IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***British Columbia (Agriculture and Lands),*** 2009 BCSC 136

Date: 20090209
Docket: S083198
Registry: Vancouver

Between:

Alexandra B. Morton, Pacific Coast Wild Salmon Society, Wilderness Tourism Association, Southern Area (E) Gillnetters Association, and Fishing Vessel Owners' Association Of British Columbia

Petitioners

And

Minister of Agriculture and Lands, The Attorney General of British Columbia on Behalf of The Province Of British Columbia, and Marine Harvest Canada Inc.

Respondents

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Petitioners	Gregory J. McDade, Q.C. Lisa C. Glowacki
Counsel for the Respondent Minister of Agriculture and Lands and the Attorney General of British Columbia	Nancy E. Brown Veronica L. Jackson Cory Bargen a/s
Counsel for the Respondent Marine Harvest Canada Inc.	Christopher Harvey, Q.C. Andrew Scarth a/s
Date and Place of Hearing:	September 29 and 30, and October 1 and 2, 2008 Vancouver, B.C.

INTRODUCTION

[1] This action concerns the jurisdiction of the Province of British Columbia (“Province”) to enact legislation with respect to finfish aquaculture in the Province’s coastal waters.

[2] The petitioners seek declarations that:

a) sections 13(5), 14, and 26(2)(a) of the ***Fisheries Act***, R.S.B.C. 1996, c. 149 [the B.C. ***Fisheries Act***]; the ***Aquaculture Regulation***, B.C. Reg. 78/2002; sections 1(h) and 2(1) of the ***Farm Practices Protection (Right to Farm) Act***, R.S.B.C. 1996, c. 131; and/or the ***Finfish Aquaculture Waste Control Regulation***, B.C. Reg. 256/2002; are *ultra vires* the Province of British Columbia, invalid and of no force or effect pursuant to s. 52 of the ***Constitution Act, 1867***;

b) a pending decision of the respondent Minister of Agriculture and Lands concerning tenure no. 1405180 would be *ultra vires* and invalid; and

c) a pending decision of the respondent Province and the respondent Minister of Agriculture and Lands to renew aquaculture licence no. 000821 would be *ultra vires* and invalid.

[3] The petitioners also seek orders prohibiting the respondent Province and Minister of Agriculture and Lands from deciding to renew tenure no. 1405180 and licence no. 000821 or exercising any powers pursuant to the regulatory regime relating to ocean finfish aquaculture. That tenure and that licence were issued to the respondent Marine Harvest Canada Inc. (“MHC”) by the Province of British Columbia pursuant to s. 14 of the B.C. ***Fisheries Act*** and ss. 11 and 18 of the ***Land Act***, R.S.B.C. 1996, c. 245.

[4] The petitioners argue that the exclusive jurisdiction to regulate the management and the protection of fisheries in Canada is vested in Parliament pursuant to s. 91(12) of the ***Constitution Act, 1867***.

[5] The Minister of Agriculture and Lands and the Attorney General of British Columbia (the "provincial Crown") argue that the impugned legislation is within the legislative authority granted to the Province by ss. 92(5) (management of lands), 92(13) (property and civil rights), 92(16) (matters of local or private nature in the Province), and 95 (agriculture in the Province) of the ***Constitution Act, 1867***.

THE IMPUGNED LEGISLATION

[6] The full text of the impugned provisions of the B.C. ***Fisheries Act*** and the ***Farm Practices Protection (Right to Farm) Act*** can be found in the Appendix to this decision. I have not included the full text of the impugned regulations.

a) The B.C. *Fisheries Act*

[7] The petitioners challenge ss. 13(5), 14, and 26(2)(a) of the B.C. ***Fisheries Act***. Section 13(5) establishes the provincial aquaculture licensing scheme, while s. 14(1) sets out the procedure to apply for such a licence and s. 14(2) gives the minister discretion on the decision to grant licences.

[8] Section 26(2)(a) gives the Lieutenant Governor in Council the power to make regulations "for safe and orderly aquaculture".

b) The Aquaculture Regulation

[9] The petitioners have challenged the validity of this regulation as a whole.

[10] This regulation is intended to prescribe and monitor "safe and orderly aquaculture" as permitted by s. 26(2)(a) of the B.C. ***Fisheries Act***. Among other things it creates an inspection regime, addresses escapes of farmed fish, sets out the requirements for aquaculture cages, and deals with drug treatments for farmed finfish.

c) The *Farm Practices Protection (Right to Farm) Act*

[11] The petitioners argue that ss. 1(h) and 2(1) of this ***Act*** are *ultra vires* the Province. I will summarize these sections here.

[12] Under s. 1(h) of the ***Farm Practices Protection (Right to Farm) Act***, licensed aquaculture is included in the definition of "farm operation" and thus subject to the protection of this ***Act***. Section 2(1)(a) then limits the liability of farmers for nuisance with respect to "odour, noise, dust or other disturbance arising from the farm operation", while s. 2(1)(b) prohibits injunctions or other court orders from preventing the farmer from conducting that farm operation.

d) The *Finfish Aquaculture Waste Control Regulation*

[13] The petitioners also challenge the validity of the entirety of this regulation.

[14] The ***Finfish Aquaculture Waste Control Regulation*** does just that: it regulates the waste produced by finfish aquaculture. It is established pursuant to the

Environmental Management Act, S.B.C 2003, c. 53. This regulation applies to all finfish farms and includes provisions for registration, waste discharge standards, pre-stocking requirements, domestic sewage requirements, best management practices, monitoring and reporting, remediation, fees, and offences and penalties.

BACKGROUND

[15] Mr. Gavin Last is the Assistant Director, Aquaculture Policy Branch, employed by the British Columbia Ministry of Agriculture and Lands ("MAL"). He obtained a law degree from the University of Saskatchewan, and is a certified aquaculture technician. In his affidavit in these proceedings, he stated that he "is responsible for the sustainable development, implementation and management of the province's aquaculture industry". He referred to the Province's Land Use Operational Policy which in turn refers to the ***Land Act***; the B.C. ***Fisheries Act***; the federal ***Fisheries Act***, R.S.C. 1985, c. F-14 [the federal ***Fisheries Act***]; the ***Canadian Environmental Assessment Act***, S.C. 1992, c. 37; and the ***Navigable Waters Protection Act***, R.S.C. 1985, c. N-22.

[16] The provincial policy lists the various responsibilities recognized by the Province as follows:

> Responsibility for the regulation and licensing of aquaculture in British Columbia is shared by a number of provincial and federal agencies.
>
> The Ministry of Agriculture and Lands is the lead provincial agency for aquaculture industry development. Under the authority of the *Fisheries Act*, MAL is responsible for the development and regulation of the aquaculture industry, evaluating the suitability of production proposals and providing licensing for aquaculture operations. It is also responsible for land-use allocation decisions and provides tenure rights

> to Crown land, foreshore and aquatic Crown land on behalf of the province under authority of the *Land Act.*
>
> The Ministry of Environment is responsible for regulating waste management, environmental monitoring and enforcement.
>
> Fisheries and Oceans Canada (DFO) is responsible for the regulation and management of wild finfish and shellfish fisheries (with the exception of wild oyster harvesting), marine navigation and major project reviews under the federal *Fisheries Act, Navigable Waters Protection Act,* and *Canadian Environmental Assessment Act*.

[17] Mr. Last's reference to the exception from federal government responsibility for wild oysters is the result of the delegation, by statute, of that responsibility from the federal government to the provincial government in the early 20th century. This agreement, entered into in October 1912, was "in pursuance of the '***Fisheries Act***' and of Chapter 23 of the Statutes of Canada, 1912 entitled 'An Act to amend the Fisheries Act' and under the authority of an Order in Council dated the 19th day of September, A.D. 1912" (the "Oyster Fisheries Agreement").

[18] The Oyster Fisheries Agreement gave the Province of British Columbia jurisdiction to grant exclusive leases of its aquatic lands between the high and low tide marks for aquaculture of oysters.

[19] Mr. Last asserted in his affidavit that the following issues relate to salmon farming:

- real property (security over the land),
- private *vs*. common property (the fish),
- fish health (wild and farmed),
- non-indigenous species (e.g. Atlantic salmon),
- water quality and environmental factors (waste containment and discharge, including dead fish),

- conflicting land or resource uses,
- marketing,
- product quality assurance and safety, and
- the purchase and use of therapeutants.

[20] Mr. Last swore that, for the purposes of this case, the only main governmental entities were the Department of Fisheries and Oceans Canada ("DFO"), Transport Canada, Environment Canada, the MAL, Land and Water B.C. and the B.C. Ministry of Environment. Mr. Last asserted that the operation of an aquaculture facility in British Columbia was viewed by the Province as a provincial matter under the provincial Legislature's authority over property and civil rights in the Province and generally all matters of a merely local or private nature in the Province, assigned to the provinces under ss. 91(13) and 92(16) of the ***Constitution Act, 1867***, respectively.

[21] Mr. Last asserted in his affidavit that although only the federal government initially granted licences for salmon farms pursuant to s. 7 of the federal ***Fisheries Act***, that licensing was "probably ultra vires the federal ***Fisheries Act*** in the context of private property and fishing rights", based upon Mr. Last's understanding of the decision of the Ontario Labour Relations Board in ***504578 Ontario Ltd. v. Great Lakes Fishermen & Allied Workers' Union***, [1986] O.L.R.B. Rep. 1691; aff'd. (1986), (*sub. nom* ***Re 504578 Ontario Ltd. and Great Lakes Fishermen, etc., Union***) 31 D.L.R. (4th) 765, (*sub. nom* ***Re 504578 Ontario Ltd. and Great Lakes Fishermen, etc., Union***) 56 O.R. (2d) 781 (H.C.); further aff'd [1990] O.L.R.B. Rep. 117 (C.A.); leave to appeal ref'd [1990] S.C.C.A. No. 233.

[22] Gary Caine is the Acting Manager, Regional Operations, Aquaculture Policy Branch of the MAL. He, too, swore an affidavit in these proceedings. He explained the layers of administration within the provincial structure to licence and manage aquaculture in British Columbia.

[23] Mr. Caine described the DFO as the "lead agency for the federal government" to ensure that each proposed new aquaculture site complies with the federal ***Fisheries Act***, Environment Canada as responsible for researching and regulating aquaculture impacts on wildlife and birds, Transport Canada for administering the ***Navigable Waters Protection Act*** and the ***Environmental Assessment Act*** as they apply to aquaculture, Health Canada for setting standards for acceptable levels of contaminants in aquaculture products and licences drugs for use in aquaculture, and the Canada Food Inspection Agency for inspecting aquaculture products and feeds to ensure consumption safety and adherence to federal requirements for animal feeds.

[24] According to Mr. Caine, the DFO manages its involvement in aquaculture at the national level through the Aquaculture Management Directorate, and its regional involvement through Regional Aquaculture Coordination Offices.

[25] The DFO published a paper in 1986 entitled ***Policy for the Management of Fish Habitat***. At page 1 of this paper, the DFO asserted that:

> Under the federal *Fisheries Act*, "fish habitats" are defined as those parts of the environment "on which fish depend, directly or indirectly, in order to carry out their life processes". The *Act* also defines "fish" to include all the life stages of "fish, shellfish, crustaceans, marine animals and marine plants". Accordingly, pursuant to the *Act*, this

> policy will apply to all projects and activities, large and small, in or near the water, that could “alter, disrupt or destroy” fish habitats, by chemical, physical or biological means, thereby potentially undermining the economic, employment and other benefits that flow from Canada’s fisheries resources.

[26] The DFO further asserted in this paper at page 2 that:

> Under the *Constitution Act (1982)*, the federal government has authority for all fisheries in Canada, and it remains direct management control of fisheries resources in the Atlantic Provinces of Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island; for the marine and anadromous salmon fisheries of British Columbia, for the marine fisheries of Quebec; and for the fisheries of the Yukon and Northwest Territories….

[27] In November 1986, the provincial Ministers of what were then the Ministries of Forests and Lands and of Agriculture and Fisheries, commissioned a public inquiry by Dr. David Gillespie into finfish aquaculture in British Columbia. The Commission report dated December 12, 1986, recommended the streamlining of jurisdictional issues relating to salmon farming between the federal and provincial governments.

[28] On September 6, 1988, the Government of Canada entered into an agreement (the “1988 Agreement”) with the Government of British Columbia which stated in its preamble:

> WHEREAS Canada and British Columbia wish to establish a mutual agreement to advance the orderly growth and development of the aquaculture industry in British Columbia;
>
> AND WHEREAS both Canada and British Columbia have substantial interests in the prudent development of an economically sound aquaculture sector and the facilitation of investment therein;
>
> AND WHEREAS both Canada and British Columbia are interested in identifying and clarifying their respective roles in advancement of the aquaculture sector;

> THEREFORE without prejudice to their respective Constitutional powers, the parties hereby agree….
>
> [emphasis added].

[29] This agreement provided for a federal-provincial Management Committee which was to meet regularly to confer regarding regulation of aquaculture, but Ms. Morton asserts that the Committee has either ceased to exist or has become inactive. Mr. Caine swore that the Committee stopped meeting in 2005, when quarterly meetings between senior officials of the DFO and the MAL replaced the meetings of the Committee.

[30] The provincial Crown maintains that the federal government agreed to withdraw the requirement of the federal Aquaculture Enterprise License ("AEL") for salmon farming and that "on-farm" matters would be administered by the provincial government. These respondents argue that the DFO would continue to issue the AEL on behalf of the Province until the necessary statutory changes were made and implemented. The provincial Crown also contends that the September 6, 1988 agreement formalized the withdrawal of federal involvement in aquaculture regulation and licensing, in part, in response to the Gillespie Commission recommendations.

[31] Mr. Last swore that the resulting revision of provincial legislation provided a mechanism for the Province to issue aquaculture licences to replace the federal AEL, and to:

- add a definition of commercial aquaculture to include finfish, shellfish and aquatic plants in any water environment;

- prohibit a person from carrying on the business of aquaculture without a licence;
- prescribe a licence and licence fees for conducting the business of aquaculture in the province;
- give the minister or a person designated by him the power to grant a licence subject to terms specified; and
- give the Lieutenant Governor in Council the power to make regulations for safe and orderly aquaculture and distribution of fish and aquatic plants.

[32] By 1991, all commercial aquaculture facilities in British Columbia were licensed by the provincial government pursuant to B.C. Reg. No. 364/89 which had been proclaimed into force by the Lieutenant Governor in Council in the fall of 1989.

[33] In July 1996, the provincial Environmental Assessment Office was directed, apparently by the provincial government, to conduct a review and make recommendations regarding the Province’s procedures to manage and regulate salmon farming. The Office reported extensively in August 1997, concluding that overall salmon aquaculture presented a low environmental risk.

[34] The Auditor-General of Canada published a report in 2000 entitled *The Effects of Salmon Farming in British Columbia on the Management of Wild Salmon Stocks*. The report determined that

> Fisheries and Oceans is managing the salmon farming industry on the basis that it poses an overall low risk to wild salmon and habitat. However, the Department is not fully meeting its legislative obligations under the *Fisheries Act* to protect wild Pacific salmon stocks and habitat from the effects of salmon farming….

[35] On February 15, 2002, the DFO published an *Interim Guide to the Application of Section 35 of the Fisheries Act to Marine Salmonid Cage Aquaculture*. At page 1 of this publication, the document states;

> The federal Minister of Fisheries and Oceans Canada (DFO) is responsible for the administration and enforcement of Section 35 of the *Fisheries Act*. When reviewing project proposals, regional Habitat Management staff determines what effects the project may have on fish habitat. This is done in accordance with the *Policy for the Management of Fish Habitat* (DFO, 1986) and with Subsection 35(1) of the *Fisheries Act* which states that “no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction (HADD) of fish habitat” except when authorized by the Minister, DFO, as contemplated in subsection 35(2) or through regulations under the ***Fisheries Act***.
>
> This document was developed in response to the rapid growth of the aquaculture industry to provide a practical and nationally consistent approach to the application of Section 35 to salmonid cage aquaculture developments. The determination by DFO Habitat Management assessors of whether a project has the potential to result in a HADD of fish habitat related to organic deposition is aided by the document, *Decision Framework for the Determination and Authorizations of Harmful Alteration, Disruption or Destruction of Fish Habitat* (DFO, 1998(a)). In the case of aquaculture, additional direction is required to assist assessors in determining whether an aquaculture project could cause a HADD of fish habitat.

[36] Sections 35 to 38 of the federal ***Fisheries Act*** are extensive. The full text of these sections can be found in the Appendix to this decision.

[37] Sections 35 and 36 deal with the pollution of fish habitat. Section 35(1) is a general prohibition of works and undertakings that harmfully alter, disrupt or destroy fish habitat. The exception to this rule is s. 35(2), which permits such works and undertakings if done “by any means or under any conditions” authorized by the Minister or by regulations under the federal ***Fisheries Act***.

[38] Parliament has assumed the authority to regulate the introduction of deleterious substances into the marine environment pursuant to s. 36 of the federal ***Fisheries Act***.

[39] Section 36 thus deals with prejudicial and deleterious substances both generally and specifically. Parliament prohibited the throwing overboard of any prejudicial or deleterious substance in water where fishing is carried on through s. 36(1)(a). The deposit of remains or offal of fish or other marine animals on land adjacent to water is prohibited by s. 36(1)(b), while s. 36(1)(c) prohibits leaving “decayed or decaying fish” in nets or other fishing apparatus. Pursuant to s. 36(3), “the deposit of a deleterious substance … in water frequented by fish” or in any place where it “may enter such water” is prohibited, though subsections (4) and (5) limit that prohibition by giving the Governor in Council the particular powers to create regulations permitting such actions. Subsection (6) requires that persons who deposit a substance under authorization pursuant to subsections (4) or (5) take various actions as required by the minister to prove that they are “depositing the deleterious substance in the manner authorized”.

[40] Section 37 of the federal ***Fisheries Act*** empowers the minister to request plans and specifications for works and undertakings that might affect fish or fish habitat, and s. 38(1) grants the minister authority to appoint inspectors and analysts.

[41] Ms. Morton swears that the DFO generally does not exercise its powers under s. 35 of this legislation, with the result that only one of the farms in the

Broughton Archipelago has been required to acquire a permit to harmfully alter fish habitat before commencing operations in the area.

[42] In September 2002, finfish aquaculture waste control regulations were introduced by the Province as the ***Finfish Aquaculture Waste Control Regulation***.

[43] The federal government also asserts jurisdiction over aspects of finfish aquaculture under s. 12(3) of the ***Canadian Environmental Assessment Act***. Ms. Morton alleges that it is standard practice for the DFO to decline to become a “Responsible Authority” under this legislation.

[44] In June 2005, The Honourable Geoff Regan, the Minister of Fisheries and Oceans of Canada published *Canada’s Policy for Conservation of Wild Pacific Salmon*. In this report, Mr. Regan stated at page 1:

> Canadians on the West Coast have an enduring connection with Pacific salmon forged thousands of years ago with the arrival of the first peoples. Wild salmon serve as a vital source of food for First Nations and have a central place in their culture and spirituality; they provide jobs, income, and enjoyment for individuals, businesses, and coastal communities and they play a key role in natural ecosystems, nourishing a complex web of interconnected species. The ties of Pacific salmon with west coast communities, people, and ecology have been eloquently described in the writings of the late Roderick Haig-Brown, who observed:
>
> > *The salmon runs are a visible symbol of life, death and regeneration, plain for all to see and share…The salmon are a test of a healthy environment, a lesson in environmental needs. Their abundant presence on the spawning beds is a lesson of hope, of deep importance for the future of man.*

[45] In the same document, at page 2, Mr. Regan commented on the role of Parliament with respect to wild salmon:

> Section 91 of the *Constitution Act, 1867* assigns exclusive legislative authority over "Sea Coast and Inland Fisheries" to the federal government. The Minister of Fisheries and Oceans exercises this authority under the *Fisheries Act* and regulations. The Minister retains the authority and accountability for the protection and sustainable use of fisheries resources and their habitat. The Minister's authority includes the direction and powers necessary to regulate access to the resource, impose conditions on harvesting, and enforce regulations. Provincial, Territorial and municipal governments have important authorities with respect to land, water and waste disposal that need to compliment efforts to conserve fish and fish habitat.

[46] In this paper, Mr. Regan recognized that between 1950 and 1990, one-third of the spawning locations in south-western B.C. "had been lost or diminished to such low numbers that spawners were not consistently monitored at these sites". The Minister also recognized that "[t]o survive and prosper, wild salmon need appropriate freshwater and marine habitat; no habitat, no salmon".

[47] At page 31 of the paper, the Minister specifically addressed aquaculture, recognizing that salmon production from this industry had expanded threefold in the preceding 10 years, and that its value then exceeded that of the commercial salmon fishery.

[48] The federal government also published ***Canada's Oceans Action Plan For Present and Future Generations*** in 2005, reporting at page 6 that at that date, the country's oceans were generating more than $22 billion directly through ocean-related industries, and that the value of fish farm production had, by then, increased by more than 500%. This paper reported at page 7 that the aquaculture industry could grow from its annual value at that time of $600 million into a $2 billion per year industry.

[49] The government of British Columbia struck a Special Committee of Sustainable Aquaculture (the "Special Committee") which published its Final Report to the Legislative Assembly of the Province on May 16, 2007. In the executive summary of the report, at page iv, the report stated:

> BC's North Coast is currently free of fish farms and wild populations remain healthy, contributing significantly to the region's economy. The Committee strongly recommends no salmon farm development north of Cape Caution.
>
> Vancouver Island and BC's South Coast includes areas dense with salmon farms in the Broughton Archipelago, Discovery Islands and Clayoquot Sound. The Committee strongly recommends a transition to ocean-based closed containment technology to minimize impact on vulnerable wild stocks and ecosystems.

[50] The Special Committee also reported on the direct economic impacts of aquaculture in the Province, stating at page 11 that aquaculture production and processing activities accounted for $371 million in direct output and contributed $134 million to provincial GDP in 2005. The wild commercial salmon sector was reported to have accounted for $216 million in direct output and $67 million in GDP in the same time period. Salmon sport fishing was reported to account for $231 million in output and $116 million in GDP in that time period.

[51] In his affidavit of July 18, 2008, Mr. Last swore that the Province's fisheries and aquaculture sector, which includes the wild and farmed fish, contributes more than $1.9 billion in revenues to the provincial economy and accounts for more than $601 million in GDP annually, and that in 2005, the aquaculture segment generated a total GDP of $274 million, the sport fishery $240 million and the commercial fishery $103 million.

[52] The Special Committee quoted a Mr. Stockner of Hazelton at page 17 of their report:

> The wild salmon economy is much more than a commercial fishing fleet and fish processors based at the mouth of the river, as important as those components are. It is the rich and diverse web of people and communities and the activities they undertake related to wild salmon, which span the watershed from the mouth of the river to the headwaters and all the tributaries that make up the entire watershed. It is First Nations people on the inland fishery along the river. It is angling guides and lodges. It is sports fishers, motels, campgrounds and bed-and-breakfasts. It is ecotourism operators who view grizzly bears dependant on healthy stocks of wild salmon. It is guides and outfitters who depend on healthy populations of bears, for example, for hunting. And it is the many levels of support and supply businesses – food, equipment, gas and other services – that support this economy. The wild salmon economy, however, would not exist without wild salmon ecology. You cannot have a healthy economy without healthy ecosystems.

[53] The Special Committee heard from a variety of witnesses, and received written submissions from a variety of authors. At page 20, it reported that “[w]hile there is no consensus amongst the scientific community about the potential harm incurred by open-net pen technology, the overwhelming majority of scientists, as well as a preponderance of evidence, suggests that from a public policy point of view we must act, and act immediately”.

[54] At page 31 of its report, the Special Committee referred to the controversial issue of the alleged proliferation of sea lice from finfish farming, pointing out that the practice in the aquaculture industry to address sea lice outbreaks was the use of the chemical therapeutant Emamectin Benzoate (SLICE), administered through fish feed pellets.

[55] The fish farm in question is located on the west coast of British Columbia in the area known as the Broughton Archipelago. That Archipelago is located between Kingcome Inlet and Knight Inlet, at the southern extremity of Queen Charlotte Strait, on the south-central coast of British Columbia, and covers an area of approximately 5,000 square kilometres.

[56] The fish farm operated by MHC is apparently located in the direct pathway of juvenile salmon migrating from at least four of the major salmon producing rivers of the Broughton Archipelago and includes an area of back eddy in the strong tidal currents of Tribune Channel that is attractive to juvenile pink salmon.

[57] The petitioners say that the Broughton Archipelago is a rich marine environment supporting many species, and is an integral wild salmon habitat and a major natural production area for all native salmon species except sockeye. The petitioners assert that a number of important salmon spawning rivers and streams empty into the Broughton Archipelago, and that salmon run through and rely upon the marine habitat as part of their life cycle. The petitioners also assert that there is commercial and sport fishing in the Archipelago.

[58] The petitioners assert that aquaculture, the cultivation of marine plants and animals, and in particular finfish aquaculture began in British Columbia in the 1970's, and was first introduced in the Broughton Archipelago in 1987. They say that there are some 28 fish farms in the Broughton Archipelago, which primarily cultivate Atlantic salmon.

[59] Apparently, the fish farms, including that of the respondent MHC, are floating nets. They are secured to the sea floor in deep marine water by anchors and occupy the column of water above their anchors up to the surface of the water. The nets contain hundreds of thousands of fish which are raised from cultivated eggs in a hatchery and then moved to the nets where they remain until they are harvested, unless they escape or die.

[60] In the nets, the farmed fish are fed food pellets that apparently contain dye to color the flesh of the fish. Ms. Morton swears that large numbers of Atlantic salmon escape from the farms in the Broughton Archipelago and then compete with the wild salmon in the area for wild food. The farm fish also receive antibiotics and other drugs, and the petitioners assert that a typical farm will generate 1,500 to 3,000 kilograms of waste and floating material which leave the nets, and depending on the tides and currents can travel up to 10 kilometres.

[61] The fish farm which is the subject of tenure no. 1405180 and licence no. 000821 is located in Watson Cove, in the Broughton Archipelago. The tenure and licence have or will soon expire. The tenure is approximately 20 hectares, and the farm is licensed to hold approximately 600,000 Atlantic salmon.

[62] Some scientists, and the petitioner Ms. Morton, are of the view that aquaculture exacerbates the proliferation of sea lice, which threaten the wild salmon, and that the presence of fish farms interferes with the migratory routes of the wild salmon. These scientists are also of the view that the waste created by the large

volume of farmed salmon, located in a discrete and fixed location, has a detrimental effect on the wild salmon when the waste leaves the net-pens.

[63] Ms. Morton also argues that the aquaculture operations are associated with increases in and the presence of diseases which affect the other marine life in nearby areas.

[64] The view of Ms. Morton and those scientists whose research she relies upon is that finfish farming has exacerbated the presence of sea lice in the Broughton Archipelago, resulting in a significant negative impact on the wild salmon who travel through the area. Mr. Last articulated the position respecting sea lice advanced by the provincial government respondents. He swore that the issue did not appear relevant to the legal questions raised in this case, and that on his review of the scientific literature and writing on the topic, “it is clear that the scientific community’s views on the effect of sea lice from the aquaculture industry on wild finfish populations lack unanimity”.

[65] Dr. Kenneth M. Brooks Sr., a biologist resident in the state of Washington, U.S.A., disagrees with Ms. Morton’s views with respect to the effects of waste products and the proliferation of sea lice from aquaculture. Dr. Brooks has studied the environmental effects of intensive fish and shellfish aquaculture for over 20 years, and those effects in the state of Washington and the Province of British Columbia for a period in excess of 17 years.

[66] Ronald Genetz, an employee of the DFO, also disagrees with Ms. Morton’s views. Mr. Genetz holds a Bachelor of Science (Hons) in Biology and Masters of

Science in Zoology from the University of British Columbia. He has been employed by the DFO for some 37 years. He has been active in terms of aquaculture, serving as the Pacific Region Aquaculture Coordinator from 1987 to 2000, and was seconded to the B.C. Salmon Farmers Association from July 2001 until April 2004. He stated in the first of his two affidavits sworn in these proceedings that "there is no evidence to support the claim that farmed Atlantic salmon escapes into the coastal waters of BC will impact the Pacific wild salmon resource by taking over habitat and/or affecting the genetic makeup of Pacific salmon through interbreeding".

[67] It is not for this court to determine the merits or effectiveness of the provincial legislation respecting aquaculture in the Province of British Columbia. That is a matter for the elected government, if the legislation is within its jurisdiction. The question for the court is that of the jurisdiction of the provincial government to pass the impugned legislation. In order to address that question, it is first necessary to consider whether all or any of the petitioners have the necessary standing to institute proceedings to raise that question.

STANDING

[68] The provincial Crown argues that all of the petitioners lack standing to pursue the remedies they seek.

[69] Traditionally for a litigant to pursue declaratory or injunctive relief with respect to legislation in this Court, that litigant required either the consent of the Attorney General, as the Attorney General is the guardian of the public interest, or a direct interest arising from the impact of the legislation in question. That requirement has

been relaxed to some extent as a result of a series of decisions by the Supreme Court of Canada: ***Thorson v. Attorney General of Canada***, [1975] 1 S.C.R. 138; ***Nova Scotia Board of Censors v. McNeil***, [1976] 2 S.C.R. 265; ***Minister of Justice (Can.) v. Borowski***, [1981] 2 S.C.R. 575 [***Borowski***]; and ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607 [***Finlay***].

[70] The distinction between the two types of standing was explained by LeDain J. for a unanimous Court in ***Finlay***. After canvassing a variety of authorities that address whether a litigant's personal interest in the legality of legislation is sufficient to afford him or her standing to challenge an exercise of statutory authority, he concluded at 622 that such standing required a certain "directness or causal relationship between the alleged prejudice or grievance and the challenged action". Having reached that conclusion, LeDain J. referred at 622-623 to an article by S.M. Thio, *Locus Standi and Judicial Review* (Singapore: Singapore University Press, 1971) at 5-6, where that author described the general requirement for standing in administrative law as being that of a "direct, personal interest". LeDain J. then went on to refer at 623 to the decision of the High Court of Australia in ***Australian Conservation Foundation Inc. v. Commonwealth of Australia*** (1980), 28 A.L.R. 257 at 270 [***Australian Conservation Foundation***]:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[71] LeDain J. concluded at 623-624 that while Mr. Finlay had a direct, personal interest in what he alleged was non-compliance with the terms and conditions of a federal government plan, the relationship between the alleged prejudice and the alleged non-compliance was too indirect, remote or speculative to create a sufficient causal relationship for standing under the general rule. LeDain J. thus went on to consider the scope and implications of the earlier decisions of the Supreme Court of Canada in ***Thorson***, ***McNeil*** and ***Borowski*** for public interest standing. At 631, he concluded that where the Attorney General refuses to assert a purely public interest in the limits of statutory authority by his own action, the court has a discretion to permit public interest standing in a private individual to institute proceedings.

[72] However, to paraphrase Martland J. in ***Borowski*** at 598, the court's discretion is to be exercised only in circumstances where:

1) The legal proceeding raises a serious legal question;
2) The private individual has a genuine interest in the resolution of the question; and
3) There is no other reasonable and effective manner for the legal question to be brought before the court.

[73] The five petitioners have similar interests in their desire to preserve and protect the wild salmon fishery in this Province, but differing interests and perspectives with respect to the impugned legislation that they consider inadequate to protect that fishery.

[74] The petitioner Ms. Morton is a registered marine biologist who has studied the marine environment in the Broughton Archipelago off the British Columbia shores,

focussing her research on the effects of ocean aquaculture on the environment in that area. Ms. Morton has published her research in peer-reviewed journals. She is the Executive Director of the Raincoast Research Society, and a Director of both the Salmon Coast Field Station Society and the Pacific Coast Wild Salmon Society.

[75] The petitioner Pacific Coast Wild Salmon Society is an incorporated society comprised of individuals who live or work in and around the Broughton Archipelago, and have an interest in the protection of wild salmon and marine habitat.

[76] The petitioner Wilderness Tourism Association is an incorporated society representing “nature-based” tourism operators throughout British Columbia who are dependant on a healthy natural environment for their livelihoods. This Association’s Mission Statement is:

> The Wilderness Tourism Association exists to ensure the ongoing viability of our industry by protecting the wilderness tourism land base. We are an organization of adventure tourism operators working to enhance the wilderness experience through advocacy and education and through involvement with government and public and private enterprise.

[77] Some of the members of the Wilderness Tourism Association operate sport fishing and wildlife viewing operations. The Association has concerns about the impact of aquaculture on the environment, and in particular, on the wild fish stocks in British Columbia.

[78] The petitioner Southern Area (E) Gillnetters Association is an incorporated society representing 180 fishermen and women who hold licences for the Area E commercial salmon gillnet fishery, also known as the Fraser River gillnet fishery. The

members of this Association are dependant on healthy wild salmon stocks for their livelihoods.

[79] Mr. Robert G. McKamey is the Vice-President of the Association. In an affidavit sworn May 2, 2008, he deposed that the members of his Association are concerned that the aquaculture operations in British Columbia are located in salmon migration and habitat areas and affect wild salmon stocks. He swore that members of his association have caught Atlantic salmon that have escaped from finfish farms off the coast of British Columbia, and that the members are concerned about the impact of sea lice and diseases from fish farms on wild salmon stocks.

[80] The petitioner Fishing Vessel Owners' Association of British Columbia was incorporated as a society in 1938. It represents the registered owners of fishing vessels throughout British Columbia. The members of this Association harvest herring and halibut, but mainly Pacific salmon.

[81] The president of the Vessel Owners' Association, Robert P. Rezansoff, swore an affidavit dated May 2, 2008 in which he deposed that the members of his Association are dependant on healthy wild fish stocks and particularly wild salmon stocks for their livelihoods. This association has previously participated in litigation concerning the management of salmon fisheries in British Columbia due to its' members concerns over the biological impact of aquaculture in the British Columbia coastal waters.

[82] The members of the Vessel Owners' Association have caught Atlantic salmon that they believe originated in fish farms in British Columbia coastal waters, and are

concerned about the impact of what they describe as “this invasive species” on the viability of native Pacific salmon.

[83] The provincial Crown argues that none of the petitioners has a direct, personal interest in the legality of legislation that is sufficient to afford them standing to challenge an exercise of statutory authority.

[84] The provincial Crown also contends that the impugned legislation was validly passed, and that these proceedings thus raise no serious legal question, but that if there is such a question, that none of the petitioners have a genuine interest in the resolution of the question, as that interest is recognized in the authorities. The provincial Crown argues that even if they do, there are other reasonable and effective means for the legal question to be brought before the court. The provincial Crown gave as examples a reference to the Court by the Attorney General of Canada or the Attorney General of British Columbia, or an application by an unsuccessful applicant for a fish farm licence.

[85] While I do not doubt that Ms. Morton, the Pacific Coast Wild Salmon Society, or the Wilderness Tourism Association have a direct, personal interest in the subject of the impugned legislation, I am not persuaded that they have any greater direct, personal interest in that subject matter than did the applicant in ***Finlay*** in the issue raised in that case. Like Mr. Finlay, the relationship between the prejudices caused to these petitioners is too indirect, remote or speculative to be a sufficient causal relationship for standing under the general rule, or to meet the definition of interest found in the quotation above from the ***Australian Conservation Foundation***.

[86] I find, however, that the petitioners Southern Area (E) Gillnetters Association and the Fishing Vessel Owners' Association of British Columbia meet the definition in ***Australian Conservation Foundation***. Their members' livelihoods depend upon the health of the west coast salmon fishery. Thus they have a direct and personal interest in the appropriate management of that fishery by legislative and regulatory means. I find that these two petitioners have personal interest standing to pursue the remedies that they seek in their petition.

[87] In the event that I am incorrect in finding direct personal interest standing for the Southern Area (E) Gillnetters Association or the Fishing Vessel Owners' Association of British Columbia, and because of my finding that the other petitioners lack such standing, I will also consider the claim of all of the petitioners to public policy standing.

[88] I am unable to accept the submission of the provincial Crown that there is no serious legal question to be tried. Such a conclusion assumes that the legislation in question is *intra vires* the Province, which is the very issue raised by the petitioners. On the evidence before me, aquaculture in British Columbia is an industry that generates hundreds of millions of dollars, and whether Parliament or the Province of British Columbia has the jurisdiction to regulate it cannot be considered other than a serious legal question.

[89] While I have concluded that the petitioners Ms. Morton, the Pacific Coast Wild Salmon Society and the Wilderness Tourism Association lack sufficient direct personal interest in the impugned legislation, the interest required to meet the

second factor articulated by LeDain J. in ***Finlay*** is more general; it is intended to separate the interests of mere “busybodies” from those with genuine interests.

[90] Each of the petitioners has a direct interest in the impugned legislation, albeit an insufficient interest to afford direct interest standing for the first three named petitioners. That said, Ms. Morton and the Pacific Coast Wild Salmon Society are informed and have participated in the public forums that have looked into and affected the development of aquaculture in British Columbia. The Wilderness Tourism Association has perhaps the most indirect interest of all of the petitioners, but as I have indicated above, their members are dependant upon a healthy natural environment for their livelihoods. While this interest is shared by many who would be unable to assert public interest standing, their concern over the impugned legislation is that it will not protect the environment upon which they depend, and that only by challenging the law will the federal government, the government that they maintain is responsible for the protection of that environment, be obliged to fulfill its constitutional obligations. As such, they are not simply interested, but stand to gain an advantage if the provincial legislation is declared *ultra vires*, or suffer a disadvantage if it is not. The Southern Area (E) Gillnetters Association and the Fishing Vessel Owners’ Association of British Columbia have a sufficient interest as their members’ livelihoods depend on healthy fish populations.

[91] I have concluded that all of the petitioners pass the screening set up by the second factor in ***Finlay***, and that affording them standing will not result in a wasting of scarce judicial resources or a failure to screen out busybodies.

[92] Will the challenge to the legislation come before the court if the petitioners are not given standing? It is not inconceivable that the legislation might be challenged by an unsuccessful applicant for a fish farm licence, but such an individual would not necessarily be affected by the impugned legislation in the way or to the extent that the petitioners may be. In ***Finlay*** at 633, LeDain J. commented that the Chief Justice in ***Borowski*** particularly emphasized the judicial concern that, in determining an issue, a court should have the benefit of the contending views of those persons most directly affected by the issue.

[93] The position taken by the Attorney General of British Columbia makes it clear that he would not consent to the institution of proceedings such as these. The Attorney General of Canada has declined the opportunity to make submissions in this case. I am, accordingly, of the view that the petitioners meet the requirement that there is no other reasonable and effective manner in which the issue of statutory authority raised by them may be brought before a court.

[94] I am therefore satisfied that I should exercise my discretion and grant all of the petitioners standing based upon public interest grounds.

JUSTICIABILITY

[95] To the extent that the petitioner’s desire is for the disallowance of aquaculture in the Broughton Archipelago, or for some different regulation of aquaculture in that area, such issues are beyond the jurisdiction of this court, and belong to Parliament or the provincial legislature. While I understand that the petitioners may wish a

different scheme to regulate aquaculture in the Province's coastal waters, the issues that they have placed before me do not engage those ends.

[96] In the event I were to grant the relief sought by the petitioners in these proceedings, whether or not those ends are achieved would then depend upon the will of Parliament. These are matters that are clearly beyond the competence of the courts: see ***Calgary Power Ltd. et al. v. Copithorne***, [1959] S.C.R. 24.

[97] That is not, however, a basis upon which to find a lack of competence in the court on the questions that the petitioners raise in their petition.

[98] The Notice of Constitutional Question ultimately settled upon by the petitioners was the constitutional validity of the following laws of British Columbia:

1) ***Fisheries Act***, RSBC 1996, c. 149, sections 13(5), 14 and 26(2)(a);
2) Aquaculture Regulation, B.C. Reg. 78/2002;
3) ***Farm Practices Protection (Right to Farm) Act***, RSBC 1996, c. 131, sections 1(h) and 2(1); and
4) Finfish Aquaculture Waste Control Regulation, B.C. Reg. 256/2002.

[99] The particulars of the constitutional challenge include:

- That the petitioners believed that finfish aquaculture in coastal waters was negatively impacting habitat and salmon stocks, and were not being properly regulated;
- That the Province had no constitutional ability to regulate aquaculture in coastal waters and in particular the facility of the respondent MHC;
- That the impugned legislation is, in pith and substance, about authorization, regulation and management of an ocean fishery and the creation of property rights in that fishery, and to

specified areas of ocean waters, areas of exclusive federal jurisdiction un s. 91(12) of the ***Constitution Act, 1867***, and *ultra vires* the Province;

- That by leaving the regulation of aquaculture to the Province, the federal government has abdicated its responsibility to regulate the ocean fishery;
- That the federal government cannot constitutionally delegate its regulatory power over fisheries to the Province;
- That if the impugned legislation is, in pith and substance, a matter within provincial jurisdiction, it is nonetheless constitutionally inapplicable to finfish aquaculture in ocean waters pursuant to the doctrine of interjurisdictional immunity, as it impairs the core of the federal fisheries power; and
- That, if the impugned legislation is, in pith and substance, a matter within provincial jurisdiction, it is nonetheless constitutionally inoperative as regards finfish aquaculture in ocean waters pursuant to the doctrine of paramountcy, as it conflicts with the federal fisheries legislation.

[100] However salutary the efforts of the province with respect to finfish farming may be, it is necessary for the resolution of the issues raised by the petitioners to determine the purpose and legal effect of the impugned legislation.

[101] In ***Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources***, [1989] 2 S.C.R. 49, Chief Justice Dickson, for a unanimous court, discussed justiciability in the Canadian legal process at 91:

> The most basic notion of justiciability in the Canadian legal process is that referred to in *Pickin*, *supra*, and inherited from the English Westminster and unitary form of government, namely, that it is not the place of the courts to pass judgment on the validity of statutes. Of course, in the Canadian context, the constitutional role of the judiciary with regard to the validity of laws has been much modified by the federal division of powers as well as the entrenchment of substantive protection of certain constitutional values in the various *Constitution Acts*, most notably that of 1982. There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends

> on the appreciation by the judiciary of its own position in the constitutional scheme.

[102] In my view, at least one of the questions posed by the petitioners is limited to the validity of provincial legislation, and as such is within the competence of the court and justiciable in these proceedings: see ***The Canadian Bar Association v. HMTQ et al.***, 2006 BCSC 1342, (*sub. nom* ***Canadian Bar Assn. v. British Columbia***) 59 B.C.L.R. (4th) 38 at para. 91; aff'd (*sub. nom* ***Canadian Bar Assn. v. British Columbia***) 2008 BCCA 92, (*sub. nom* ***Canadian Bar Assn. v. British Columbia***) 290 D.L.R. (4th) 617; leave to appeal ref'd (*sub. nom* ***Canadian Bar Assn. v. British Columbia***) [2008] S.C.C.A. No. 185.

GENERAL CONSTITUTIONAL PRINCIPLES

[103] I accept the submission of the provincial Crown that the following constitutional principles are relevant to the questions raised by the petitioners, and must guide my analysis of the issues to be determined:

a. The presumption of constitutionality
b. The onus of proof of unconstitutionality
c. The interpretation that favours validity is to be preferred.

[104] Laws passed by Parliament and the Legislatures are presumed to be within their respective spheres of constitutional jurisdiction. Courts should approach questions as to the validity of legislation based upon the assumption that the legislation was validly enacted: see ***Nova Scotia Board of Censors v. McNeil***, [1978] 2 S.C.R. 662 at 687-688.

[105] A party who challenges legislation must show that the legislation does not fall within the jurisdiction pursuant to which it was passed: see ***Reference re Firearms Act (Can.)***, 2000 SCC 31, [2000] 1 S.C.R. 783 at para. 25 [***Firearms Reference***].

[106] Where a challenged law is open to more than one interpretation, the court should prefer the interpretation that favours the validity of the legislation: see Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., vol. 1 (Scarborough, ON: Thompson Canada Limited, 2007) at 15-23 [Hogg vol. 1].

DIVISION OF POWERS

[107] The respective powers of Parliament and the provincial legislatures are set out in ss. 91 and 92 of the ***Constitution Act, 1867***. Neither Parliament nor a provincial legislature can expand its jurisdiction over the classes of subjects in ss. 91 or 92 by passing legislation which purports to do so.

[108] In ***Canadian Western Bank v. Alberta***, 2007 SCC 22, [2007] 2 S.C.R. 3 [***Canadian Western Bank***], the majority referred to co-operative federalism, also described as flexible federalism, at para. 42-43:

> …A broad application [of the interjurisdictional immunity doctrine] also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. See F. Gélinas, “La doctrine des immunités interjuridictionnelles dans le partage des compétences: éléments de systematization”, in *Mélanges Jean Beetz* (1995), at p. 471, and Hogg, at para. 15.8(c). It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts

> have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.
>
> Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a “core” of indeterminate scope – difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a “core” is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time: *Citizens Insurance*, at p. 109; *John Deere Plow*, at p. 339. For example, while the courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to “trade and commerce” would have led to an altogether different and more rigid and centralized form of federalism. It was by proceeding with caution on a case-by-case basis that the courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions.

[109] The interplay of these doctrines and principles to be applied to constitutional analysis was discussed at para. 22-24. Binnie and LeBel JJ., for the majority explained:

> … federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each

> head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.
>
> To attain these objectives, a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential. For this reason, the powers of each of these levels of government were enumerated in ss. 91 and 92 of the *Constitution Act, 1867* or provided for elsewhere in that Act. As is true of any other part of our Constitution – this "living tree" as it is described in the famous image from *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136 – the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society. It is also important to note that the fundamental principles of our constitutional order, which include federalism, continue to guide the definition and application of the powers as well as their interplay. Thus, the very functioning of Canada's federal system must continually be reassessed in light of the fundamental values it was designed to serve.
>
> As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism" [citations omitted]….

[110] The doctrines and principles include the pith and substance doctrine, the double aspect doctrine, the necessarily incidental or ancillary doctrine, the interjurisdictional immunity doctrine, the doctrine of paramountcy, and the doctrine of subsidiarity.

CONSITUTIONAL DOCTRINES AND PRINCIPLES

a. Pith and Substance

[111] It is upon this doctrine that the petitioners principally rely. The doctrine characterizes and classifies the challenged legislation in order to determine its dominant purpose. It requires a consideration of the essential character of the legislation that is impugned.

[112] In ***Canadian Western Bank***, Binnie and LeBel JJ. recognized that a constitutional analysis must begin with an analysis of the "pith and substance" of the impugned legislation, and at para. 26 to 27 commented:

> This initial analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates. As Rand J. put it in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 333:
>
> > … the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the legislature acting has been empowered to make laws. That principle inheres in the nature of federalism... . [Emphasis in original.]
>
> If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers.
>
> To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law (*Reference re Firearms Act*, at para. 16). To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose (*Attorney-General*

> *for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337). Equally, the courts may take into account the effects of the legislation. For example, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 ("*Alberta Banks*"), the Privy Council held a provincial statute levying a tax on banks to be invalid on the basis that its effects on banks were so great that its true purpose could not be (as the province argued) the raising of money by levying a tax (in which case it would have been *intra vires*), but was rather the regulation of banking (which rendered it *ultra vires*, and thus invalid).

[113] The decision in ***Canadian Western Bank*** must of course be read in the light of the earlier decision of ***Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)***, 2002 SCC 31, [2002] 2 S.C.R. 146 [***Kitkatla***].

[114] In ***Kitkatla***, LeBel J. for the Court stated at para. 54 that in looking at the impugned legislation's effect, "the Court may consider both its legal effect and its practical effect".

[115] In addition, at para. 55 of ***Kitkatla***, LeBel J. addressed "the appropriate approach to the pith and substance analysis where what is challenged is not the act as a whole but simply one part of it". He held at para. 56-58 that the proper approach is to consider first the challenged provisions and then the legislation as a whole. If the impugned provisions are in pith and substance outside of the enacting level of government's jurisdiction, then mere placement in an otherwise valid act or regulatory scheme will not save them.

[116] The constitutional validity of the whole of the B.C. ***Fisheries Act*** and the ***Farm Practices Protection (Right to Farm) Act*** is not at issue in this case. The petitioners challenge only portions of those Acts. Consequently, I will consider only the challenged provisions in my analysis below.

b. Double Aspect Doctrine

[117] Gonthier J. for the Court discussed this doctrine in ***Law Society of British Columbia v. Mangat***, 2001 SCC 67, [2001] 3 S.C.R. 113 at para. 48-50, and described it as first enunciated by the Privy Council in ***Hodge v. The Queen*** (1883), 9 App. Cas. 117 at 130 [***Hodge***] where Lord Fitzgerald stated that "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91".

[118] Gonthier J. then referred to the decision of Dickson J., as he then was, in ***Multiple Access Ltd. v. McCutcheon***, [1982] 2 S.C.R. 161 at pp. 180-82 [***Multiple Access***]:

> Because "[t]he language of [ss. 91 and 92] and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme" …, a statute may fall under several heads of either s. 91 or s. 92. For example, a provincial statute will often fall under both s. 92(13), property and civil rights and s. 92(16), a purely local matter, given the broad generality of the language. There is, of course, no constitutional difficulty in this. The constitutional difficulty arises, however, when a statute may be characterized, as often happens, as coming within a federal as well as a provincial head of power. "To put the same point in another way, our community life--social, economic, political, and cultural--is very complex and will not fit neatly into any scheme of categories or classes without considerable overlap and ambiguity occurring. There are inevitable difficulties arising from this that we must live with so long as we have a federal constitution"….
>
> …
>
>> But if the contrast between the relative importance of the two features is not so sharp, what then? Here we come upon the double-aspect theory of interpretation, which constitutes the second way in which the courts have dealt with inevitably overlapping categories. When the court considers that the federal and provincial features of the challenged rule are of roughly equivalent importance so that neither should be ignored respecting the division of

> legislative powers, the decision is made that the challenged rule could be enacted by either the federal Parliament or provincial legislature. In the language of the Privy Council, "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91".

[Citations omitted.]

[119] In ***114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)***, 2001 SCC 40, [2001] 2 S.C.R. 241 [***Spraytech***], the Supreme Court of Canada again considered the double aspect doctrine, and L'Heureux-Dubé J. for the majority referred with approval to the decision of the British Columbia Court of Appeal in ***British Columbia Lottery Corp. v. Vancouver (City)*** (1999), 169 D.L.R. (4th) 141, 61 B.C.L.R. (3d) 207. L'Heureux-Dubé J. stated at para. 39 that:

> As a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter. As stated by the Quebec Court of Appeal in an informative environmental decision, *St-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc.*, [1992] R.J.Q. 875 (C.A.), at pp. 888-91:
>
> > [TRANSLATION] According to proponents of the unitary theory, although the provincial legislature has not said so clearly, it has nonetheless established a provincial scheme for managing waste disposal sites. It has therefore reserved exclusive jurisdiction in this matter for itself, and taken the right to pass by-laws concerning local waste management away from municipalities. The *Environment Quality Act* therefore operated to remove those powers from municipal authorities.
> >
> > According to proponents of the pluralist theory, the provincial legislature very definitely did not intend to abolish the municipality's power to regulate; rather, it intended merely to better circumscribe that power, to ensure complementarity with the municipal management scheme... .
> >
> > ...
> >
> > The pluralist theory accordingly concedes that the intention is to give priority to provincial statutory and regulatory provisions. However, it does not believe that it can be deduced from this that any complementary municipal provision in relation to planning and

> development that affects the quality of the environment is automatically invalid.
>
> ...
>
> A thorough analysis of the provisions cited *supra* and a review of the environmental policy as a whole as it was apparently intended by the legislature leads to the conclusion that it is indeed the pluralist theory, or at least a pluralist theory, that the legislature seems to have taken as the basis for the statutory scheme.

c. Doctrines Requiring Validity of the Impugned Legislation

[120] The necessarily incidental, interjurisdictional immunity and paramountcy doctrines all apply only where the impugned legislation is valid. However, the other criteria for each of these doctrines and their effects differ.

i) Necessarily Incidental or Ancillary Doctrine

[121] This doctrine permits valid provincial legislation to encroach on the federal sphere of competence. In ***Canadian Western Bank***, Binnie and LeBel JJ. explained the doctrine at para. 28:

> … legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage of the analysis of constitutionality, the “dominant purpose” of the legislation is still decisive. Its secondary objectives and effects have no impact on its constitutionality: “merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law” (*Global Securities Corp. v. British Columbia (Securities Commission*), [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 23). By “incidental” is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature: see: *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 , 2005 SCC 49, at para. 28. Such incidental intrusions into matters subject to the other level of government's authority are proper and to be expected: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 670. In *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, by way of further

> example, and in contrast to the *Alberta Banks* case already mentioned, the Privy Council upheld the validity of legislation levying a tax on banks, holding that the pith and substance of the legislation was indeed to generate revenue for the province, and its essential purpose was therefore in relation to direct taxation, not banks or banking. See P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at para. 15.5(a).

[122] This doctrine therefore recognizes that so long as the impact of provincial legislation on matters within federal jurisdiction is secondary or incidental to the law's most important aspect, the secondary or incidental impact is permissible. If this doctrine applies, then the effect of the doctrine is to confirm the validity of the provincial legislation.

ii) Interjurisdictional Immunity Doctrine

[123] This is an interpretive doctrine that confines provincial legislation to the Province's jurisdiction. It applies where the provincial law is valid with respect to most applications of the law, as set out in Hogg vol. 1 at 15-28, but in some applications impairs a vital or essential part of a federal undertaking, person, or thing: ***Canadian Western Bank*** at para. 42 and 48-49. Where interjurisdictional immunity applies, the result is that the impugned law is not held to be invalid, but simply inapplicable to the federal undertaking, person or thing, and is limited in application to matters within the jurisdiction of the Province by reading down the legislation: Hogg vol. 1 at 15-28.

[124] In ***Canadian Western Bank*** the majority commented at para. 35-47 that the dominant tide of constitutional interpretation does not favour interjurisdictional immunity. Thus, although the doctrine has a proper part to play in appropriate

circumstances, the Court neither encouraged an intensive reliance on the doctrine, nor accepted it as a doctrine of first recourse in a division of powers dispute.

iii) Doctrine of Paramountcy

[125] Paramountcy ensures that valid provincial legislation does not encroach too far into the federal sphere. It applies where there are two valid laws, one federal and one provincial, that are inconsistent with each other: Hogg vol. 1. at 16-2 to 16-3. The application of this doctrine was explained by Binnie and LeBel JJ. for the majority in ***Canadian Western Bank*** at para. 75:

> … To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.

[126] If the doctrine is triggered, then the federal law prevails over the provincial law. The provincial law becomes inoperative and is held in abeyance unless and until Parliament repeals the federal law. The provincial law remains both valid and applicable, but does not operate while the federal law does: Hogg vol. 1 at 16-19 to 16-20.

d. Subsidiarity

[127] This is the recognition of the principle that decisions are often best made by the level of government that is closest to the citizens affected: ***Spraytech*** at para. 3.

ANALYSIS

a. Pith and Substance

[128] Section 91(12) of the ***Constitution Act, 1867*** assigned exclusive jurisdiction over the "Sea Coast and Inland Fisheries" to Parliament. Chief Justice Sir W.J. Ritchie considered the grant of fishing rights in the Miramichi, and commented on the competing federal and provincial powers with respect thereto, in ***The Queen v. Robertson*** (1882), 6 S.C.R. 52. At 120-124 the Chief Justice explained those powers:

> … the legislation in regard to "Inland and Sea Fisheries" contemplated by the British North America Act was not in reference to "property and civil rights" — that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding [of] fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof….
>
> I reiterate what I on a former occasion intimated, that at the time of the union the entire control, management and disposition of the crown lands, and the proceeds of the public domain, were confided to the executive administration of the provincial governments as representing

> the crown for the benefit of the provinces respectively, and to the legislative actions of the provincial legislatures, so that the crown lands, though standing in the name of the Queen, were, with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate; and this property, the Imperial Act, by clear unambiguous language, has, as we have seen, declared shall after confederation continue to be the property of the provinces; and I cannot discover any intention to take from provincial legislatures all legislative power over property and civil rights in fisheries, such as we are now dealing with, and so give to the parliament of *Canada* the right to deprive the province or individuals of their right of property therein, and to transfer the same or the enjoyment thereof to others, as the license in question affects to do.
>
> To all general laws passed by the Dominion of *Canada* regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

[129] Sixteen years later, in ***Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia***, [1898] A.C. 700 at 712-713 [***Reference re: British North America Act, 1867,***

s. 108 (Can.)], the Privy Council affirmed that the ***Constitution Act, 1867*** did not convey any proprietary rights in relation to the fisheries to the federal government, but observed that:

> … At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected….

[130] The petitioners assert that the pith and substance of the impugned legislation is the management of an ocean fishery, through licensing and regulation that controls all important aspects of the interaction between and impact of the farm fish and the wild ocean species and habitat including:

1) the number of ocean fish farms,
2) the location of the fish farms,
3) the size of the fish farms both in area and in the number of fish allowed in each facility,
4) the species of fish allowed, and
5) the management and operation of the fish farms.

[131] The petitioners also argue that the Province’s regulatory scheme grants property rights in the ocean fisheries and interferes with and restricts the public right to fish in the ocean.

[132] In ***Attorney-General for British Columbia v. Attorney-General for Canada (No. 2)*** (1913), 15 D.L.R. 308 at 314-318, [1914] A.C. 153 [***B.C. Fisheries Reference***], the Privy Council determined that the Province of British Columbia had no competence to grant a right to fish in navigable, tidal and marine waters, and no power to alter or restrict the public right to fish.

[133] For those areas of ocean on the coast of British Columbia where the fish farm cages are located, the rights to fish of those other than the holders of the fish farm licenses are restricted by the presence of the cages.

[134] The granting of fish farm licenses by the provincial Crown purports to permit those to whom such licenses are granted to introduce fish into significant areas of B.C.’s coastal waters, up to several hectares in size, which would otherwise be frequented by wild fish. This disruption is directly contrary to s. 35 of the federal ***Fisheries Act***.

[135] In addition, the fish introduced in this way leave waste matter in the water. The definition of “offal” in Catherine Soanes and Angus Stevenson, eds., *Concise Oxford English Dictionary*, 11th ed. (Oxford and New York: Oxford University Press, 2004) [*Concise OED*], includes “decaying or waste matter” along with “the entrails and internal organs of an animal used as food”. Leaving this waste matter is thus directly contrary to s. 36(1)(b) of the federal ***Fisheries Act***.

i) Definition of a Fishery

[136] The respondents do not argue that the Province has the jurisdiction to regulate fisheries. Instead, they both argue that MHC's operation is not a fishery. MHC argues further that if their operation is a fishery, it is a private fishery and thus beyond federal jurisdiction.

[137] However, if the respondents are wrong and a fish farm is to be viewed as a fishery, then in effect the provincial legislation is regulating a fishery.

[138] James Barclay, in *A Complete and Universal English Dictionary* (London: Thomas Kelly, 1833) defined "fishery" as "the action of taking fish" or "the place where fish abound, and are generally sought for".

[139] An American dictionary from 1858 similarly defines fishery in terms of location, as "a place for catching fish": Noah Webster, *An American Dictionary of the English Language* (Springfield, Mass.: George and Charles Merriam, 1858). Webster adds that a fishery is "the business of catching fish".

[140] The *Oxford English Dictionary Online* (2nd ed., Oxford University Press: 1989 and 2008) [*OED*], though current, also include usages that date back to the 17th century, demonstrating that the words set out in the *OED* have been used in the manner defined since at least those dates.

[141] The *OED* includes six definitions of "fishery", four of which are relevant to the petition in this case. The first definition is "the business, occupation, or industry of catching fish, or of taking other products of the sea or rivers from the water", with

citations from 1677, 1769, and 1890. The *OED*’s second definition for “fishery” is “a place or district where fish are caught; fishing-ground” and lists usages in 1699, 1792, and 1823. The *OED* gives a third definition, with citations from 1710, 1788, and 1885: “a fishing establishment” or “those who are engaged in fishing in a particular place”. The fourth definition is the legal definition: “the right of fishing in certain waters”.

[142] Angus Stevenson, ed., *Shorter Oxford English Dictionary on Historical Principles*, 6th ed. (Oxford and New York: Oxford University Press, 2007), vol. 1 [*Shorter OED*], sets out three of the definitions from the *OED*:

> 1. The business, occupation, or industry of catching fish ….
> 2. (An establishment in) a place or district where fish are caught…[and]
> 3. …The right of fishing in certain waters….

[143] The *OED* and the *Shorter OED* thus include definitions which deal with the location, action, business and right of fishing, but do not include a reference to the rearing of fish.

[144] Other current dictionary definitions of “fishery”, however, include “rearing” fish. The *Concise OED* defines “fishery” as “a place where fish are reared, or caught in numbers” and “the occupation or industry of catching or rearing fish”. These definitions explicitly apply to fish farms, as the farms are both a place where fish are reared and an industry of rearing fish.

[145] The definition of “fishery” in Katherine Barber, *The Canadian Oxford Dictionary* (Toronto, Oxford, and New York: Oxford University Press, 1998)

[*Canadian OED*] also clearly applies to fish farms. The *Canadian OED* defines "fishery" in three ways:

> 1. a fish hatchery or place where fish are reared.
> 2. a fishing ground or area where fish are caught.
> 3. the occupation and industry of catching or rearing fish.

[146] I consider that the average Canadian's understanding of the term "fishery" is also relevant, given the living tree aspect of Canadian constitutional interpretation and the recognition in the jurisprudence that the perceptions of "[t]he man on the Macdonald bus" are important: See ***Landry v. Cadeau***, [1985] B.C.J. No. 1396 at para. 30 (S.C.) *per* Southin J., as she then was. In my view, the "man on the Macdonald bus" would conclude that a fish farm is a fishery.

[147] Parliament defined the term in s. 2 of the federal ***Fisheries Act*** as follows:

> "fishery" includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith; ...

[148] The definition of "fisheries" within the federal jurisdiction was recently addressed by the Supreme Court of Canada in ***Ward v. Canada (Attorney General)***, 2002 SCC 17, [2002] 1 S.C.R. 569 [***Ward***].

[149] In ***Ward***, McLachlin C.J. stated at para. 17 that:

> The first task in the pith and substance analysis is to determine the pith and substance or essential character of the law. What is the true meaning or dominant feature of the impugned legislation? This is

> resolved by looking at the purpose and the legal effect of the regulation or law: see *Reference re Firearms Act*, *supra*, at para. 16. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was regulating the fishery, or venturing into the provincial area of property and civil rights. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law: see *Reference re Firearms Act*, *supra*, at paras. 17-18; *Morgentaler*, *supra*, at pp. 482-83. The effects can also reveal whether a law is "colourable", i.e. does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction?: see *Morgentaler*, *supra*, at p. 496.

[150] After confirming the continuing authority of ***Robertson*** at para. 34, McLachlin C.J. referred with approval at para. 35 to the definitions of "fishery" cited by Newcombe J. in ***Reference re Certain Sections of the Fisheries Act, 1914***, [1928] S.C.R. 457, aff'd [1930] A.C. 111 (P.C.), from *Patterson on the Fishery Laws* (1863), at p. 1, as "the right of catching fish in the sea, or in a particular stream of water"; and to what Newcombe J. described as the "'leading definition' from J. A. H. Murray's *A New English Dictionary* (1888), defining fishery in terms of the 'business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water'".

[151] Chief Justice McLachlin also referred at para. 36 to the "theme that the fisheries power refers to the resource". She cited Laskin C.J. (dissenting, but not on this point) in ***Interprovincial Co-Operatives Ltd. v. The Queen***, [1976] 1 S.C.R. 477 at 495, who held that "the federal fisheries power 'is concerned with the protection and preservation of fisheries as a public resource,' extending even to the 'suppression of an owner's right of utilization'".

[152] At para. 40-41 of ***Ward***, the Chief Justice pointed out:

> Moreover, the courts have rejected the view that the federal power extends only to management of fisheries in their natural state and terminates prior to the point of sale. In *British Columbia Packers Ltd. v. Canada Labour Relations Board*, [1976] 1 F.C. 375 (C.A.) (appeal to S.C.C. dismissed on other grounds, [1978] 2 S.C.R. 97), Jackett C.J. remarked that the fisheries power does not extend to the "making of laws in relation to things reasonably incidental to carrying on a fishing business, such as labour relations and disposition of the products of the business, when such things do not in themselves fall within the concept of 'fisheries'" (p. 385 (emphasis deleted)). However, it is clear that aspects of sale that are necessarily incidental to the exercise of the fisheries power fall within federal jurisdiction: see *R. v. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158 (C.A.); *R. v. Saul* (1984), 10 D.L.R. (4th) 736 (B.C.S.C.); *R. v. Twin* (1985), 23 C.C.C. (3d) 33 (Alta. C.A.). The rationale is that the federal government may limit sales in order to prevent injurious exploitation of the resource. It therefore appears that no bright line can be drawn at the point of sale for the purposes of defining the scope of the federal fisheries power.
>
> These cases put beyond doubt that the fisheries power includes not only conservation and protection, but also the general "regulation" of the fisheries, including their management and control. They recognize that "fisheries" under s. 91(12) of the *Constitution Act, 1867* refers to the fisheries as a resource; "a source of national or provincial wealth" (*Robertson*, *supra*, at p. 121); a "common property resource" to be managed for the good of all Canadians (*Comeau's Sea Foods*, *supra*, at para. 37). The fisheries resource includes the animals that inhabit the seas. But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation.

[153] At para. 42-43, Chief Justice McLachlin cautioned that:

> Although broad, the fisheries power is not unlimited. The same cases that establish its broad parameters also hold that the fisheries power must be construed to respect the provinces' power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. This too is a broad, multi-faceted power, difficult to summarize concisely. For our purposes, it suffices to note that the regulation of trade and industry within the province generally (with certain exceptions) falls within the province's jurisdiction over property and civil rights: see *Citizens Insurance*, *supra*; see also *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 (P.C.).

> Thus we have before us two broad powers, one federal, one provincial. In such cases, bright jurisdictional lines are elusive. Whether a matter best conforms to a subject within federal jurisdiction on the one hand, or provincial jurisdiction on the other, can only be determined by examining the activity at stake. Measures that in pith and substance go to the maintenance and preservation of fisheries fall under federal power. By contrast, measures that in pith and substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights.

ii) What is Finfish Aquaculture?

[154] I am unable to conclude, as the respondents argue, that the activity of finfish aquaculture is an activity other than a fishery. The activity of fish farming involves the rearing of fish as the fish must reside in provincial waters until such time as they reach a sufficient age and size to be of commercial value. The farms vary in size, but on the evidence before me the cages containing the farm fish can occupy several hectares and hold several hundreds of thousands of fish. The farm fish are reared in areas previously frequented by “wild” fish. But for the finfish farms, the areas would still be frequented by “wild” fish, but the “wild” fish are prevented from doing so due to the presence of the cages in which the farm fish are reared.

[155] While the ultimate harvesting of the fish is from within the cages where they are raised, the fish are nonetheless taken as “products of the sea”. It is also possible for fish to escape from these cages. The caged fish must ultimately be “caught”, in some manner in order to be harvested and sold, and caught in the areas previously available to the “wild” fish.

[156] I conclude that the fish which are reared in finfish farms on the coast of British Columbia are either a part of the overall British Columbia Fishery or are a fishery unto themselves. In either case they fall under the jurisdiction of Parliament under s. 91(12) of the ***Constitution Act, 1867***.

[157] I am also unable to accept the provincial Crown's argument that the activity of finfish farming is at first instance within provincial jurisdiction. The management and preservation of the fisheries has been clearly held to be within the exclusive jurisdiction of Parliament. As stated by Martland J. in ***Northwest Falling Contractors Ltd. v. the Queen***, [1980] 2 S.C.R. 292 at 301:

> The definition of a deleterious substance is related to the substance being deleterious to fish. In essence, the subsection seeks to protect fisheries by preventing substances deleterious to fish entering into waters frequented by fish. This is a proper concern of legislation under the heading of "Sea Coast and Inland Fisheries".

See also ***R. v. Crown Zellerbach Canad, Ltd.***, [1988] 1 S.C.R. 401 at 422, and s. 43 of the federal ***Fisheries Act*** where Parliament has chosen to enact legislation for the management and control of the fisheries, and the conservation and protection of fish.

[158] During the time that they are being reared, farm fish are fed largely, if not exclusively, with feed that the "wild" salmon do not compete for. The feeding of the farm fish requires the introduction of chemicals, and results in the introduction of the waste produced by the farm fish into the waters shared with the "wild" fish. Whether these chemicals and waste products have a deleterious affect on the "wild" fish habitat, and if so, how that should be managed, I need not decide. Yet the reality of

the presence of the fish farms is that they introduce into the areas where they are located materials that would not otherwise be there, and the jurisdiction to preserve at least the wild fishery is given exclusively to the Parliament under the ***Constitution Act, 1867***.

[159] I am further unable to accept the petitioner MHC's argument that the fish farms constitute a private fishery beyond federal jurisdiction. In the ***B.C. Fisheries Reference*** at D.L.R. 318, Viscount Haldane, the Lord Chancellor, held for the court that the fishery in tidal waters is a public fishery and that the federal government had the exclusive right to regulate it. He also held at 316 that "no public right of fishing … can be taken away without competent legislation". Consequently, he held that only the federal government had the jurisdiction to grant private fishery rights in tidal waters.

[160] Given this decision, finfish farms cannot constitute a private fishery, even if the fish in the pens are private property, unless the federal government grants such a private fishery to the fish farms or, as I will discuss in more detail below, validly delegates that power to the provincial government.

[161] The inclusion of fisheries in s. 91(12) of the ***Constitution Act, 1867*** was a recognition that fisheries, as a national resource, require uniformity of the legislation which affects and protects that national resource. Accepting that the management and preservation of the fisheries, including farmed fisheries, is within the jurisdiction of Parliament, the question then becomes whether the respondents can rely on

ss. 92(5), 92(13), 92(16) or 95 of the ***Constitution Act, 1867*** to justify the impugned legislation.

b. Double Aspect Doctrine

[162] I have concluded that the activity of fish farming falls under the jurisdiction of Parliament, pursuant to s. 91(12) of the ***Constitution Act, 1867***. Yet the Province of British Columbia may enact legislation that affects the fisheries, so long as that legislation falls within a head which the ***Constitution Act, 1867*** has assigned to the jurisdiction of the Province.

[163] The provincial Crown has asserted that it is entitled to legislate with respect to farm fishing based upon the legislative authority given to it pursuant to ss. 92(5) (management of lands), 92(13) (property and civil rights), 92(16) (matters of local or private nature in the Province), and 95 (agriculture) of the ***Constitution Act, 1867***.

[164] As stated above, pursuant to para. 25 of the ***Firearms Reference*** a party who challenges legislation must show that the legislation does not fall within the jurisdiction pursuant to which it was passed.

[165] The provincial Crown has chosen to refer to fish farming under the rubric of "aquaculture". Ms. Morton says that "aquaculture" is the cultivation of marine plants and animals, or the natural produce of the marine environment. I accept Ms. Morton's definition of the term.

[166] The aspect of aquaculture defined as the cultivation of marine plants is not in issue in these proceedings, so I do not propose to consider whether the impugned legislation is within provincial jurisdiction insofar as it relates to marine plants.

i) Management of Lands

[167] I recognize that the land beneath the fish farms is the property of the provincial government: see ***B.C. Fisheries Reference*** at D.L.R. 317-318. The fish farms are thus anchored to provincial land, but I am unable to accept that the jurisdiction of the Province over the management of land is sufficient to permit it to legislate the fish farming activities taking place above provincial land that it purports to have regulated. To conclude otherwise would be contrary to ***British Columbia (Attorney General) v. Lafarge***, 2007 SCC 23, [2007] 2 S.C.R. 86 [***Lafarge***].

[168] In ***Lafarge***, the court held that British Columbia could validly regulate land within a Province, even if the activities taking place on the land were subject to federal jurisdiction. In this case, that gives the Province the jurisdiction to grant land tenures pursuant to the ***Land Act***. The petitioners have not challenged that jurisdiction. What is challenged is the Province's regulation of the activities taking place above that land.

[169] In short, the ability of the provincial Crown to legislate with respect to management of land is not a jurisdiction that overlaps with the federal jurisdiction respecting fisheries, and it does not, in my view, entitle the provincial Crown to enact the impugned legislation.

ii) Property & Civil Rights

[170] The provincial jurisdiction over property and civil rights has been carefully identified as separate from the federal jurisdiction over the fisheries themselves, allowing the Provinces to regulate the "business of fishing" including fish processing and labour relations applicable to the fishing industry and the sale or disposition of fish once caught: see, for example ***Re United Fisherman & Allied Workers Union and British Columbia Packers Ltd. et al.*** (1975), 64 D.L.R. (3d) 522 at 529 (F.C.A.), aff'd (*sub nom.* ***B.C. Prov. Council, U.F. & A.W. Union, etc.***) [1978] 2 S.C.R. 97; and ***Mark Fishing Co. Ltd. et al. v. United Fisherman & Allied Workers Union et al.*** (1972), 24 D.L.R.(3d) 585, [1972] 3 W.W.R. 641 (B.C.C.A.), aff'd (1973), 38 D.L.R. (3d) 316, [1973] 3 W.W.R. 13 (S.C.C.). The power does not, however, extend so far as to permit a Province the "right to pass any laws interfering with the regulation and protection of the fisheries": ***Robertson*** at 123.

[171] Nor does the provincial power extend to the catching and handling of fish, as those matters are "undoubtedly within the jurisdiction of the Parliament of Canada under s. 91(12) of the *British North America Act*": Ritchie J., for the court in ***Moore v. Johnson et al.***, [1982] 1 S.C.R. 115 at 122.

[172] The provincial Crown does, of course, retain the ability to raise revenue by the taxation of activities within the Province, the granting of land tenures, and the licensing of the business of fishing through the provincial jurisdiction over property and civil rights. However, as held by Viscount Haldane at D.L.R. 319 of the ***B.C. Fisheries Reference***, the Province does not have jurisdiction to license private

fisheries. Nonetheless, I find that ss. 13(5) and 14 of the B.C. ***Fisheries Act*** are within the jurisdiction of the provincial Crown as their dominant purpose is to produce revenue based on the licensing of the business of fishing: see ***Canada Western Bank*** at para. 28.

[173] The remainder of the challenged legislation concerns the management of a Fishery and cannot be enacted by both the federal Parliament and the provincial Legislature. It is not a subject which, to paraphrase ***Hodge***, in one aspect and for one purpose falls within s. 92, and in another aspect and for another purpose falls within s. 91. The management of fisheries, as I have already said, is a matter of exclusive federal jurisdiction.

iii) Matters of a Local and Private Nature

[174] I am also unable to accept that the jurisdiction of the provincial Crown over matters of a local or private nature in the Province could entitle the Province to legislate under the double aspect doctrine with respect to a matter that was singled out as a national resource to be managed and preserved by Parliament. The inclusion of the fisheries in s. 91(12) of the ***Constitution Act, 1867*** is simply inconsistent with the proposition that a portion of such a resource could be viewed as a matter of a local or private nature.

iv) Agriculture

[175] What then of the provincial Crown's jurisdiction over agriculture? In ***Water Law in Canada – The Atlantic Provinces*** by Gerard V. La Forest., Q.C., *et al.*

(Ottawa: Department of Regional Economic Expansion, 1973) at 40, the authors state:

> It is obvious nonetheless, that in most cases, at least, development of provincially owned fisheries will require the co-operation of the federal and provincial authorities. For example, where fishing, such as lobster fishing, requires use of subsoil belonging to the province, provincial permission will be required even though a Dominion licence has been granted. Only in the case of ordinary fishing in tidal waters may the Dominion completely ignore provincial ownership of fisheries. That is because there has from immemorial antiquity been a right in the public to fish in tidal waters that overrides the usual exclusive common law right of the landowner to fish on his land. This right being a public, not a proprietary, right comes within the federal power to legislate respecting fisheries, and since the public right overrides the private right, there is nothing left for the provinces to legislate upon. It would require a federal statute to give an exclusive right or fishery in tidal waters. The public right of fishing, it should be repeated, is limited to ordinary fishing. It does not include fishing by weirs or other methods involving the use of the soil.
>
> [Footnotes omitted.]

[176] The Oyster Fisheries Agreement from 1912 provided that the Province was, subject to the Fishery Regulations of Canada, authorized by the agreement to:

> …grant leases from time to time of such areas of the sea coast, bays, inlets, harbours, creeks, rivers and estuaries of said Province as the Government of the said Province may consider suitable for the <u>cultivation and production</u> of oysters and the lessees of said Province shall, subject, however, to the Fishery Regulations of Canada, have the exclusive right to the oysters produced or found on the beds within the limits of their respective leases.
>
> Provided, however, that in respect of Public Harbours, this agreement shall not prejudice the right or title of the Dominion of Canada to enjoy and use the same for any purpose other than the cultivation and production of oysters.
>
> [Emphasis added.]

[177] Implicit in the Oyster Fisheries Agreement is the assumption that “cultivation and production of oysters” is distinct from agriculture. The passage from *Water Law in Canada – The Atlantic Provinces* implies a similar assumption with respect to lobster rearing. If so, then the rearing of fish in coastal waters cannot, in my view, be considered to be agriculture for jurisdictional purposes.

[178] To conclude that the provincial jurisdiction over agriculture extends to what the provincial Crown itself has chosen to call aquaculture is to ignore the very distinction drawn by the provincial Crown in its description of the activity, and to permit what the Supreme Court of Canada ruled could not be permitted in ***Reference re Upper Churchill Water Rights Reversion Act (1980)***, [1984] 1 S.C.R. 297. At p. 332 of that decision, McIntyre J., for the court said:

> Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be *ultra vires*. A colourable attempt to preserve the appearance of constitutionality in order to conceal an unconstitutional objective will not save the legislation. I refer to the words of Lord Atkin quoted above that "a colourable device will not avail".

[179] Referring to aquaculture as agriculture cannot conceal the purpose and legal effect of the impugned legislation, nor render *intra vires* what is otherwise *ultra vires* the provincial Crown. I find that the purpose and legal effect of the impugned legislation other than ss. 13(5) and 14 of the B.C. ***Fisheries Act***, except as it relates to marine plants, is the management and regulation of a fishery.

[180] As I have already indicated, the impugned legislation, other than ss. 13(5) and 14 of the B.C. ***Fisheries Act***, insofar as it relates to marine plants is not in issue in these proceedings. As far as marine animals and fish are concerned, the far closer marine analogy to agriculture is the oyster fishery, which appears to have been considered as a fishery by both levels of government, requiring the exception by agreement between the federal and provincial governments, and by legislation by the federal government.

v) Delegation or Transfer of Legislative Authority

[181] I have not ignored the fact that the federal government chose not to participate in these proceedings nor the efforts of both levels of government in attempting to address finfish farming in their 1988 Memoranda of Agreement and Understanding.

[182] As stated by Dickson C.J. in ***OPSEU v. Ontario (Attorney General)***, [1987] 2 S.C.R. 2 at 19, "in my opinion the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity". The choice of the federal government not to take a position with respect to the impugned legislation is to be afforded weight, and perhaps significant weight, but at the end of the matter, that choice is not determinative of the issue.

[183] The efforts of the two levels of government by way of their documentation of 1988 amount to more than administrative delegation. If permitted they would result in the transfer or delegation from the federal government to the B.C. provincial government of law-making powers divided by the ***Constitution Act, 1867***. Such a

transfer or delegation is prohibited. This prohibition was discussed by Chief Justice Rinfret in ***Attorney-General of Nova Scotia et al. v. Attorney-General of Canada et al.***, [1950] 4 D.L.R. 369 at 371-372:

> The Parliament of Canada and the Legislatures of the several Provinces are sovereign within their sphere defined by the *B.N.A. Act*, but none of them has the unlimited capacity of an individual. They can exercise only the legislative powers respectively given to them by ss. 91 and 92 of the Act, and these powers must be found in either of these sections.
>
> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject-matters referred to it by s. 91 and that each Province can legislate exclusively on the subject-matters referred to it by s. 92. The country is entitled to insist that legislation adopted under s. 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in s. 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.
>
> No power of delegation is expressed either in s. 91 or in s. 92, nor, indeed, is there to be found the power of accepting delegation from one body to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language. Under the scheme of the *B.N.A. Act* there were to be, in the words of Lord Atkin in *Reference re: Weekly Rest in Industrial Undertakings Act*, [1937], 1 D.L.R. 673, A.C. 326, “water-tight compartments which are an essential part of the original structure.”
>
> Neither legislative bodies, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word “exclusively” used both in s. 91 and in s. 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Legislatures, to confer powers upon the other: *St. Catharine's Mllg. & Lbr. Co. v. The Queen*, (1887) 13 S.C.R. 577 at p. 637, by Strong J.; *C.P.R. v. Notre Dame de Bonsecours* [1899] A.C. 367, by Lord Watson.

[184] Even if the federal power over the fisheries was unexercised, "[t]he abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the [*Constitution Act, 1867*]": ***Union Colliery Company of British Columbia v. Bryden***, [1899] A.C. 580 at 588 (P.C.), cited with approval by Binnie and LeBel JJ. in ***Canadian Western Bank*** at para. 34.

[185] The provincial Crown agrees that the federal government cannot delegate via the 1988 Agreement, but submits that it does not constitute delegation but merely a recognition of the Province's ability to legislate in this area. Given that I have found that fish farming is a fishery and that the Province does not have the ability to legislate regarding it, I do not accept this submission.

[186] I accept the petitioners' submission that absent an agreement similar to the Oyster Fisheries Agreement under the authority of an Order in Council delegating authority from Parliament to the Province of British Columbia to grant fish farm licences, the only jurisdiction to do so remains in Parliament.

c. Doctrines Assuming Validity of the Impugned Legislation

[187] If I am wrong that the challenged provincial legislation, other than ss. 13(5) and 14(1) of the B.C. ***Fisheries Act***, is *ultra vires* the Province, then does it meet the requirements of the necessarily incidental doctrine? For the reasons set out below, I find that it does not.

i) Necessarily Incidental/Ancillary Doctrine

[188] I find that dominant purpose of the impugned provincial legislation, other than ss. 13(5) and 14(1) of the B.C. ***Fisheries Act***, is to regulate aquaculture. Consequently its effects on the federal fisheries power are not incidental, and the scheme is constitutionally invalid.

ii) Interjurisdictional Immunity Doctrine

[189] As indicated above, this is not a doctrine of first recourse in a division of powers dispute, and the Supreme Court of Canada discouraged intensive reliance on this doctrine in ***Canadian Western Bank***.

[190] I find that the impugned legislation other than ss. 13(5) and 14 of the B.C. ***Fisheries Act*** involves the provincial Crown in the management and regulation of fisheries, and thus constitutes an interference with the core of a matter within the exclusive jurisdiction of Parliament: the management and regulation of fisheries.

[191] As the jurisdiction of Parliament in issue is the management and preservation of the fisheries, confining the provincial legislation other than ss. 13(5) and 14 of the B.C. ***Fisheries Act*** to non-fisheries matters by reading it down leaves essentially only that part of the legislation that applies to marine plants. To conclude otherwise would be inconsistent with the broad federal jurisdiction pursuant to s. 91(12) of the ***Constitution Act, 1867*** as it has been interpreted by the courts.

iii) Doctrine of Paramountcy

[192] I have concluded above that the provincial Crown’s attempt to save the legislation based on the double aspect doctrine fails and that the jurisdiction to regulate fish farms is exclusively federal. I therefore find that the doctrine of paramountcy does not apply because there can be no valid inconsistent provincial legislation where the jurisdiction is exclusively federal.

d. Subsidiarity

[193] I see no basis for the application of this doctrine in this case. Given the specific enumeration of the management and protection of the fisheries in s. 91(12) of the ***Constitution Act, 1867***, the national resource of the fisheries in not a matter that should or can be left to a level of government other than Parliament.

RELIEF

[194] Sections 13(5) and 14 of the B.C. ***Fisheries Act*** are *intra vires* the provincial Crown.

[195] Throughout my reasons, I have considered the constitutionality of the impugned legislation only with respect to fish farms. However, the B.C. ***Fisheries Act*** definition of “aquaculture” includes cultivation of marine plants as well as animals. The ***Farm Practices (Right to Farm) Act*** explicitly refers to that definition, and the ***Aquaculture Regulation*** implicitly does. I have excluded consideration of the constitutionality of that legislation with respect to cultivation of marine plants. Consequently, s. 26(2)(a) of the B.C. ***Fisheries Act***, ss. 1(h) and 2(1) of the ***Farm***

Practices (Right to Farm) Act, and the ***Aquaculture Regulation*** may all be constitutionally valid with respect to cultivation of marine plants.

[196] Where the legislative scheme at issue is, or may be, valid with respect to some matters but invalid regarding others, the appropriate remedy is to read down the legislation: Hogg vol. 1 at 15-28. Therefore I will read down s. 26(2)(a) of the B.C. ***Fisheries Act***, ss. 1(h) and 2(1) of the ***Farm Practices (Right to Farm) Act***, and the ***Aquaculture Regulation*** to apply only to the cultivation of marine plants.

[197] The ***Finfish Aquaculture Waste Control Regulation*** applies only to finfish aquaculture. Therefore I find it *ultra vires* the provincial Crown in its entirety and invalid.

[198] The absence of sufficient legislation to regulate fish farms could well be more harmful to the public than the perpetuation of the impugned legislation, until the federal government has an opportunity to consider additional legislation of its own.

[199] In ***Schachter v. Canada***, [1992] 2 S.C.R. 679 at 715-717, Lamer C.J., for the unanimous court on this issue, held that delaying declarations of invalidity is appropriate where there is a potential danger to the public, a threat to the rule of law, or other practical difficulties from the immediate effectiveness of the declaration. I consider that the same reasoning applies to reading down legislation.

[200] In my view it is preferable to maintain the *status quo ante* than to leave the entire matter of finfish farming in British Columbia unregulated by other than the present federal legislation. In the result, I order that the present provincial regulatory

scheme with respect to finfish farming in British Columbia is to continue for a further 12 months. At the end of the 12 months from the date of this judgment, s. 26(2)(a) of the B.C. ***Fisheries Act***, ss. 1(h) and 2(1) of the ***Farm Practices (Right to Farm) Act***, and the ***Aquaculture Regulation*** will be read down to apply only to the cultivation of marine plants and the ***Finfish Aquaculture Waste Control Regulation*** will cease to have any effect.

[201] In the circumstances, I dismiss the petitioner's applications for declarations that the pending decisions of the respondent Minister of Agriculture and Lands concerning tenure no. 1405180, and of the respondent Province and the respondent Minister of Agriculture and Lands to renew aquaculture licence no. 000821, would be *ultra vires* and invalid.

[202] I also dismiss the petitioner's application for an order prohibiting the respondent Province and Minister of Agriculture and Lands from deciding to renew tenure no. 1405180 and licence no. 000821 or exercising any powers pursuant to the regulatory regime relating to ocean finfish aquaculture.

[203] I did not receive submissions from the parties with respect to costs, and so I make no orders regarding costs. In the event that the petitioners wish to make submissions on costs, they must do so in writing within two weeks of the release of this decision. The respondents must submit their written submissions within two

weeks of the petitioners' submissions. The petitioner will have one further week after submission of the respondents' materials to submit written reply submissions.

"Hinkson J."

APPENDIX

B.C. ***Fisheries Act***

…

13(5) A person must not carry on the business of aquaculture at any location or facility in British Columbia or its coastal waters unless the person holds a licence issued for that purpose under this Part and has paid the fee prescribed by the Lieutenant Governor in Council.

…

14(1) An application for a licence under section 13 must be made in writing to the minister, on a form to be supplied by the minister.

(2) On receipt of the application the minister may issue a licence.

…

26(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations the Lieutenant Governor in Council considers necessary or advisable

(a) for safe and orderly aquaculture;…

...

Farm Practices Protection (Right to Farm) Act

1 In this Act:

…

"farm operation" means any of the following activities involved in carrying on a farm business:

…

(h) aquaculture as defined in the *Fisheries Act* if carried on by a person licensed, under Part 3 of that Act, to carry on the business of aquaculture;

…

2(1) If each of the requirements of subsection (2) is fulfilled in relation to a farm operation conducted as part of a farm business,

(a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation, and

(b) the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.

…

Federal ***Fisheries Act***

35(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

36(1) No one shall

(*a*) throw overboard ballast, coal ashes, stones or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on;
(*b*) leave or deposit or cause to be thrown, left or deposited, on the shore, beach or bank of any water or on the beach between high and low water mark, remains or offal of fish or of marine animals; or
(*c*) leave decayed or decaying fish in any net or other fishing apparatus.

(2) Remains or offal described in subsection (1) may be buried ashore, above high water mark.

(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

(4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of

(a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or

(b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5).

(5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing

(a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);

(b) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;

(c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;

(d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;

(e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and

(f) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.

(6) A person authorized to deposit a deleterious substance by or under regulations made pursuant to subsection (5) shall, when directed in writing by the Minister, notwithstanding any regulations made pursuant to paragraph (5)(*e*) or any conditions set out in an authorization made pursuant to paragraph (5)(*f*), conduct such sampling, analyses, tests, measurements or monitoring, install or operate such equipment or comply with such procedures, and report such information, as may be required by the Minister in order to determine whether the person is depositing the deleterious substance in the manner authorized.

37(1) Where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish or in any place under any conditions where that deleterious substance or any other deleterious substance that results from the deposit of that deleterious substance may enter any such waters, the person shall, on the request of the Minister or without request in the manner and circumstances

prescribed by regulations made under paragraph (3)(*a*), provide the Minister with such plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work or undertaking and with such analyses, samples, evaluations, studies or other information relating to the water, place or fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine

(*a*) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof; or

(*b*) whether there is or is likely to be a deposit of a deleterious substance by reason of the work or undertaking that constitutes or would constitute an offence under subsection 40(2) and what measures, if any, would prevent that deposit or mitigate the effects thereof.

(2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(*b*), or, if there are no such regulations in force, with the approval of the Governor in Council,

(*a*) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or

(*b*) restrict the operation of the work or undertaking, and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances.

(3) The Governor in Council may make regulations

(*a*) prescribing the manner and circumstances in which any information or material shall be provided to the Minister without request under subsection (1); and

(*b*) prescribing the manner and circumstances in which the Minister or a person designated by the Minister may make orders under subsection (2) and the terms of the orders.

(4) Where the Minister or a person designated by the Minister proposes to make an order pursuant to subsection (2), he shall offer to consult with the governments of any provinces that he considers to be interested in the proposed order and with any departments or agencies of the Government of Canada that he considers appropriate.

(5) Nothing in subsection (4) prevents the Minister or a person designated by the Minister from making an interim order pursuant to subsection (2) without the offer of consultation referred to in subsection (4) where he considers that immediate action is necessary.

38(1) For the purposes of this section, the Minister may designate as an inspector or analyst any person who, in the opinion of the Minister, is qualified to be so designated.

(2) The Minister shall furnish every inspector with a certificate of his designation and on entering any place, premises, vehicle or vessel referred to in subsection (3) an inspector shall, if so required, produce the certificate to the person in charge thereof.

(3) An inspector may, at any reasonable time, enter any place, premises, vehicle or vessel, other than a private dwelling-place or any part of any place, premises, vehicle or vessel used as a permanent or temporary private dwelling-place, where the inspector believes on reasonable grounds that any work or undertaking resulting or likely to result in the deposit of a deleterious substance in water frequented by fish or in any place under any conditions referred to in subsection 37(1) is being, has been or is likely to be carried on, and the inspector may, for any purpose related to the enforcement of this section, conduct inspections, including examining any substance or product found therein, taking samples thereof and conducting tests and measurements.

(3.1) An inspector with a warrant issued under subsection (3.2) may at any reasonable time enter any place, premises, vehicle or vessel, other than a private dwelling-place or any part of any place, premises, vehicle or vessel used as a permanent or temporary private dwelling-place, where the inspector believes on reasonable grounds that an offence under subsection 40(2) is being or has been committed and search that place, premises, vehicle or vessel for evidence of the offence.

(3.2) Where on ex parte application a justice of the peace is satisfied by information on oath that there are reasonable grounds to believe

that there is in any place, premises, vehicle or vessel referred to in subsection (3.1)

(*a*) anything on or in respect of which an offence under subsection 40(2) is being or has been committed, or

(*b*) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence under subsection 40(2), the justice of the peace may issue a warrant under his hand authorizing the inspector named therein to enter and search the place, premises, vehicle or vessel for any such thing subject to such conditions as may be specified in the warrant.

(3.3) In executing a warrant issued under subsection (3.2), the inspector named therein shall not use force unless the inspector is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

(3.4) An inspector may exercise the powers of entry and search referred to in subsection (3.1) without a warrant issued under subsection (3.2) if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

(3.5) For the purposes of subsection (3.4), exigent circumstances include circumstances in which the delay necessary to obtain a warrant would result in danger to human life or safety or the loss or destruction of evidence.

(4) Where, out of the normal course of events, there occurs a deposit of a deleterious substance in water frequented by fish or a serious and imminent danger thereof by reason of any condition, and where any damage or danger to fish habitat or fish or the use by man of fish results or may reasonably be expected to result therefrom, any person who at any material time

(*a*) owns the deleterious substance or has the charge, management or control thereof, or

(*b*) causes or contributes to the causation of the deposit or danger thereof, shall, in accordance with any regulations applicable thereto, report such occurrence to an inspector or such other person or authority as is prescribed by the regulations.

(5) Every person referred to in paragraph (4)(*a*) or (*b*) shall, as soon as possible in the circumstances, take all reasonable measures consistent with safety and with the conservation of fish and fish habitat

to prevent any occurrence referred to in subsection (4) or to counteract, mitigate or remedy any adverse effects that result or may reasonably be expected to result therefrom.

(6) Where an inspector, whether or not a report has been made under subsection (4), is satisfied on reasonable grounds that there is an occurrence referred to in subsection (4) and that immediate action is necessary in order to carry out any reasonable measures referred to in subsection (5), he may, subject to subsection (7) and the regulations, take any such measures or direct that they be taken by any person referred to in paragraph (4)(*a*) or (*b*).

(7) Any requirement or direction of an inspector under this section that is inconsistent with any direction of a marine safety inspector under the *Canada Shipping Act, 2001* is void to the extent of the inconsistency.

(8) For the purposes of subsections (4) to (6), any inspector or other person may enter and have access through any place, premises, vehicle or vessel and may take all reasonable action in order to comply with those subsections or any of them, but nothing in this subsection relieves any person from liability at law for his illegal or negligent acts or omissions or for loss or damage caused to others by such entry, access or action.

(9) The Governor in Council may make regulations prescribing

(*a*) the person or authority to whom or which a report is to be made under subsection (4), the manner in which the report is to be made, the information to be contained therein and the circumstances in which no report is required to be made;
(*b*) the manner in which inspectors may take any measures or give any directions under subsection (6) and the conditions to which such measures or directions are subject;
(*c*) the manner and circumstances in which any measures taken or directions given under subsection (6) may be reviewed, rescinded or varied; and
(*d*) any other matters necessary for or incidental to carrying out the purposes and provisions of this section.

(10) The owner or person in charge of any place, premises, vehicle or vessel entered by an inspector pursuant to subsection (3) and every person found therein shall give the inspector all reasonable assistance to enable the inspector to carry out his duties and functions under this section and shall furnish the inspector with such information with

respect to the administration of this section as he may reasonably require.

(11) Subject to subsections (12) and (13), a certificate purporting to be signed by an analyst stating that he has analyzed or tested a substance or product and stating the result of his analysis or test is admissible in evidence in any prosecution for an offence under subsection 40(2) or (3) without proof of the signature or official character of the person appearing to have signed the certificate and, in the absence of any evidence to the contrary, is proof of the statements contained in the certificate.

(12) The party against whom there is produced any certificate pursuant to subsection (11) may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

(13) No certificate shall be admitted in evidence pursuant to subsection (11) unless the party intending to produce it has given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate in question.