Federal Court  Cour fédérale

Date: 20130220

Docket: T-1925-11

Citation: 2013 FC 169

Ottawa, Ontario, February 20, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

**UHA RESEARCH SOCIETY,
JAMES EDWARD AUSTIN,
HIDEAWAY II VENTURES LTD. AND
ANDREW MILNE ON THEIR OWN BEHALF
AND ON BEHALF OF ALL ELIGIBLE
CATEGORY G LICENCE-HOLDERS**

Applicants

and

**THE ATTORNEY GENERAL OF CANADA,
MINISTER OF FISHERIES AND OCEANS
AND DON CARTO**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Respondent, Mr. Don Carto, holds a licence issued by the Respondent Minister of Fisheries and Oceans (the Minister) permitting him to carry out aquaculture in an area of 17.9

hectares in Trevenen Bay in the Strait of Georgia in British Columbia (the Aquaculture Site). Mr. Carto's original licence included the right to cultivate and harvest certain species of clams, oysters and other such marine species on the Aquaculture Site. In an amendment to the licence dated August 19, 2011 (the Licence Amendment), the Minister granted Mr. Carto certain rights to harvest geoduck on his Aquaculture Site. Of concern to the Applicants, Mr. Carto was granted the right to harvest geoduck that were on the Aquaculture Site prior to the grant of the Licence Amendment.

[2] The UHA Research Society, James Edward Austin, Hideaway II Ventures Ltd. and Andrew Milne (collectively, the Applicants) brought this application for judicial review of the Licence Amendment on behalf of all 55 eligible category G (geoduck) licence holders in the Pacific Region. The Applicants ask this Court to quash the Licence Amendment and also seek other declaratory and injunctive relief.

II. Issues

[3] After the oral hearing of this matter, I am satisfied that the overarching issue for determination is whether the Minister erred by issuing a Licence Amendment that is not authorized by the *Pacific Aquaculture Regulations*, SOR/2010-270 [*PAR*s]. Specifically, did the Minister lack the authority to issue a Licence Amendment to permit Mr. Carto to harvest geoduck existing on the Aquaculture Site at the time the amendment was issued?

[4] The Applicants' arguments that the decision to issue the Licence Amendment should be overturned can be organized into the following sub-issues:

1. Does the public right of fishery have any application to the decision?

2. Can the Minister authorize the harvest of fish (including geoduck) that exist on a tenure prior to the date of the licence issuance?

3. What is the meaning of "incidental to the operation of an aquaculture facility" as those words are used in the *PARs*?

4. Would Mr. Carto's harvest of the pre-existing geoduck on the Aquaculture Site be "incidental to the operation of an aquaculture facility"?

5. Were the findings reflected in the reasons for the decision reasonable in the context of the record?

[5] For the reasons that follow, I have concluded that the Minister did have the authority to issue the Licence Amendment and that the decision taken to issue the Licence Amendment was reasonably open to the Minister based on the record before him. Accordingly, this application for judicial review should be dismissed.

III. Standard of Review

[6] Considerable discussion took place at the hearing about the appropriate standard of review. The Applicants cited recent Federal Court of Appeal jurisprudence, asserting that the standard of review should be correctness (*Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans),* 2012 FCA 40 at paras 98-105, 427 NR 110 [*David Suzuki*]; *Sheldon Inwentash and Lynn Factor Charitable Foundation v Canada*, 2012 FCA 136 at paras 18-23, 432 NR 338 [*Sheldon Inwentash*]). The Applicants submit that the present case is similar to *Sheldon Inwentash* since both cases dealt with an extricable question of law relating to particular statutory categories. The Applicants also argue that *David Suzuki* is relevant, since it also dealt with the Minister's interpretation of the *Fisheries Act*, RSC, 1985, c F-14 [the *Fisheries Act*].

[7] It is trite law that the appropriate standard of review must be ascertained with reference to the question before the Court. As the Supreme Court of Canada stated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190 [*Dunsmuir*]:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q* at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[8] In this case, as I have described the issues or questions before the Court, they fall into two distinct categories. Sub-issues 1, 2 and 3 may well fall into the category of questions which the Court of Appeal in *David Suzuki* and *Sheldon Inwentash* stated should be subject to a correctness review. I will assess those parts of the decision on that basis.

[9] When a correctness standard is applied, the Supreme Court stated in *Dunsmuir*, above at paragraph 50:

> a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. This analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer.

[10] However, the remaining sub-issues appear to be questions of mixed fact and law to which a reasonableness standard should apply. In determining that the Licence Amendment should issue, the Minister made a number of findings of fact or mixed fact and law relating to Mr. Carto's activities, the general circumstances of these geoduck and the history of the Aquaculture Site. Issuance of an aquaculture licence is a highly discretionary decision in an area in which Minister has significant expertise (*Fisheries Act*, above at s. 7; *Dunsmuir*, above at para 53; *David Suzuki*, above at para 104; *Tucker v Canada (Minister of Fisheries and Oceans)*, 2001 FCA 384, 288 NR 10 [*Tucker FCA*], affirming 197 FTR 66, [2000] FCJ No 1868 (TD) [*Tucker FC*]). This expertise places the Minister in a better position than the courts to determine the significance of Mr. Carto's specific activities vis-à-vis the geoduck on the Aquaculture Site. Further, two considerations addressed by Justice Rothstein in *Tucker FC*, above at paras 13-16 – the "absolute discretion" under s. 7 of the *Fisheries Act* and policy-oriented nature of the decision – are relevant to the present case. Although the decision reflects an understanding that refusing to allow a pre-seed harvest could set a precedent, the value of the decision as a precedent was not determinative because of the fact-driven nature of the decision. This is consistent with Justice Rothstein's reasoning in *Tucker FC* and the application of a reasonableness standard.

[11] A reasonableness standard requires the court to determine whether a decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above at para 47). As noted by Justice Binnie in *Canada (Minister of Citizenship and Immigration v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339:

> There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[12] In sum, I will apply a standard of correctness to sub-issues 1, 2 and 3 and a standard of reasonableness to sub-issues 4 and 5.

IV. Background

[13] The background leading to this application for judicial review is somewhat lengthy but necessary to situate the reader.

[14] Geoduck are the largest of Canada's Pacific clams and are of great commercial value. During early development, a geoduck "seed" will settle on the ocean floor and dig itself into the substrate, where it will continue to grow. For the rest of its life, a geoduck will remain buried in the same place beneath the ocean floor that it reaches as a juvenile. A double siphon that resembles an elephant's trunk allows the geoduck to strain marine organisms out of sea water to obtain nutrients. Although they may live much longer, geoduck reach market size at around 8-10 years of age. Divers harvest geoduck with special equipment that dislodges them from the substrate using pressurized water.

[15] In 2005, Mr. Carto and his business partner, Ms. Karen King, commenced an aquaculture venture called C-King. In March 2005, Ms. King acquired a company called O.K. Oyster, which held a provincial aquaculture licence covering the Aquaculture Site. Ms. King and Mr. Carto received provincial authorization to amend the aquaculture licence to cultivate a variety of marine species, which did not include geoduck.

[16] During the remediation of the Aquaculture Site, Mr. Carto found geoduck seeds lodged in metal baskets and trays left over from the oyster operation. In his affidavit evidence in this matter, Mr. Carto suggests that these juvenile geoduck were either wild geoduck or came from a floating hatchery maintained nearby. Provincial representatives gave Mr. Carto permission to cultivate the geoduck. They assured him that licensing could occur later on, when Mr. Carto could show that the geoduck could grow and the Provincial Ministry had refined its policies.

[17] Mr. Carto recovered geoduck seeds and planted them, mainly from late 2005 until the end of 2007. Mr. Carto protected the geoduck planted in the intertidal waters by placing them in plastic tubes dug into the ocean floor during their early development. He also installed predator netting to protect geoduck in the subtidal waters and monitored and removed predators. Mr. Carto grew kelp as part of his multi-species aquaculture operation, which provided nutrients for the growing geoduck.

[18] In August 2010, Mr. Carto and Ms. King applied for an amendment to their provincial aquaculture licence to include geoduck, since the geoduck in the Aquaculture Site were nearing the size at which they could be harvested. Although the amendment was approved, the licence

expired in December 2010 since a recent court ruling (*Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136, 92 BCLR (4th) 314 [*Morton*]) led to the transfer of formal responsibility for aquaculture licences to the federal government.

[19] From that point, Mr. Carto and Ms. King were required to deal with the federal Department of Fisheries and Oceans (DFO). Throughout the negotiations with the DFO, Mr. Carto dealt with Ms. Kerry Marcus, as well as a few other employees.

[20] On September 28, 2010, Ms. Marcus took a tour of the Aquaculture Site. At this time and in the months that followed, Mr. Carto told Ms. Marcus about his activities with respect to geoduck. He showed Ms. Marcus a picture that, according to him, contained juvenile geoduck. As reflected in her affidavit in this matter, Ms. Marcus was advised by a research biologist that there were no geoduck in the picture, but she still took Mr. Carto at his word that he had cultivated them.

[21] Mr. Carto and Ms. King received a federal aquaculture licence for all species except for geoduck in December 2010, since, at the time of their application, they had not yet received the formal amendment to their provincial licence to include geoduck. Mr. Carto and Ms. King inquired about an amendment to this federal licence, corresponded with Ms. Marcus and eventually submitted a Harvest Plan. Ms. Marcus recommended that the geoduck amendment be granted in her Referral Summary Report. With approval by the Regional Director General, the Licence Amendment was issued on August 19, 2011 with certain conditions. Of primary concern

to the Applicants, the Licence Amendment gave Mr. Carto approval to harvest the geoduck that already existed on the Aquaculture Site.

[22] This approval to harvest existing geoduck appears, at least to the Applicants, to be contrary to the usual practice of permitting the commercial fishery to conduct a "pre-seed harvest" of shellfish on the tenure prior to the commencement of aquaculture activities. If this protocol had been followed, the 55 geoduck licence holders would have been able to harvest any and all geoduck located on Mr. Carto's Aquaculture Site, whether or not they had been planted and cultured by Mr. Carto or were otherwise located on the tenure.

[23] The Applicants learned of the decision to issue the Licence Amendment, with its authorization to harvest existing geoduck, at a meeting held in October 2011. They sought judicial review on November 28, 2011.

V. Decision Under Review

[24] The Applicant seeks review of the decision to approve the Licence Amendment which permits Mr. Carto: (a) to cultivate geoduck; and (b) to harvest the geoduck already present on his tenure. The Applicants do not object to the grant of the right to cultivate geoduck; their sole concern is with respect to the proposed harvest of geoduck on the Aquaculture Site.

[25] The decision in question was based upon a Referral Summary Report and Recommendation dated August 11, 2011 drafted by Ms. Marcus. All three parties rely on Ms. Marcus's Report as outlining the reasons for the decision.

[26] In her Report, Ms. Marcus began by evaluating the impact of the licence amendment, if granted, on other resource users in the area and the surrounding environment. She stated that there was no First Nations opposition and the Aquaculture Site is in an area where the commercial fishery will be unaffected. She also explained that since the area is already subject to active aquaculture, there would be no significant risk to fish and their habitat.

[27] Ms. Marcus noted Mr. Carto's opposition to a pre-seed harvest by the commercial fishery and that Mr. Carto included the harvest of the pre-existing geoduck in his Harvest Plan. She also acknowledged that the commercial fishery and the UHA could be concerned about a refusal to allow a pre-seed harvest. Ms. Marcus noted that waiving a pre-seed harvest in this case could set a precedent, but the facts of each case must be evaluated individually.

[28] Ms. Marcus recommended that the commercial fishery should not be granted a pre-seed harvest. Ms. Marcus cited the *Interim Protocol for Pre-Seed Harvest of Subtidal Geoduck Aquaculture Sites* (2010) [*Pre-Seed Harvest Protocol*], explaining that there was no history of commercial geoduck fishing at the Aquaculture Site and it was unlikely that a high-density population of commercially harvestable geoduck would be found there. Further, Mr. Carto's pre-existing aquaculture operation is already present in the Aquaculture Site which would be unduly disrupted by commercial operations. Ms. Marcus also explained that Mr. Carto had replanted

juvenile geoduck and, "[w]hile the aquaculturalist has not deliberately seeded hatchery-raised geoduck, he has demonstrated active husbandry of the pre-existing geoduck at the site".

[29] Ms. Marcus also acknowledged that aquaculturalists are permitted access to by-catch of wild geoduck by the *Pre-Seed Harvest Protocol* as well as the *National Policy on Access to Wild Aquatic Resources as it Applies to Aquaculture*. These policies allow for geoduck not deliberately placed on the lease to be harvested along with those deliberately cultured. Harvest of wild geoduck at the site by Mr. Carto would allow him to test the substrate and density of the existing population.

VI. Statutory Framework

[30] Mr. Carto's aquaculture licence and the Licence Amendment at issue in this application are creatures of the statutory regime affecting fisheries. I begin with an overview of that scheme.

[31] Section 7 of the *Fisheries Act* provides the Minister with discretion to issue fishing licences:

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.	7. (1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences d'exploitation de pêcheries — ou en permettre l'octroi —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.

[32] Section 43 of the *Fisheries Act* allows the Governor in Council to make regulations for carrying out the purposes and provisions of the Act, including regulations relating to the issuance, suspension and cancellation of licences.

43. (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations . . . (f) respecting the issue, suspension and cancellation of licences and leases;	43. (1) Le gouverneur en conseil peut prendre des règlements d'application de la présente loi, notamment : . . . f) concernant la délivrance, la suspension et la révocation des licences, permis et baux

[33] Aquaculture licences are issued pursuant to the *PARs*. Specifically, s. 3 of the *PARs* authorizes the issuance of an aquaculture licence allowing for participation in aquaculture and prescribed activities:

3. The Minister may issue an aquaculture licence authorizing a person to engage in aquaculture and prescribed activities.	3. Le ministre peut délivrer un permis d'aquaculture autorisant une personne à pratiquer l'aquaculture ou des activités réglementaires.

[34] Section 1 of the *PARs* provides a definition for aquaculture as well as for "prescribed activities":

1. The following definitions apply in these Regulations. … "aquaculture" means the cultivation of fish. (aquaculture)	1. Les définitions qui suivent s'appliquent au présent règlement. …

…	« activités réglementaires »
"prescribed activities" means	S'entend des activités suivantes :
(a) the catching of fish for the purpose of cultivation;	a) la prise de poisson à des fins d'élevage;
(b) the catching of fish that is incidental to the operation of an aquaculture facility;	b) la prise accidentelle de poisson dans le cadre de l'exploitation d'une installation d'aquaculture;
(c) the catching of fish for the purpose of complying with any monitoring condition specified in an aquaculture licence;	c) la prise de poisson afin de se conformer à toute condition concernant les mesures de surveillance prévues par le permis d'aquaculture;
(d) the catching of fish that escape from an aquaculture facility for the purpose of returning them to the aquaculture facility or otherwise disposing of them; and	d) la prise de poissons évadés d'une installation d'aquaculture dans le but de les retourner dans l'installation ou d'autrement en disposer;
(e) the catching of nuisance fish. (activités réglementaires)	e) la prise de tout poisson nuisible. (prescribed activities)
	« aquaculture » Élevage du poisson. (aquaculture)

[35] Aquaculture licences may be issued subject to conditions as outlined in s. 4 of the *PAR*s. In general terms, the Minister is authorized to impose conditions "[f]or the proper management and control of fisheries and the conservation and protection of fish". The regulatory authority to impose conditions on aquaculture licences is very broad. In addition to the specific conditions set out in s. 4 of the *PAR*s, the Minister may impose any of the specific conditions set out in s. 22(1) *Fishery (General) Regulations,* SOR/93-53 [*FGR*s].

VII. Analysis

A. *Public Right of Fishery*

[36] The Applicants assert that there is a quasi-constitutional public right of fishery, which can only be abrogated through the enactment of competent legislation. While I accept that there may be a residual public right of fishery in certain circumstances where Parliament has not legislated, this public right has no application to this case.

[37] In *R v Gladstone*, [1996] 2 SCR 723 at paragraph 67, 137 DLR (4th) 648, the Supreme Court addressed the public right of fishery in Canada. The Court summarized and accepted case law from the Judicial Committee of the Privy Council, stating that the public right of fishery cannot be abrogated, and an exclusive fishery thereby created, without legislation:

> It should also be noted that the aboriginal rights recognized and affirmed by s. 35(1) exist within a legal context in which, since the time of the Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation:
>
> > . . . the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike.
> >
> > …
> >
> > [I]t has been unquestioned law that since Magna Charta [*sic*] no new exclusive fishery could be created by Royal grant in tidal waters, and that no

> public right of fishing in such waters, then existing, can be taken away without competent legislation.
>
> (*Attorney-General of British Columbia v. Attorney General of Canada*, [1914] A.C. 153 (J.C.P.C.), at pp. 169-70, per Viscount Haldane.)

[38] The role of the public right of fishery in the context of the present *Fisheries Act* was addressed by the British Columbia Court of Appeal in *R v Kapp*, 2006 BCCA 277, 56 BCLR (4th) 11 per Justice Low, all other judges concurring on this point, aff'd 2008 SCC 41, [2008] 2 SCR 483 dealing with the *Charter* and aboriginal rights issues only [*Kapp*].

[39] At paragraph 19, Justice Low stated that:

> The common law right to fish in Canada has been substantially limited by the *Fisheries Act*. The statute and regulations passed pursuant to it control fishing. A right to fish in waters to which the statute has application does not exist in law unless authorized under that statute, usually by licence. [Emphasis added.]

[40] Hence, although the public right of fishery may still exist, it is nonetheless restricted by the *Fisheries Act*. This legislation regulates who may enter the fishery and the allocation of the fishery resources, imposing significant limits on who may exercise the public right to fish and under what circumstances they may do so.

[41] The Applicants recognize that the management and allocation of the public resource between user groups in the public fishery does not offend the public right to fish (*Kapp*, above at paras 54-66). However, the Applicants distinguish this case law since Mr. Carto received exclusive access to all the wild geoduck in the Aquaculture Site, through an aquaculture licence, without any limitation. I do not agree.

[42] *Kapp* must be read in the context of the changes in the law articulated in and following *Morton*. *Morton* confirmed that the federal government has jurisdiction over aquaculture, a fishery which falls under the federal fisheries power (*Morton*, above at paras 156, 161, 193). After this decision, formal responsibility for aquaculture was transferred to the federal government. Federal legislation and regulations relating to aquaculture now legally abrogate the public right of fishery.

[43] Reading *Morton* and *Kapp* together, the federal government has exercised its legislative authority to manage the fisheries resources within the public fishery and private aquaculture fishery. This necessarily includes the geoduck fishery – comprising all the geoduck in the region – and the allocation of resources between the owners of G licences and aquaculturalists. The *PARs* and an aquaculture licence validly authorized by them are "simply part of the regulatory scheme in force at the relevant time" and "only one of the methods of allocation of the resource" (*Kapp*, above paras 54, 57). The Minister retains the right to issue other licences pursuant to his absolute discretion under s. 7 of the *Fisheries Act* (*Kapp*, above at para 60). Therefore, this decision appears to be very similar to the allocation decision in *Kapp*, which did not create an exclusive fishery and did not offend the public right to fish.

[44] Therefore, the determinative issue is whether the licence issued to Mr. Carto falls within the scope of the *Fisheries Act* and the *PARs*. The Minister's decision to issue the Licence Amendment is not rendered incorrect by the public right of fishery. Where the legislative scheme exists and regulates the public right to fish, an aquaculture licence that falls within the bounds of the applicable legislation and regulations is validly authorized.

B. *Authorization under the PARs*

[45] I turn to an examination of the *PARs*. Section 3 of the *PARs* states that, "[t]he Minister may issue an aquaculture licence authorizing a person to engage in aquaculture and prescribed activities" (emphasis added). If Ms. Marcus correctly concluded that the harvest of the geoduck already present on Mr. Carto's tenure fell within the definition of aquaculture or prescribed activities, then the licence is validly issued under the *PARs*.

[46] The Applicants assert that the prohibition on commercial fishing renders Mr. Carto's activities vis-à-vis the geoduck on his tenure illegal. A licence for aquaculture, as well as the corresponding licences for broodstock and to transfer the seeded geoduck, is required. This argument appears to negate the straightforward possibility that the geoduck on Mr. Carto's tenure are the proper subject of an aquaculture licence as the product of aquaculture, defined under the *PARs* as the cultivation of fish.

[47] The legal status of these pre-existing geoduck must be determined with reference to the prescribed activity of "the catching fish that is incidental to the operation of an aquaculture facility" and the very unique facts presented by this case.

[48] For the following reasons, I believe that the licence is validly issued since the harvest of the pre-existing geoduck is incidental to the operation of an aquaculture facility.

C. *The Meaning of "Incidental to the Operation of an Aquaculture Facility"*

[49] As noted, s. 3 of the *PARs* permits an aquaculture licence to authorize "prescribed activities" including the "catching of fish that is incidental to the operation of an aquaculture facility" (*PARs*, s. 1). This case raises a question of statutory interpretation: namely, the meaning of the words "incidental to the operation of an aquaculture facility".

[50] The modern rule of statutory interpretation, as stated by Elmer A. Driedger (*The Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87) and cited with approval by the Supreme Court (*Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21, 36 OR (3d) 418; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, [2002] 2 SCR 559), is as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[51] When reading the words of the *PARs* to determine their grammatical and ordinary sense, it is logical to define "incidental" in reference to jurisprudence requiring a meaningful connection to a particular activity, including activities that are subordinate to a principal activity (*Bank of Nova Scotia v Canada (Superintendent of Financial Institutions)*, 2003 BCCA 29 at paras 55-58, 11 BCLR (4th) 206; *R v Sundown*, [1999] 1 SCR 393 at paras 28-33, 170 DLR (4th) 385; *Canadian National Railway v Harris*, [1946] SCR 352 at 386, [1946] 2 DLR 545, Estey J). In this particular circumstance, the meaningful connection must be to the operation of an

aquaculture facility. The word "incidental" does not necessarily imply a particular meaning that may be found in the fishing industry at large, as posited by the Applicants.

[52] This interpretation is supportable with reference to the broader context of the statutory scheme as a whole. The framework of the *PARs* demonstrates that the presence of a licensed, cultured crop may not be necessary, contrary to the assertions of the Applicants.

[53] Section 4 of the *PARs* does not appear to be limited, as argued by the Applicants, to exclude a harvest of fish preceding a licensed, seeded crop. According to s. 4, an aquaculture licence may contain conditions relating to "the harvesting of fish in the aquaculture facility" and the records that must be kept of harvests and other catches, such as catches of nuisance fish or fish that escape the facility (*PARs*, s. 4, emphasis added). This provision was drafted very broadly, with no limitation on what type of fish may be harvested. The use of a qualifier in other situations – for example, with respect to "nuisance fish" – further emphasizes that the word "fish" is meant to be viewed broadly.

[54] Other conditions that may be placed in an aquaculture licence also support this interpretation. The conditions under s. 22(1) of the *FGRs* relating to fishing may be placed in an aquaculture licence pursuant to s. 4 of the *PARs*; for example, specification of a fishing vessel, fishing equipment, species and quantity of fish or locations and times when fishing is permitted. This element of the *PARs* casts doubt on whether Parliament intended a clear demarcation under fisheries regulations between licensed, cultured fish and other fish.

[55] The purpose of the *PARs* is to license and facilitate aquaculture activities. A meaningful link to the operation of an aquaculture facility is consistent with this purpose. It also provides an important limitation, ensuring that an aquaculture licence requires some level of aquaculture activity.

[56] I would not assume, as the Applicants do, that "incidental to the operation of an aquaculture facility" should be interpreted with reference to the meaning of "incidental catch" or "accidental catch" in the context of commercial fishing. On the basis of plain meaning alone, the use of the phrase "to the operation of an aquaculture facility" seems to import additional considerations than simply whether or not a catch was inadvertent. Further, the term "incidental catch" is used in s. 5 of the *PARs*, which states that:

5. Unless the retention of incidental catch is expressly authorized by an aquaculture licence, every person who catches a fish incidentally must immediately return it, if it is alive, to waters outside the aquaculture facility in a manner that causes it the least harm.	5. Sauf dans le cas où le permis d'aquaculture autorise expressément la rétention des prises accidentelles, quiconque prend accidentellement un poisson doit, s'il est encore vivant, le remettre sur-le-champ dans les eaux situées à l'extérieur de l'installation d'aquaculture de manière à lui occasionner le moins de blessures possible.

[57] Section 5 of the *PARs* does appear to equate the word "incidental" with the word "accidental", as the Applicants assert. However, since different wording was chosen in the definition of "prescribed activities" under s. 1 of the *PARs*, this suggests that a different meaning was also intended.

[58] Therefore, an aquaculture licence may authorize the catching of fish incidental to the operation of an aquaculture facility. A meaningful connection to aquaculture activities is necessary, but the *PARs* do not require the presence of a licensed, cultured crop or that the catch is accidental. If Ms. Marcus's findings support a meaningful link to an aquaculture operation in this case, then Mr. Carto's licence is appropriately authorized under the *PARs*.

C. *Mr. Carto's Actions*

[59] Ms. Marcus's factual findings, viewed in the context of the record before her, demonstrate that Mr. Carto's aquaculture licence is validly authorized. Mr. Carto's harvest of the pre-existing geoduck, although not cultivated pursuant to an aquaculture licence, appears to be incidental to his ongoing Mari-Poly aquaculture operation, which includes the farming of geoduck.

[60] Ms. Marcus found that:

- Mr. Carto was engaged in "active husbandry of the geoduck population at the site" on the basis of his activities, including "replanting juvenile geoduck… disrupted in various bottom clean-up operations, as well as the natural sets that have occurred under mesh containers and netting left on the bottom from previous farm operations";

- The "[h]arvest of existing wild geoduck at the site is intended by the aquaculturalist to test the substrate and the density of the existing stocks";

- There "is no impact to the commercial fishery": there is "no documented commercial harvest history at the site" and "the likelihood of existing high density population of commercially harvestable geoduck is low"; and

- The Aquaculture Site was already "actively under culture" of a number of marine species and "[t]he site is well occupied with [Mr. Carto's] farming gear (rafts, long lines and on bottom sea cucumber)".

[61] Ms. Marcus's factual findings demonstrate that the harvest of the pre-existing geoduck may reasonably be considered to be incidental to the operation of an aquaculture facility. Ms. Marcus characterized the geoduck in the Aquaculture Site as almost exclusively those husbanded by Mr. Carto. Ms. Marcus's findings demonstrate that Mr. Carto was committed to geoduck husbandry and intended to continue these activities pursuant to his aquaculture licence in the future. The harvesting of the geoduck already on the site would provide helpful information for Mr. Carto about where in the Aquaculture Site and under what conditions geoduck grow best as he proceeds with his activities pursuant to his licence. Ms. Marcus also acknowledged Mr. Carto's overall aquaculture operation – of which the geoduck are only a part. This further supports her conclusion that Mr. Carto plans to harvest the geoduck not just for commercial reasons, but to obtain information to continue his work.

[62] Ms. Marcus does not use the word "aquaculture" or its definition under s. 1 of the *PARs*, "cultivation of fish", to describe Mr. Carto's activities. This makes sense, since these activities were not licensed. However, Ms. Marcus's factual findings lead the reader to conclude that unlicensed cultivation did occur – Mr. Carto replanted geoduck, cleaned up the sea floor and engaged in "active husbandry". Further, the record demonstrates that the geoduck in the Aquaculture Site benefited from the predator netting, PVC tubes and kelp provided by Mr. Carto. This is consistent with the meaning of cultivation under this particular statutory scheme and more broadly, in other areas of law, such the context of cultivation of marijuana. For example, in *R v Mowry*, 2006 NBCA 18 at paragraph 11, 297 NBR (2d) 16, the New Brunswick Court of Appeal accepted the following definition of cultivation: "[t]o bestow labour and attention upon land in order to the raising of crops, to till, to improve and render fertile by husbandry".

[63] The Applicants assert that Mr. Carto had an obligation to replace geoduck that he found, and that, if his activities extend further, they constitute enhancement and nothing more. However, Ms. Marcus's finding that Mr. Carto engaged in "active husbandry" appears to be much closer to a finding that Mr. Carto cultivated geoduck, as opposed to simply discharging his statutory responsibility or engaging in enhancement.

[64] Mr. Carto's activities go farther than the requirement to replace fish incidentally caught, as required under s. 33 of the *FGRs*. Section 33 requires a person who catches a fish incidentally without authorization, to replace that fish in a manner that causes the least harm to it. Ms. Marcus stated in cross-examination that reburying a geoduck would go beyond this requirement to replace. Further, Mr. Carto's cleanup activities with respect to the Aquaculture

Site, expressly acknowledged by Ms. Marcus, as well as his activities documented in the record, involved much more than simple replacement.

[65] Mr. Carto's actions do not fit the definition of enhancement espoused by the Applicants. Enhancement is defined by the Applicants as involving seeding on non-privately-held tenure, but nothing more. Mr. James Austin, a geoduck licence holder and President of the UHA Research Society, was cross-examined on his affidavit. Mr. Austin stated on cross-examination that the commercial fishery performs enhancement activities, which consist of:

> putting privately-grown geoduck, juvenile geoduck back into the common property, into the, into the wild production… But they are left there to mature.
>
> …
>
> Some of them have been planted, yes, and some of them have been sprinkled on the seabed and protected. Some of them have been planted with a technical planter that we had.
>
> (Applicants' Record at 101-103; see also Applicants' Record at 597-598 in which enhancement, according to the UHA, appears to be restricted to seeding and reburying small geoduck.)

[66] Mr. Carto's situation is different than that of enhancement, in the context of the commercial fishery, as described by Mr. Austin. Mr. Carto has done much more with his Mari-Poly aquaculture operation than the commercial fisheries do. For example, Mr. Carto provided greater protection to his geoduck, protecting planted geoduck as well as those sprinkled on the seafloor. Mr. Carto's kelp also provided food for the geoduck. The term "enhancement" used by the Applicants appears to involve planting geoduck and leaving them alone to mature. Mr. Carto's approach, as described by Ms. Marcus, was much more interventionist and of a fundamentally different character.

D. *Reasonableness of Findings in the Context of the Record*

[67] The Applicants assert that the references in the record to Mr. Carto's activities, presumably in the licence applications, refer to proposed changes subject to approval and, thus, cannot be considered to be activities incidental to his aquaculture operation. I do not agree.

[68] Ms. Marcus explained in her Summary Report that Mr. Carto "has demonstrated active husbandry of the pre-existing geoduck at the site", referencing his activities in cleaning up the Aquaculture Site, salvaging juvenile geoduck and replanting them. Further, the information before Ms. Marcus showed that Mr. Carto took an active role in rescuing, replanting, protecting and feeding the geoduck at the Aquaculture Site:

- Ms. Marcus spoke to Mr. Carto about his activities relating to the geoduck and communicated with him by e-mail;

- She had access to Mr. Carto's federal licence application dated November 24, 2010 and his DFO Interim Site Management Plan dated March 3, 2011, both of which refer to predator netting; and

- She also received Mr. Carto's provincial licence amendment application dated August 26, 2010, which referenced the netting and PVC tubes used to protect the geoduck, as well as the kelp grown at the Aquaculture Site.

[69] In advancing their argument, the Applicants ignore the context in which the licence amendment applications were submitted. Mr. Carto informed Ms. Marcus by e-mail, that:

> As you know we worked very closely with MAL licensing as well as enforcement for the last 6+ years to develop this Mari-Poly Culture model.
>
> Doing the R&D required to prove all of these species could be grown under one licence in one area.
>
> A substantial amount of money has been spent thus far in developing to a stage [where] we are now ready for full quota production.
>
> With regards to the Geo duck we were able to salvage some seed during under water clean up that was done.
>
> This natural seed stock was spread out on the farm to test the substrate for a successful grow out.
>
> We were told by the province to continue our R&D [projects] that had been discussed and when were successful and ready to go into production we could have it added to current licence which was done prior to the deadline.

[70] This is an acknowledgment that the provincial licence describes the apparatus already in place. The purpose of the licence amendment application was to gain official approval for actions that had already occurred and which were already sanctioned by the province.

[71] The Applicants also point to Ms. Marcus's statement in her cross-examination that she did not remember discussing geoduck with Mr. Carto during her site visit, and the divers did not see any geoduck, geoduck predator netting or PVC tubes. However, the Applicants ignore the fact that the intent of this particular site visit was to examine Mr. Carto's sea cucumber and sea cucumber culture methodology. Therefore, Ms. Marcus's findings in her Summary Report are perfectly reasonable, since, at the time, the DFO staff were not focused on geoduck.

[72] Lastly, the Applicants raise the issue of a picture that Mr. Carto showed to Ms. Marcus on the basis that it contained juvenile geoduck. The Applicants imply that since this picture does not contain geoduck, it may be inferred that Mr. Carto cannot identify geoduck or that there are no geoduck in the Aquaculture Site.

[73] In my view, the evidence relating to this photo is not sufficient to render Ms. Marcus's conclusions unreasonable. At best, this evidence appears to be somewhat contradictory. Further, Ms. Marcus chose to believe Mr. Carto's explanation of his activities based on her communications with him and documentation received from the provincial government. It is not the role of the court to reweigh this evidence to come to a different conclusion. Even if there are no geoduck in this particular picture, it does not necessarily follow that Mr. Carto did not cultivate geoduck in the Aquaculture Site. Therefore, Ms. Marcus's factual finding that Mr. Carto engaged in geoduck husbandry should not be disturbed on this basis.

VIII. Conclusion

[74] In conclusion, I find that Mr. Carto's Licence Amendment is appropriately authorized under the *PARs*. Stated in terms of the standard of review, I am satisfied that the threshold decision that the Minister had the authority to issue the Licence Amendment was correct. Further, the Minister's interpretation of the words "incidental to the operation of an aquaculture facility" was correct. Finally, the Minister's findings of the fact and mixed fact and law (as reflected in the Summary Report) were reasonable.

[75] This case presents unusual facts. In the general case, it is not likely that pre-existing stocks would be incidental to an aquaculture operation since there would be no history – licensed or not – of cultivation at the site and no grounds upon which the Minister could conclude that this cultivation would continue in the future. However, Mr. Carto's situation is unique. Mr. Carto applied for a federal aquaculture licence after the transition from provincial regulation of aquaculture. Under the provincial regime, Mr. Carto was apparently sanctioned by the provincial government to test out the farming of geoduck in the context of his experimental Mari-Poly culture model, with the assumption that a licence could be obtained later if cultivation was successful. Although Mr. Carto did eventual receive a provincial licence, this provincial licence was not valid for long because of the decision in *Morton*. This left Mr. Carto to apply for a federal aquaculture licence under somewhat unusual circumstances. In addition, the harvest of these geoduck will provide important information for the continuation of Mr. Carto's husbandry of geoduck. The geoduck harvest is authorized pursuant to the "prescribed activity" of "catching fish incidental to the operation of an aquaculture facility".

[76] The application for judicial review will be dismissed with costs to the Respondents. At the close of the hearing, I asked that counsel for all parties present their Bills of Costs. I gave the parties an opportunity to comment on those Bills of Costs. The Applicants did not comment on the Bills of Costs put forward for consideration by the Respondents. In my discretion, I believe that a total award of $40,000 inclusive of all fees, disbursements and taxes is reasonable. I will include an award of a lump sum amount of $20,000 to each of: (a) Mr. Carto; and (b) the Attorney General of Canada and the Minister of Fisheries and Oceans (jointly).

JUDGMENT

THIS COURT ORDERS AND ADJUDGES as follows:

1. The application for judicial review is dismissed;

2. Costs in the following lump sum amounts, inclusive of all fees, taxes and disbursements, are to be paid by the Applicants to the Respondents:

    a) to Mr. Don Carto: $20,000; and

    b) to the Attorney General of Canada and Minister of Fisheries and Oceans (jointly): $20,000.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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