants.

[202] On November 12, 2020, Mr. Beech, Parliamentary Secretary, presided over a press conference in British Columbia. The Applicants said that the press conference, which addressed the 2025 Transition Plan for all of British Columbia, created legitimate expectations that if the farms in the Discovery Islands were to be shut down, this would be addressed as part of the plan.

[203] By letter dated November 24, 2020, the Applicants were given the opportunity "to inform the decision to be taken" on the reissuance of licences.

[204] The letter of November 24, 2020 did not say anything about transfers.

[205] Cermaq responded by letters dated November 30, 2020 and December 4, 2020; BC Ltd. responded by letter dated December 1, 2020; Grieg responded by letter dated December 2, 2020; and Mowi responded by letter dated December 4, 2020.

[206] On December 8, 2020, the Deputy Minister signed the Memorandum to the Minister.

[207] On December 10, 2020, Mr. Dobrinsky, Ms. Parker, Mr. Quaiattini and Dr. Morrison, on behalf of Mowi, met with the Minister.

[208] On December 11, 2020, the Minister met with senior staff and DFO management.

[209] By email on December 14, 2020, Ms. Webb asked BC Ltd. for clarification of its response to the letter of November 24, 2020. BC Ltd. responded to Ms. Webb by email on December 15, 2020.

[210] No record of any meeting or communication after December 8, 2020 is included in the CTR.

[211] In my opinion, this timeline of events leading up to the Decision shows that the Applicants were not given a meaningful opportunity to provide submissions or respond to concerns in respect of the full scope of the Decision.

iv. Reasons

[212] The Applicants also argue that the duty of procedural fairness existing relative to the Decision required the Minister to provide reasons, and that she failed to do so. Their submissions in this regard are independent of submissions about the standard of reasonableness.

[213] The Applicants submit that the notation made by the Minister on December 16, 2020, rejecting DFO's recommendation, does not constitute "reasons". They argue that the CTR is not "reasons", that the Applicants only had access to the CTR when they filed their applications for Judicial Review and that the reasons should have been available from the date when the Minister made her decision.

[214] The Applicants plead that the Decision is arbitrary and contrary to the Minister's stated objective to avoid the culling of fish. However, the effect of the Decision was the involuntary culling of fish by the Applicants. They argue that the Minister owed reasons in this regard, considering the consequences to them.

[215] The Minister's reply to these arguments is that reasons can be "discerned" from the CTR and no additional reasons were required. She argues that the adverse impacts upon industry,

including the Applicants, are described in the Memorandum that was before her and the Applicants can infer that she considered these impacts when making her decision.

[216] Further, the Minister submits that the Memorandum includes a section dealing with "Consultation with Seven First Nations". These concerns, according to the Minister, included not only the operation of the farms but the potential adverse impacts that continued farming may have upon the wild salmon stocks. The Minister proposes that this rationale, by itself, is a reason for her decision.

[217] The Minister notes that this section of the Memorandum suggests that the continued operation of the farms is inconsistent with the precautionary principle.

[218] In my opinion, the Minister's response to the Applicants' submissions is inadequate.

[219] I agree that the CTR, by itself, is not "reasons" for the Decision. It is not for the Applicants or the Court to piece together the Minister's basis for the Decision.

[220] As noted above, the CTR includes a recommendation from DFO that the existing licences be extended until June 30, 2020.

[221] This recommendation is followed by comments about "Length of Recommended Licence Renewal" and "Additional Measures". The first block of comments refer to the requests of First

Nations for more consultation time. They refer also to the British Columbia policy in tenures, for 2022 and the British Columbia focus on area based management.

[222] The second block of comments also refers to First Nations' concerns and recommends that the Minister "reaffirm a commitment" to area based management. This recommendation describes area based management as follows:

> ABM involves managing all aquaculture activities within a geographic area taking into account the totality of their potential environmental effects rather than our current approach of site by site management and will support the co-management of aquaculture.

[223] The submissions from the Minister that the reasons for her decision can be "discerned" from the CTR raise the problem that the recommendations set out in the Memorandum, including the two blocks of comments, support a decision contrary to the one that was made. It is not for the Applicants or the Court to speculate as to the basis upon which the Minister made her decision when she herself did not provide an explanation.

[224] Insofar as the Minister argues that the CTR provides "reasons" for the transfer aspect of the Decision, I observe that the CTR does not address an end to transfer licences.

[225] I acknowledge the directions of the Supreme Court of Canada in its decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, that the adequacy of reasons is no longer an independent basis to set aside an administrative decision. At the same time, however, I recognize the longstanding principle that the Court cannot create reasons where none exist.

[226] I refer to the decision in *Quadrini v. Canada Revenue Agency*, [2012] 2 F.C.R. 3, at paragraph 17 where the Court said:

> In engaging in careful regulation based on the principles of finality and impartiality, courts have made a number of general statements. For example, tribunals should not make submissions to the reviewing court that, in substance, amend, vary, qualify or supplement the reasons for decision of the tribunal. …

[227] I refer as well to *Vavilov, supra* at paragraph 81, where the Supreme Court of Canada said the following:

> It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

[228] In my opinion, failure of the Minister to provide reasons in her Decision of December 16, 2020 amounts to a breach of procedural fairness. A news release does not provide reasons. A news release is a means for a person, in this case either the Minister or DFO, to express a viewpoint of opinion. The consequences of the Decision in this case are significant and the Minister owed a duty to provide reasons.

D. *Reasonableness*

[229] Finally, there remains the issue of assessing the Decision against the applicable standard of review.

[230] All parties agree that the merits of the Decision are reviewable upon the standard of reasonableness, as discussed in *Vavilov, supra*.

[231] Reasonableness is to be assessed relative to the factual and legal context; see *Vavilov, supra* at paragraph 85.

[232] The factual context for the Applicants' operations is set out above. The legal context comes from the Act and Regulations made pursuant to the Act.

[233] Subsection 7(1) of the Act gives the Minister absolute discretion over the issuance of licences and provides as follows:

Fishery leases and licences	**Baux, permis et licences de pêche**
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.	**7 (1)** En l'absence d'exclusivité du droit de pêche conférée 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.

[234] Subsection 3(1) of the *Pacific Aquaculture Regulations, supra* permits the issuance of an aquaculture licence, as follows:

Aquaculture Licences	**Permis d'aquaculture**
3 (1) The Minister may issue an aquaculture licence authorizing a person to engage in aquaculture and prescribed activities on payment of the flat fee and the annual fee for the licence for the first year of	**3 (1)** Le ministre peut délivrer un permis d'aquaculture autorisant une personne à pratiquer l'aquaculture ou des activités réglementaires sur paiement des droits fixes et

the period during which it is valid.	annuels pour la première année de validité du permis.

[235] Sections 55 and 56 of the *Fishery (General) Regulations, supra* relate to the issuance of transfer licences, as follows:

Release or Transfer of Fish	**Libération ou transfert de poissons**
55 (1) Subject to subsection (2), no person shall, unless authorized to do so under a licence,	**55 (1)** Sous réserve du paragraphe (2), il est interdit à quiconque, à moins d'y être autorisé en vertu d'un permis :
(a) release live fish into any fish habitat; or	**a)** de libérer des poissons vivants dans tout habitat du poisson;
(b) transfer any live fish to any fish rearing facility.	**b)** de transférer des poissons vivants dans des installations d'élevage.
(2) Subsection (1) does not apply in respect of fish that is immediately returned to the waters in which it was caught.	**(2)** Le paragraphe (1) ne s'applique pas au poisson qui est immédiatement remis dans l'eau où il vient d'être pris.
Licence to Release or Transfer Fish	**Permis pour libérer ou transférer des poissons**
56 The Minister may issue a licence if	**56** Le ministre peut délivrer un permis dans le cas où :
(a) the release or transfer of the fish would be in keeping with the proper management and control of fisheries;	**a)** la libération ou le transfert des poissons est en accord avec la gestion et la surveillance judicieuses des pêches;
(b) the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and	**b)** les poissons sont exempts de maladies et d'agents pathogènes qui pourraient nuire à la

	protection et à la conservation des espèces;
(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.	**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.

[236] The broad discretion of the Minister in the matter of licencing was addressed by the Supreme Court of Canada in the decision of *Comeau's Sea Food Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12.

i. "Old" Test and "New" Test

[237] The Minister persisted in describing the Decision as one of discretion, attracting a high degree of deference. The Applicants replied that this is the language of *Maple Lodge, supra* and that the decision is no longer authoritative since the decision in *Vavilov, supra*.

[238] According to the decision in *Maple Lodge, supra*, in order to find a discretionary decision unreasonable, one of the following factors must be present:

1. Bad faith;
2. Non-adherence to statutorily mandated natural justice; and
3. Consideration of factors irrelevant or extraneous to the statutory purpose.

[239] The Minister also relies on the decision in *Barry Seafoods 2021, supra.*

[240] I agree with the submissions of the Applicants, that the factors in *Maple Lodge, supra* are no longer the test upon a reasonableness review. I refer to the decision in *Portnov, supra* where the Federal Court of Appeal said the following at paragraph 25:

> Today, the framework for reviewing the substance of administrative decision-making is *Vavilov*. It is intended to be sweeping and comprehensive – a "holistic revision of the framework for determining the applicable standard of review" (at para. 143). We are to draw upon *Vavilov*, not cases like *Katz*: we must "look to [the] reasons [in *Vavilov*] first in order to determine how [*Vavilov*'s] general framework applies to [a] case" (*ibid*.).

[241] It follows that the Minister's reliance on *Barry Seafoods 2021, supra* is misplaced.

[242] In the language of *Vavilov, supra,* in this case, the Court must look for "justification, transparency and intelligibility".

ii. Reasons

[243] The problem in this case in applying the current test of reasonableness is, first, the absence of reasons.

[244] I reject the submissions of the Minister that her "reasons" can be found in the CTR. The CTR is the record of the material that was before her when she made the Decision. The CTR, in this case, cannot at the same time be the reasons for that Decision.

[245] The CTR is the record before the Court. The Court cannot look beyond the CTR; see the decision in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing*

Agency (2012), 428 N.R. 297 at paragraph 19. The Applicants complain that the Minister, through the affidavit evidence that she filed, attempted to supplement the "record" that is before the Court.

[246] This is improper. I refer to the decision in *Leahy v. Canada (Ministry of Citizenship and Immigration)* (2012), 438 N.R. 280 where the Federal Court of Appeal said the following at paragraph 145:

> In this regard, counsel should be mindful of the limitations of supporting affidavits on judicial review. They cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision-maker. They may point out factual and contextual matters that are not evident elsewhere in the record that were obviously known to the decision-maker. They can also provide the reviewing court with general orienting information, such as how the request for information was handled, how the documents were gathered, and how the task of assessment was conducted. …

[247] The CTR is silent about any change in the process of issuing transfer licences. It is not silent about the possibility of closing the farms, but that opinion was not recommended to the Minister. There is no argument made by any of the Applicants that they were entitled to a licence, as a matter of right. The argument is that they were entitled to reasons for the Decision that was ultimately made by the Minister.

[248] The Applicants submit that where a decision maker departs from a recommended course of action, reasons are required. I agree.

[249] I refer to the decision *Wilkinson v. Canada* (2014), 460 F.T.R. 175 at paragraphs 20, 44 and 45, where the Court said the following about the departure of a decision maker from the conclusion of a Classification Grievance Committee:

> Classification Grievance Committees are highly specialized and their decisions will also be afforded a high degree of deference (see *Beauchemin* and *McEvoy*, *supra*). In the case at hand, the Deputy Head chose to disagree with the conclusion reached by the Committee. That is certainly his prerogative although it is not often the case as acknowledged by the respondent. Hence it is possible for the decision of the Deputy Head to fall within the range of outcomes which are possible and acceptable because they are defensible in respect of the facts and the law. However, one will expect that such departure will be justified in order to meet the standard of reasonableness. This decision under review did not reach the necessary standard.
>
> …
>
> In a case like this one, the reasons given to depart from a well-articulated recommendation must be intelligible, in the sense that they "are able to be understood" (The Canadian Oxford Dictionary, 2001, sub verbo, "intelligible"). With great respect, the decision does not have that measure of intelligibility. It seems to contemplate statements made with respect to degrees 7 and 6 as if they related to degrees 6 and 5. If that is not what the decision actually meant, the respondent has been incapable of enlightening the Court either by providing an alternate meaning. The respondent also seems to rely on "the intention behind ... the position" in order to take the analysis outside of the job description that is at the heart of the grievance adjudication. Finally it faults the Committee for not having considered the organizational context, where it would appear that the Committee considered that context. If the Deputy Head disagreed with the findings on that account, he did not express where his disagreement lies. At the end of the day, this reviewing court is left without understanding "why the tribunal made its decision" (*N.L.N.U.*, *supra*, para 16).
>
> My conclusion on the reasonableness of the decision suffices to dispose of the matter. The application for judicial review is granted, with costs.

[250] I also refer to the decision in *Ross v. Canada (Minister of Justice)* (2014), 453 F.T.R. 56 where the Court said the following at paragraph 56:

> Mr. Pringle was the Minister's delegate to conduct the investigation under s 696.2(3) of the Code. It was open to the Minister not to accept Mr. Pringle's advice and views in making the ultimate decision. However, in light of his departure from Mr. Pringle's advice, to meet the standard of reasonableness the Minister was under a heightened duty to explain the reasons for his disagreement. [citations omitted]

[251] As well, I refer to the decision in *Séguin v. Canada (Attorney General),* 2021 FC 45 at paragraph 40 where the Court said:

> Finally, reasonableness review is concerned with context: what constitutes a reasonable decision "will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov* at para 90). In instances such as these, where a Deputy Head chooses to depart from the recommendations of the CGC, such a departure must be justified in light of the CGC's expertise (*Wilkinson 1* at paras 20, 40; see also *Wilkinson v. Canada (Attorney General),* 2020 FCA 223 (F.C.A.) at paras 19-21)

[252] In *Vavilov, supra,* the Supreme Court of Canada directed administrative decision makers to “grapple” with the issues in play; see paragraph 128:

> … However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker* , at para. 39.

[253] I agree with the Applicants that the Minister failed to do so.

[254] The Decision, in the absence of reasons, cannot be justified. In the absence of reasons, it is not transparent. In the absence of reasons, it is not intelligible.

iii. Other Arguments

[255] The Minister made submissions about "social acceptability". Upon cross-examination, Ms. Webb, a senior employee of DFO, was unable to explain what these words meant.

[256] The Minister, in her notation, said that the intention of her Decision was to allow time for the fish in the farms to "grow out" and that the fish already in the farms be harvested in order "to avoid culling".

[257] The consequences of the Decision were completely the opposite.

[258] The evidence shows that the fish were indeed culled.

[259] I note the change in the Minister's words between the notation made on December 16, 2020 and the News Release of December 17, 2020.

[260] In the notation to the Memorandum contained in the CTR, the Minister said that in "the period between licence renewal and June 30, 2022, no hatchery smolts will be introduced."

[261] The News Release of December 17, 2020 says the following: "To stipulate that no new fish of any size may be introduced into the Discovery Islands facilities during this time".

[262] These two positions cannot be reconciled.

[263] I refer to the oral submissions made by the Minister, that the News Release was to provide “clarification” of her decision.

[264] This argument is without merit.

[265] It is impossible, in my opinion, to “clarify” a decision that has not yet been communicated.

[266] Mowi addressed the erroneous inclusion of its facility at Hardwicke, as part of the area caught by the Decision. It argues that the Hardwicke site is not within the specified Discovery Islands zone, that is FHZ 3-2. Mowi submits that the Hardwicke site is within FHZ 3-3.

[267] The Minister’s response, given upon the cross-examination of Ms. Webb, is that Hardwicke was included as “an administrative error”.

[268] In her written submissions, the Minister argued that while the inclusion of Hardwicke may have “initially” been an error, Mowi had “ample time to raise the issue with DFO but did not”. The Minister submitted that Hardwicke is on the border between FHZ 3-2 and 3-3, and that its inclusion was for “good reason”.

[269] In my opinion, this response by the Minister is unsatisfactory. It does not show an appreciation of the facts pertaining to Mowi's operation.

[270] BC Ltd. advanced a similar argument about the Minister's lack of appreciation of the facts. It submitted that the Minister failed to distinguish its status as a smaller operation, in comparison with Mowi, Cermaq and Grieg.

[271] These submissions show that the Minister did not demonstrate a full appreciation of the facts pertaining to these Applicants' operations.

[272] In my opinion, none of the arguments outlined above assist in overcoming the deficiencies in the Minister's Decision and its lack of reasonableness.

VIII. CONCLUSION

[273] I am satisfied that the Applicants have shown that the Decision of the Minister was an administrative decision, subject to the requirements of procedural fairness and otherwise, subject to review upon the standard of reasonableness.

[274] All the evidence and submissions of all the parties were considered. It is not necessary to address the Applicants' arguments about fettering of discretion by the Minister, in order to dispose of the present proceedings.

[275] The submissions of the Interveners, with the focus upon amendments to the Act, the constitutional protection of First Nations' rights, and respect for the precautionary principle, are not dispositive of the issues raised in this proceeding.

[276] The Applicants have shown that the Decision was made in breach of their rights to procedural fairness, for the reasons above.

[277] As noted in *Vavilov*, *supra* at paragraph 100, the Applicants carry a heavy burden to show that the Decision of the Minister is unreasonable. I am satisfied that the Applicants met that burden.

[278] I understand that the injunction granted on April 5, 2021 was not observed by the Minister.

[279] In the result, the applications for Judicial Review will be granted, the Decision of the Minister will be set aside and the injunction granted on April 5, 2021 will remain in effect.

[280] In the event of success upon these applications, the Applicants asked for the opportunity to make submissions on costs. That opportunity will be provided and a Direction will issue in that regard.

JUDGMENT in T-129-21

THIS COURT'S JUDGMENT is that the applications for Judicial Review are allowed with costs, the Decision of the Minister is set aside, the Injunction granted on April 5, 2021 continues and remains in force. The Applicants will be given the opportunity to make submissions on costs, a Direction will follow in that regard.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-129-21
STYLE OF CAUSE:	MOWI CANADA WEST INC., CERMAQ CANADA LTD., GRIEG SEAFOOD B.C. LTD., AND 622335 BRITISH COLUMBIA LTD. v. THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD v. ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY AND WATERSHED WATCH SALMON SOCIETY, FIRST NATIONS FISHERIES COUNCIL OF BRITISH COLUMBIA, THE BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS, THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS AND THE FIRST NATIONS SUMMIT
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 19, 20, 21, 22 & 25, 2021
REASONS AND JUDGMENT:	HENEGHAN J.
DATED:	APRIL 22, 2022

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