

Court File No. T-1798-19

FEDERAL COURT

BETWEEN:

'NAMGIS FIRST NATION

FEDERAL COURT COUR FÉDÉRALE		D É P O S É
F I L L E D	NOV 4 2019	
	APPLICANT FRANK DRAK	
VANCOUVER, BC		1

- and -

MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST
GUARD

RESPONDENT

NOTICE OF APPLICATION

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*,
RSC 1985 and Rule 301 of the *Federal Court Rules*, SOR/98-106.

TO THE RESPONDENT

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears in the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date NOV 4 2019

Issued by _____

ORIGINAL SIGNED BY
FRANK FEDORAK
A SIGNÉ L'ORIGINAL
(Registry Officer)


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TO: Minister of Fisheries, Oceans and the Canadian Coast Guard
c/o Department of Justice Canada
Vancouver Regional Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____
day of NOV 4 2019 A.D. 20 _____

Dated this _____ day of NOV 4 2019



FRANK FEDORAK
REGISTRY OFFICER
AGENT DU GREFFE

APPLICATION

This is an application for judicial review in respect of:

1. Fisheries and Oceans Canada's ("**DFO**") policy not to prohibit the issuance of licenses ("**Transfer Licences**") under s. 56 of the *Fishery (General) Regulations*, SOR/93-53 (the "**FGRs**") for cohorts of fish infected with the Piscine orthoreovirus, ("**PRV**") formerly known as Piscine reovirus, (the "**PRV Policy**"); and
2. Any decisions made by the Minister of Fisheries, Oceans and the Canadian Coast Guard (the "**Minister**") or his delegate, pursuant to the PRV Policy, to issue licences under s. 56 of the FGRs to introduce, release or transfer fish into the marine environment in the Territory of the 'Namgis First Nation ("**Namgis**") or in any areas used by fish that 'Namgis relies on to exercise its Aboriginal right to fish for food, social and ceremonial ("**FSC**") purposes.

PART I – RELIEF SOUGHT

THE APPLICANT MAKES AN APPLICATION FOR:

3. The following declarations:
 - (a) the PRV Policy is unlawful and/or unreasonable because it:
 - (i) fails to satisfy the legal requirements of s. 56 of the FGRs;
 - (ii) fails to apply the precautionary principle;
 - (iii) fails to comply with the Order of this Court in *Morton v. Canada (Fisheries and Oceans)*, 2019 FC 143 ("**Morton 2019**") because the Minister, or his delegate, when re-affirming the PRV Policy, failed to properly consider the reasons of *Morton 2019*;

- (iv) is based on findings of fact made in a perverse or capricious manner, or without regard for the material before the Minister's delegate;
 - (v) was made without requisite administrative and procedural fairness; and,
 - (vi) fails to consider the role the decision could play for 'Namgis First Nation in the ongoing process of reconciliation between 'Namgis and the Crown in Right of Canada ("**Canada**");
- (b) any Transfer Licence issued pursuant to the PRV Policy is unlawful and/or unreasonable for the same reasons described in 3(a) above;
 - (c) Canada was required, but failed to, adequately consult and accommodate 'Namgis prior to adopting and implementing the PRV Policy;
 - (d) Canada's duty to consult and accommodate 'Namgis in relation to the PRV Policy is at the "high" or "deep" end of the *Haida* spectrum;
 - (e) Canada is, accordingly, required to consult with 'Namgis with a view to obtaining its consent in relation to the PRV Policy, and, if that were not possible, to directly engage in "deep consultation" with 'Namgis and to seek to significantly accommodate 'Namgis' Aboriginal title and rights, but failed to meet that duty;
 - (f) in the alternative to (e), if Canada's duty to consult and accommodate 'Namgis about the PRV Policy is at lower end of the *Haida* spectrum, Canada nevertheless failed to discharge its duty;
 - (g) in adopting the PRV Policy, Canada failed to consider the role the decision could play for 'Namgis in the ongoing process of reconciliation between 'Namgis and Canada;

- (h) farmed Atlantic salmon must be tested for all strains, variants, genotypes and sub-genotypes of PRV prior to the issuance of a Transfer Licence by the Minister or his delegate; and
- (i) cohorts of farmed Atlantic salmon that test positive for PRV must not be authorized for transfer.

4. An order:

- (a) quashing the PRV Policy and any subsequent decision to issue a Transfer Licence in 'Namgis Territory or in any areas used by fish that 'Namgis relies on to exercise its Aboriginal right to fish for FSC purposes pursuant to the PRV Policy;
 - (b) requiring Canada to consult and accommodate 'Namgis in relation to the PRV Policy, including assessing the potential adverse impact of PRV to all five species of wild Pacific salmon that 'Namgis relies on to exercise its constitutionally protected right to fish for FSC purposes;
 - (c) directing that this Court shall retain jurisdiction to resolve issues that may arise in the course of Canada's consultation with 'Namgis in connection with the PRV Policy; and
 - (d) prohibiting the Minister from issuing any Transfer Licences in 'Namgis Territory, or in any areas used by fish that 'Namgis relies on to exercise its Aboriginal right to fish for FSC purposes until such time as Canada has discharged its duty to consult and accommodate 'Namgis in relation to the PRV Policy;
5. costs in favour of 'Namgis; and
6. such further relief as counsel may advise and this Court may permit.

PART II – GROUNDS FOR APPLICATION

THE GROUNDS FOR THE APPLICATION ARE:

A. Factual and Procedural Background

7. The Minister, acting pursuant to s. 7 of the *Fisheries Act*, RSC 1985, c F-14 (the “**Fisheries Act**”), issues licences to operate aquaculture facilities for a period of six years (an “**Aquaculture Licence**”). During that six-year Aquaculture Licence period, each time an aquaculture licensee wishes to introduce or transfer fish into a licensed fish farm, the licensee must obtain a separate Transfer Licence issued by the Minister pursuant to s. 56 of the FGRs.

8. Previously, Aquaculture Licences permitted licensees to themselves authorize transfers or introductions of fish into licensed fish farms. This Court, in *Morton v. Canada (Fisheries and Oceans)*, 2015 FC 575 (“**Morton 2015**”) found this arrangement unlawful: Aquaculture Licence conditions improperly and unlawfully sub-delegated the Minister’s responsibilities under s. 56 of the FGRs to the Licensees, including the Minister’s responsibility to determine if the fish to be transferred “have any disease or disease agent that may be harmful to the protection and conservation of fish” under s. 56(b).

9. In partial, but incomplete, response to *Morton 2015*, Aquaculture Licences now require a Licensee to apply to the British Columbia Introductions and Transfers Committee (the “**ITC**”) to obtain a Transfer Licence prior to transferring or introducing fish into a fish farm’s open-net pens.

10. In *Morton 2015*, this Court also interpreted s. 56(b) as placing upon the Minister a positive duty to test for any disease or disease agent that “*might be harmful* to the protection and conservation of fish.” This Court found that the Minister’s mandatory duty extends to testing for “latent disease agents” such as PRV, and held that the ultimate objective of s. 56 is to mandate “no transfers [into

the marine environment] if the fish have diseases or disease agents that may be harmful to the protection and conservation of fish.”

11. DFO adopted its previous PRV Policy to avoid the result and findings in *Morton 2015*. That previous PRV Policy provided no requirement whatsoever to test for PRV prior to issuing a Transfer Licence.

12. On February 4, 2019, this Court issued its decision in *Morton 2019*, and quashed the previous PRV Policy on four independent grounds:

- (a) the Minister had failed to adopt a reasonable interpretation of s. 56 of the FGRs;
- (b) the Minister had failed to adhere to the precautionary principle;
- (c) the Minister failed to consider the current health and status of wild Pacific salmon in the context of the prevailing scientific uncertainties surrounding PRV and failed to address the risk PRV poses to wild Pacific salmon health and status; and
- (d) the Minister had breached the Crown’s constitutional duty to consult and accommodate ‘N_am_gi_s with respect to the previous PRV Policy.

13. In *Morton 2019*, this Court also confirmed that the findings in *Morton 2015* with respect s. 56 of the FGRs and the precautionary principle were not *obiter dicta* and were another basis for finding the impugned licence conditions invalid.

14. This Court ordered the Minister or his delegate to reconsider the previous PRV Policy taking its reasons into consideration. The Court suspended its judgment for four months.

15. On March 4, 2019, after not being contacted by DFO to consult on the Minister’s reconsideration of the PRV Policy, ‘N_am_gi_s wrote DFO seeking consultation. When no response came, ‘N_am_gi_s wrote to DFO again on March 29,

2019; this time describing substantive concerns, delivering materials supporting those concerns, requesting information about DFO's reconsideration of the PRV Policy and seeking consultation.

16. Without responding to 'Namgis' previous correspondence, DFO arranged a meeting with 'Namgis on May 15, 2019, at which 'Namgis noted that DFO had left consultation until it was too late to be meaningful. 'Namgis further noted that given the judgment in *Morton 2019* would come into effect on June 4, 2019, it was profoundly skeptical that DFO had not already formulated its reconsidered PRV Policy.

17. DFO then wrote to 'Namgis on May 24, 2019 seeking its consent to vary the period the judgment in *Morton 2019* was suspended by one month. 'Namgis did not consent to that request, and on May 28, 2019, DFO filed a motion to vary the suspension period in Federal Court. 'Namgis filed materials in response.

18. On June 3, 2019, 'Namgis and DFO reached an agreement on how consultation should take place on the PRV Policy over a four-month period. Based on the agreement it entered into with the Crown, 'Namgis consented to a four-month variance of the suspension period.

19. On June 4, 2019, the day judgment in *Morton 2019* was to take effect, the Minister, without any consultation with 'Namgis, announced an "interim" PRV Policy. That "interim" PRV Policy required testing for the supposed Norwegian and Icelandic "strains" of PRV, but it did not require any regulatory action or precautionary measures should fish for the proposed transfer or introduction test positive for those "strains" of PRV.

20. Between June 2019 and September 2019, 'Namgis consulted in good faith with DFO. However, for the reasons described below, DFO did not meet its legal or constitutional obligations to consult in good faith.

21. By letter of October 3, 2019, Rebecca Reid, Regional Director, Pacific Region of DFO, informed 'Namgis of DFO's reconsideration of the PRV Policy. The

PRV Policy described in Ms. Reid's letter is the exact same policy the Minister announced on June 4, 2019.

The Applicant

22. 'Namgis' members and their ancestors have lived in and been the stewards of their Territory since time immemorial. The Territory is located on the northeast coast of Vancouver Island and includes adjacent marine environments, which have, since time immemorial, provided an integral source of 'Namgis' distinctive culture and ancestral practices.

23. 'Namgis is a "band" under the *Indian Act*, RSC 1985, c I-5, and its members are one of the "aboriginal peoples of Canada" whose Aboriginal rights are recognized and affirmed by s. 35 of *The Constitution Act, 1982*.

24. 'Namgis' members and their ancestors have hunted, fished, gathered, travelled, and raised families on the land and in the water of their Territory since time immemorial. 'Namgis' members continue to live in, care for, and harvest resources in their Territory.

25. 'Namgis has unceded and unsurrendered Aboriginal title and rights within and throughout its Territory. 'Namgis has Aboriginal title to the land, water, air, marine foreshore, and seabed in its Territory, as well as free-standing Aboriginal fishing and stewardship rights in relation to chum, coho, pink, sockeye, and Chinook salmon.

26. 'Namgis exercises those rights both inside and outside of its Territory, including throughout the Broughton Archipelago, Johnstone Strait, and the surrounding area with the permission of the First Nations who hold title for those areas outside of the Territory.

27. Salmon is, and has since time immemorial been, a vitally important resource for 'Namgis. It is an important source of food, essential for certain distinctive

spiritual and ceremonial purposes, and intimately tied to 'Namgis' distinctive culture and governance systems. 'Namgis fishes for, and uses, all species of Pacific salmon, including pink, coho, chum, sockeye, and Chinook, and its members have done so since time immemorial as an integral constituent element of 'Namgis' distinctive culture and ancestral practices.

28. In recent times, pink, coho, chum, sockeye, and Chinook populations in 'Namgis Territory have become severely depleted. As part of its stewardship efforts to protect and preserve wild Pacific salmon populations in its Territory, 'Namgis has taken the following steps to conserve those populations:

- (a) voluntarily stopped fishing for pink, coho, chum, sockeye, and Chinook salmon on the Nimpkish River;
- (b) established a hatchery on the Nimpkish River for the purposes of rearing chum, sockeye, coho, and Chinook for eventual release; and
- (c) established a land-based, closed-containment aquaculture facility as a pilot project to demonstrate that land-based fish farming using recirculating aquaculture system technology is economically viable and ecologically sustainable.

29. These steps form part of 'Namgis' efforts to discharge its sacred stewardship obligations, and constitute an exercise of the governance elements of its Aboriginal title and rights.

B. The PRV Policy

30. On October 3, 2019, DFO notified 'Namgis that DFO "has concluded that the transfer of wild fish infected with the PRV-1a BC strain into the marine environment is consistent with s. 56 of the FGR. Therefore, at this time, DFO will not require hatchery fish to be tested for this virus and will not refuse to issue a transfer licence should smolts be found to test positive for PRC-1a (sic) BC strain" (underlining

added). The notification letter is unclear about DFO's assessment of the risk farmed Atlantic salmon infected with PRV pose to wild Pacific Salmon. At the date of this application, DFO had not responded to 'Namgis' requests for clarification.

C. The PRV Policy is unlawful

31. The PRV Policy is unlawful and/or unreasonable for the following reasons:

- (a) it fails to satisfy the legal requirements of s. 56 of the FGRs, and, specifically:
 - (i) the requirement in s. 56(a) that the release or transfer of the fish would be in keeping with the proper management and control of fisheries;
 - (ii) the requirement in s. 56(b) that any fish to be transferred must be free of "any disease or disease agent that may be harmful to the protection and conservation of fish"; and
 - (iii) the requirement in s. 56(c) that the release or transfer of the fish **will not** have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks;
- (b) the PRV Policy fails to apply the precautionary principle;
- (c) DFO failed to reasonably consider the reasons of this Court in *Morton 2019*;
- (d) the process and manner DFO used to reconsider the PRV Policy lacked the requisite procedural and administrative fairness;
- (e) the PRV Policy is based upon findings of fact made in a perverse or capricious manner or without regard for the material before the Minister's delegate; and

- (f) the Minister's delegate failed to consider the role the decision could play for 'Namgis in the ongoing process of reconciliation between 'Namgis and Canada.

32. Canada also breached its duty to consult and accommodate 'Namgis in relation to the PRV Policy and that policy's application in 'Namgis' Territory, including with respect to the issuance of any Transfer Licences made pursuant to the PRV Policy.

(i) *The PRV Policy fails to satisfy the legal requirements of s. 56*

33. The issuance of Transfer Licences is governed by Part VIII of the FGRs and specifically s. 56 of the FGRs.

34. The PRV Policy is inconsistent with the legal requirements of s. 56, as interpreted by this Court in *Morton 2015* and *Morton 2019*. The requirements of s. 56 are conjunctive. The Minister may only issue a Transfer Licence if all three of the legal requirements set out in s. 56 are satisfied:

- (a) releasing or transferring the fish would be in keeping with the proper management and control of fisheries (s. 56(a));
- (b) the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish (s. 56(b)); and
- (c) the release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks (s. 56(c)).

The Statutory Precondition contained in s. 56(a)

35. Section 56(a) requires the Minister to consider if the proposed transfer is in keeping with the proper management and control of the fisheries. The Minister, as caretaker for the users of the public resource of Canada's fisheries, must prioritise

conservation of that public resource and Aboriginal fisheries above other uses of Canada's fisheries. The PRV Policy is inconsistent with the statutory precondition contained in s. 56(a).

The Statutory Precondition contained in s. 56(b)

36. The intent and effect of s. 56(b) is for the following to occur:
- (a) the Minister cause any fish to be transferred to be tested for disease and disease agents (such as PRV); and
 - (b) the Minister is prohibited from issuing Transfer Licences for fish that test positive for disease or disease agents that may be harmful to the protection and conservation of fish.

37. In *Morton 2015*, this Court concluded as follows:

- (a) PRV appears to be the viral precursor (or disease agent) to HSMI;
- (b) PRV (the disease agent) "*may be harmful to the protection and conservation of fish, and therefore 'a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation'*"; and
- (c) "it would be an unreasonable inference to draw from the evidence that it [HSMI] will not appear in farmed Atlantic salmon on the Pacific Coast".

38. Accordingly, this Court's direction in *Morton 2015* must be followed. Prior to issuing a Transfer Licence, the Minister has a positive legal duty to (i) require that fish be tested for diseases or disease agents (including potentially "latent disease agents" such as PRV), and (ii) prohibit fish which test positive for PRV from being transferred.

39. The PRV Policy authorizes the issuance of Transfer Licences without either of (i) or (ii) occurring. This circumstance perpetuates the same risks associated with the licence conditions this Court found to be unlawful in *Morton 2015*.

40. In *Morton 2019*, this Court found that a transfer of fish with a disease agent that potentially causes harm up to the conservation unit or species level is a severe potential impact and contrary to the precautionary principle and further found that requiring a high level of potential harm before a transfer was prohibited is contrary to the Minister's obligation to protect and conserve fish.

41. The risk PRV poses to wild Pacific salmon and 'N^{am}gis' constitutionally protected Aboriginal title and rights is unassailable:

- (a) PRV causes HSMI in Atlantic salmon. HSMI causes fish to die or to experience significant morbidity, which causes an inability to eat and swim such that fish cannot escape predators or migrate up rivers to spawn.
- (b) HSMI is one of the leading causes of mortality in farmed Atlantic salmon across the world.
- (c) The exact same strain of PRV causing HSMI on fish farms likely causes the red blood cells of Chinook to rupture, releasing toxins into their livers and kidneys and killing many of the infected fish. This condition is known as jaundice/anemia.
- (d) PRV also causes erythrocytic inclusion body syndrome (EIBS) in coho salmon.
- (e) PRV contributes to Haemorrhagic kidney syndrome in Atlantic salmon either by co-infection with infectious salmon anaemia virus (ISAV) and may be the primary causal agent in Haemorrhagic kidney syndrome in Atlantic salmon.
- (f) PRV has likely been recently introduced to British Columbia, and co-evolved with Atlantic salmon such that species of wild Pacific salmon are less well-adapted to PRV and experience more adverse impacts than Atlantic salmon.

- (g) PRV has mutated and evolved into more virulent and pathogenic strains. In at least one instance that mutation and evolution is thought to have occurred in Norwegian fish farms.
- (h) Densely crowded fish farms provide an ideal environment for viruses to evolve into more virulent and pathogenic forms.
- (i) PRV is found in high concentrations in Atlantic salmon farms along British Columbia's coast.
- (j) Multiple fish farms, containing millions of foreign Atlantic salmon, are located in 'Namgis Territory and along the migratory routes of the wild Pacific salmon that 'Namgis relies on to exercise its Aboriginal title and rights.
- (k) Those open-net fish farms provide no protection for pathogen transfer and can shed PRV in enormous quantities.
- (l) PRV is likely able to survive in the marine environment for extended periods of time and may be able to travel in excess of 30 km in the water column.
- (m) PRV infection is significantly higher in wild salmon exposed to salmon farms.

42. PRV is a disease agent that may be harmful to the protection and conservation of fish within the meaning of s. 56(b). The PRV Policy fails to adhere to the statutory precondition of s. 56(b) to ensure the protection and conservation of fish and to ensure the safety of fish stocks introduced into the marine environment as well as wild Pacific salmon populations that 'Namgis relies on.

The Requirement of s. 56(c)

43. Section 56(c) requires that transfers of fish **will not** have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks. Wild fish are grouped into conservation units according to genetic similarities and to protect the genetic diversity of wild Pacific salmon. The Minister has not reasonably assessed the risks PRV poses to all species of wild Pacific salmon and has not

reasonably assessed the vulnerable conservation units of wild Pacific Salmon that Namgis relies on to protect its constitutionally protected title and rights.

(ii) *The PRV Policy fails to apply the precautionary principle*

44. The precautionary principle is an established domestic canon of statutory interpretation, and also a norm of customary international law. The precautionary principle embodies the following propositions:

- (a) environmental measures must anticipate, prevent and attack the causes of environmental degradation; and
- (b) where there are threats of serious or irreversible damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

45. In *Morton 2015*, this Court held as follows respecting the proper application of the precautionary principle in interpreting s. 56(b):

- (a) s. 56(b) embodies the precautionary principle, and operates to confine the Minister's discretion such that it must be exercised in a way that ensures the protection and conservation of fish;
- (b) s. 56(b) "prohibits the Minister from issuing a transfer licence if disease or disease agents are present that 'may be harmful to the protection and conservation of fish'"; and
- (c) the application of the precautionary principle to the phrase "may be harmful" does not require: (i) scientific certainty, consensus, or unanimity respecting harm, nor (ii) that harm even be established as the likely consequence of a transfer of fish. Similarly, the scope of "any disease or disease agent" in s. 56(b) should not be interpreted as requiring a unanimous scientific

consensus that a disease agent (e.g., PRV) is the cause of the disease (e.g., HSMI)."

46. Contrary to this Court's finding in *Morton 2015*, DFO requires conclusive proof that PRV causes a disease with significant morbidity, disease or mortality in British Columbia farmed and wild salmon populations. The Minister's conclusion that PRV is not a "disease agent" cannot be reasonably supported by the existing body of scientific evidence. Further, regulatory conduct relying on this conclusion is contrary to the precautionary principle as embodied in s. 56(b).

47. In *Morton 2019*, this Court again confirmed that s. 56(b) of the FGRs embodies the precautionary principle and the Minister must adhere to the precautionary principle, not merely consider it. This Court also found that the precautionary principle requires the Minister to exercise more caution when information is uncertain, unreliable or inadequate. The Minister must take steps to prevent irreversible harm, even when the potential risk of harm is uncertain, suspected, conjectured or feared.

48. This Court in *Morton 2019* also found that s. 56(b) requires decision makers to operate with a high degree of transparency, accountability and meaningful public involvement. Further, the precautionary principle implies a reversal of the burden of proof with respect to harm and the need for longer term outlooks.

49. The PRV Policy does not anticipate, prevent and attack causes of environmental degradation and does not exercise more caution in the face of scientific uncertainty.

50. Further, the Minister has not discharged the reserved burden of proof to reasonably establish that PRV will not be harmful to all species of wild Pacific salmon. Instead, the PRV Policy expressly requires that for PRV to be classified as a disease agent there must be conclusive proof that PRV causes a disease with

significant morbidity, disease or mortality in British Columbia farmed and wild salmon populations

(iii) *The PRV Policy does not adequately consider or address this Court's reasons in Morton 2019*

51. In *Morton 2019*, this Court ordered that “The Minister or his Delegate shall reconsider the continuation of the PRV Policy taking these reasons into consideration”.

52. In *Morton 2019*, this Court found that the Minister’s interpretation of s. 56 of the FGRs was inconsistent with the Minister’s primary obligation under the *Fisheries Act* and defeated the purposes of conservation by requiring an inappropriate magnitude of harm before transfers of fish were prohibited for transfer under s. 56 of the FGRs.

53. This Court also found that harm at a conservation unit or population level is a potentially severe impact prohibited by s. 56. Consequently, the threshold the Minister’s delegate can set for prohibiting licences under s. 56 is less than a severe impact, less than potential harm to a conservation unit, and less than potential harm to a population of fish. DFO has not adequately defined the required potential harm to an aggregate of fish before a s. 56 licence must be prohibited.

54. This Court found the Minister’s interpretation of s. 56(b) of the FGRs was unreasonable and expressly noted the Minister had not addressed the meaning of “protection” in the phrase “may cause harm to the protection and conservation of fish”. DFO has not developed a reasonable interpretation of s. 56(b) that is consistent with the case law that has interpreted the “conservation and protection of fish” and that interprets conservation in a manner that includes the enhancement of fish for all user groups such as First Nations.

55. This Court in both *Morton 2015* and *Morton 2019* admonished DFO and reminded it that “ensuring the health of wild stocks should be ‘DFO’s number one priority in conducting fish health work’”. Neither the PRV Policy nor the documents

developed in support of it demonstrate that ensuring the health of wild fish stocks is prioritised over the interests of the fish farm industry.

56. In *Morton 2019*, this Court also found that in light of the high degree of scientific uncertainty surrounding PRV, the rapidly evolving science, DFO's outstanding lack of risk assessments, and the known decline in wild salmon populations, the Minister's delegate failed to address the risk PRV poses to the health and status of wild Pacific and thus failed to adhere to the precautionary principle.

57. DFO still has not adequately assessed the risk PRV poses to the health and status of wild salmon. Among other things, it still has not conducted reliable challenge studies¹ on all five species of wild Pacific salmon. Nor has it adequately assessed how conditions faced by wild Pacific salmon could exacerbate the harmful effects of PRV to wild Pacific salmon or to particular at-risk conservation units of wild Pacific salmon.

58. DFO still has not addressed numerous other concerns observed by this Court in *Morton 2019*. DFO has not:

- (a) addressed what impact the prevalence of heart lesions found in farmed salmon would have on wild salmon populations if the same prevalence of lesions were to occur in wild populations;
- (b) addressed how research indicating that laboratory results on the effects of PRV may differ from studies of PRV's effects on wild salmon;

¹ Challenge studies are experiments in which groups of fish are exposed to a pathogen to determine if the pathogen causes disease in those fish.

- (c) revisited and reassessed the risk raised by Di Cicco et al. (2018)², with its own chosen methods, to confirm that the risk that paper raised was not sufficient to change the PRV Policy;
- (d) completed reliable challenge studies on three species of wild Pacific salmon for which challenge studies had not previously been conducted, namely, pink, chum and coho; or
- (e) completed reliable challenge studies on the two other species of wild Pacific salmon, sockeye and Chinook.

59. The Minister has failed to reasonably consider and address the foregoing deficiencies, among others, as this Court ordered the Minister to do.

60. Further, the Minister has also failed to reasonably consider numerous other issues this Court observed with respect to the Minister's interpretation of s. 56 of the FGRs, the Minister's consideration of the health and status of wild fish, the application of the precautionary principle and the reasonableness of the previous PRV Policy.

61. Given this failure to reasonably consider and address this Court's reasons, the current PRV Policy is not reasonable and does not comply with the order of this Court in *Morton 2019*.

(iv) *The PRV Policy was adopted without the requisite procedural and administrative fairness*

62. DFO's reconsideration of the PRV Policy lacked procedural and administrative fairness. Despite the extra care required for making decisions with

² Di Cicco et al (2018) found that the exact same strain of PRV causing HSML in BC fish farms is statistically correlated to jaundice/anemia in Chinook salmon, a condition that causes the red blood cells to rupture *en masse*.

respect to PRV, and the heightened transparency required by the precautionary principle, the process for reconsidering the PRV Policy included the following flaws, among others, which prevented the PRV Policy from being reconsidered in an administratively fair manner:

- (a) DFO relied on the Canadian Science Advisory Secretariat's ("**CSAS**") Science Advisory Report 2019/022: Advice from the assessment of the risk to Fraser River Sockeye Salmon due to piscine orthoreovirus (PRV) transfer from Atlantic Salmon farms in the Discovery Islands area, British Columbia (the "**2019 Fraser River Sockeye / Discovery Islands CSAS Review**"). The 2019 Fraser River Sockeye / Discovery Islands CSAS Review biased the Minister's reconsideration of the PRV Policy in the following ways:
 - (i) Its narrow scope was limited to the effect of PRV from fish farms in the Discovery Islands on Fraser River sockeye and did not assess the risk of fish farms infected with PRV to all five species of wild Pacific salmon, and other marine life, in other locations.
 - (ii) The panel conducting the review was scoped to exclude, diminish or suppress the involvement of experts opposed to the PRV Policy.
 - (iii) The process for the 2019 Fraser River Sockeye / Discovery Islands CSAS Review did not meet accepted peer-review standards or ensure the process was without the reasonable apprehension of bias.
- (b) DFO misrepresented the consensus reached by the panel conducting the Fraser River Sockeye / Discovery Islands CSAS Review.
- (c) The Fraser River Sockeye / Discovery Islands CSAS Review was conducted in secrete and completed before 'Namgis or other concerned parties could comment on it.
- (d) Despite there being no published research describing and documenting the genomic sequence for a BC strain of PRV, DFO did not provide or publish

the documents or the research it relied on to conclude that there is a native BC strain of PRV.

- (e) DFO capriciously relied on unpublished research that supported the PRV Policy, but did not consider other unpublished research contrary to the PRV Policy.
- (f) DFO has in its possession research which was conducted in both British Columbia and Norway contrary to the PRV Policy, but did not provide that research to the CSAS panel, 'Namgis, or other concerned parties. Further, DFO did not place that information before the Minister's delegate for consideration.
- (g) DFO did not respond to information requests, answer questions or provide documents requested by 'Namgis.
- (v) ***The PRV Policy was approved and adopted in a perverse or capricious manner or without regard for the material before the decision maker***

63. In reconsidering the PRV Policy, DFO acted in a perverse or capricious manner and without regard for the materials before the decision maker:

- (a) DFO ignored, suppressed or otherwise disregarded, without justification, scientific findings that are contrary to the PRV Policy;
- (b) DFO misrepresented scientific findings such that they would appear to support a conclusion that the PRV Policy ought not or need not include any requirement to test for PRV;
- (c) internationally-accepted scientific standards were intentionally not used, without justification:
 - (i) by the British Columbia Animal Health Centre and DFO's Aquaculture Management Division to diagnose HSMI, for the purpose of allowing DFO to continue to deny (or remain wilfully blind to) the presence of

disease caused by PRV in aquaculture facilities in British Columbia;
and

- (ii) by DFO scientists to produce materials and rationales favourable to the PRV Policy;
- (d) DFO concluded that there is a native BC strain of PRV without any published research to support that conclusion and contrary to published research indicating that PRV was recently introduced to BC from the North Atlantic;
- (e) DFO did not reasonably consider:
- (i) environmental and biotic factors affecting pathogen dispersal and transmission; or
 - (ii) ecosystem level considerations of current conditions, including the current state of populations of wild, Pacific salmon;
- (f) DFO relied on the absence of reliable challenge studies for all five species of wild Pacific salmon, and the complete absence of challenge studies for coho, pink and chum salmon, to conclude that PRV does not pose a risk to all five species of wild Pacific salmon; and
- (g) DFO relied on a risk assessment for PRV specific to one species of wild Pacific salmon in one ecological setting to conclude that PRV does not pose a risk to all species, conservation units and populations of wild salmon in every ecological setting.

64. Despite the weight of evidence supporting the conclusion that PRV that was likely imported from the north Atlantic, and despite PRV being pathogenic everywhere else it is found in the world, and despite evidence of PRV-related diseases in British Columbia, such as HSMI and jaundice/anemia, DFO has unreasonably concluded that:

- (a) PRV in British Columbia has evolved into a strain that is now “native” and endemic to British Columbia;
- (b) this BC strain of PRV does not cause disease; and
- (c) poses no risk of disease to all species, conservation units and populations of wild Pacific salmon.

65. To come to this conclusion DFO must remain willfully and recklessly blind to its own reasoning: PRV present in BC is not an evolutionary endpoint; PRV has recently evolved and continues to do so. The PRV Policy recklessly ignores the reasonable inferences that flow from this reasoning: there is a very real risk that that placing millions of fish infected with this supposed “BC strain of PRV” will cause that strain of PRV to evolve into a more virulent and pathogenic strain that will be released into the ecosystem. This real risk is consistent with:

- (a) the DFO’s conclusion that PRV has evolved into multiple strains, (PRV-I, PRV-II, PRV-III) and sub-genotypes PRV-Ia and PRV-Ib; and
- (b) the evidence that the more pathogenic genotype, PRV-Ib, likely evolved from PRV-Ia in Norwegian fish farms.

66. Based on the foregoing deficiencies, among other things, the Minister adopted the PRV Policy by acting in a perverse or capricious manner or without regard for the material before DFO and the body of scientific evidence available on PRV.

(vi) The PRV Policy does not take into account the principle of reconciliation

67. In addition to meeting the legal requirements of s. 56 of the FGRs, s. 35(1) of the *Constitution Act, 1982* further constrains the Minister’s discretion by requiring him to consider whether, and if so how, a decision to issue a Transfer Licence may

advance or impair the process of reconciliation with 'Namgis. The PRV Policy makes no provision for this mandatory consideration.

D. Canada breached its duty to consult and accommodate 'Namgis in relation to the PRV Policy and any Transfer Licences issued pursuant to it

68. Canada knows of 'Namgis' Aboriginal title and rights, including the importance of salmon to 'Namgis' culture, economy, governance, and way of life.

69. Canada also knows of 'Namgis' conservation and population enhancement efforts respecting salmon populations in its Territory, and its acute concerns respecting the potential transfer of PRV-infected fish into the marine environment in its Territory.

70. Wild salmon fishing constitutes a vital ancestral practice that is integral to 'Namgis' distinctive culture, and PRV causes serious impacts to wild salmon.

71. The PRV Policy could cause, and any Transfer Licences issued pursuant to it, are substantially likely to cause, fish infected with a contagious disease agent, PRV, into the marine environment used by populations of wild fish, that 'Namgis relies on to exercise its constitutionally protected title and rights and adversely impact 'Namgis' Aboriginal title and rights by spreading a contagious disease agent that is harmful to the protection and conservation of fish to:

- (a) the already depleted wild salmon populations 'Namgis relies on to exercise its Aboriginal title and right to manage and fish salmon (which is additionally central to their culture, governance, and ongoing existence as Aboriginal peoples); and
- (b) the juvenile salmon 'Namgis releases from its hatchery to enhance salmon stocks.

72. In view of the (i) serious potential for harm, (ii) substantial likelihood that it will occur, and (iii) strength of 'Namgis' Aboriginal title and rights claims in relation

to its Territory, Canada's duty to consult and accommodate 'Namgis respecting the PRV Policy was at the "deep" end of the *Haida* spectrum. Canada failed to discharge its duty in that regard.

73. In *Morton 2019*, this Court found that Canada had breached the duty to consult with respect to the previous PRV Policy. Despite the need to consult 'Namgis on its reconsideration of the PRV Policy, DFO did not meet with 'Namgis until May 15, 2019 – less than three weeks before DFO was required to have reconsidered its previous PRV Policy and complied with the order in *Morton 2019*.

74. Acting in good faith, 'Namgis agreed to a four-month variance of the suspended judgment in *Morton 2019*, despite its belief that DFO did not wish to consult with 'Namgis in good faith, but wished to use that variance to paper the record and allow 'Namgis to blow off steam before DFO proceeded to adopt the PRV Policy it had already formulated.

75. 'Namgis used the four-month period variance to consult in good faith. DFO did not. As a result, consultation was inadequate on numerous fronts, including the following:

- (a) The decision on the PRV Policy was made before consultation began. On June 4, 2019, one day after 'Namgis had agreed to a four month consultation process with DFO, the Minister announced an interim PRV Policy. On October 3, 2019, one day before the suspended judgment in *Morton 2019* would take effect, the Minister's delegate notified 'Namgis that it was implementing the same PRV Policy.
- (b) The completion of the 2019 Discovery Island / Fraser Sockeye Risk Assessment, which DFO primarily relied on for the scientific research to inform the PRV Policy, was completed before consultation began.
- (c) DFO refused to inform 'Namgis on the proposed course of conduct it might pursue. Despite the reasonable conclusion that DFO had already formulated

its reconsidered PRV Policy before beginning consultation, DFO repeatedly refused to inform 'Namgis what the contents of the PRV Policy might be or could be.

- (d) DFO has refused to answer fundamental questions about the testing described in the "interim" policy announced on June 4, 2019.
- (e) DFO failed to respond to the information requests and questions contained in 'Namgis' March 29, 2019 letter and throughout the consultation process refused to answer numerous questions or respond to information requests.
- (f) DFO refused to bring scientists to full-day meetings which had been scheduled expressly for the purpose of discussing the science of PRV and 'Namgis attending those meetings with several experts on PRV.
- (g) DFO repeatedly misrepresented and withheld information.
- (h) DFO consulted using draft and incomplete documents, resulting in information gaps that significantly impeded consultation.
- (i) DFO failed to discharge its Secretariat Responsibilities, which resulted in a lack of timely, meaningful opportunities to discuss 'Namgis' concerns.
- (j) DFO failed to provide reasonable capacity funding for 'Namgis to engage in consultation.
- (k) DFO failed to provide 'Namgis with an assessment of the potential impacts to its Aboriginal title and rights. Despite 'Namgis providing information, in its March 29, 2019 letter, on the depleted state of wild salmon it relies on, the vulnerability of those populations to additional stressors and the adverse impacts that would flow to the exercise of 'Namgis' Aboriginal title and rights from impacts to those populations of wild Pacific salmon, DFO has never responded to that information. DFO has not provided an assessment of the risk PRV poses to the stocks in 'Namgis Territory and has not assessed the risk PRV poses to 'Namgis' Aboriginal title and rights.

- (l) DFO failed to discuss any accommodations aimed at protecting 'Namgis' Aboriginal title and rights. 'Namgis was limited to providing accommodations aimed at protecting populations of wild salmon generally and addressing deficiencies with DFO's science and policy development.

76. As a result of the foregoing deficiencies, among other things, consultation was not adequate and Canada failed to discharge its constitutional duty to consult and accommodate 'Namgis.

PART III – MATERIALS IN SUPPORT OF THE APPLICATION

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- (a) the affidavit of Councillor Kelly Speck;
- (b) the affidavit and expert report of Dr. Richard Routledge;
- (c) the affidavit and expert report of Dr. Gideon Mordecai;
- (d) the affidavit of Won Drastil; and
- (e) such further and other material as counsel may advise and this Honourable Court may permit.

The Applicant requests that the Minister and/or DFO send a certified copy of the following material that is not in the possession of the applicant, but is in the possession of the Minister and/or DFO to the Registry:

1. All supporting and accompanying documents created or submitted in support of the preparation of the PRV Policy and the associated approval of the PRV Policy.
2. All internal documents created by or on behalf of DFO relating to its consideration of the PRV Policy.

3. All documents, whether handwritten, printed or in electronic form relating to the consideration and approval of the PRV Policy.

4. All correspondence, notes of meetings, notes and records of communications between officials of DFO and third parties in respect its approval of the PRV Policy.

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