Federal Court  Cour fédérale

Date: 20150506

Docket: T-789-13

Citation: 2015 FC 575

Ottawa, Ontario, May 6, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ALEXANDRA MORTON

Applicant

and

MINISTER OF FISHERIES AND OCEANS and MARINE HARVEST CANADA INC

Respondents

JUDGMENT AND REASONS

TABLE OF CONTENTS

I. Overview

[1] Under the authority of a license issued by the Minister of Fisheries and Oceans, Marine Harvest Canada Inc. operates a fish farm at Shelter Bay, British Columbia. In March, 2013, Marine Harvest transferred salmon smolts (that is, salmon which have undergone a physical change called "smolting" enabling them to live in salt water) from its Dalrymple hatchery (the hatchery) to the Shelter Bay fish farm (the fish farm). The smolts were subsequently sampled at the fish farm, and in June 2013 tested positive for piscine reovirus (PRV).

[2] Alexandra Morton (the applicant) is a biologist. She lives and works in the Broughton Archipelago, the area with the greatest density of fish farms on the British Columbia coast. Ms. Morton has researched aquatics since the 1990s and has longstanding concerns with respect to the effects of aquaculture on the health of the wild salmon population. She brought this proceeding in the public interest and her standing is not contested.

[3] Ms. Morton was troubled by the transfer of smolts that occurred in March 2013. In her view, the positive PRV test at their destination (the fish farm) demonstrated that the smolts had PRV at their origin (the hatchery), and therefore that Marine Harvest had transferred diseased fish contrary to the *Fishery (General) Regulations*, SOR/93-53 (*FGRs*). Ms. Morton contacted the Department of Fisheries and Oceans (DFO) to inquire as to the regulatory scheme governing such a transfer. In particular, Ms. Morton inquired about whether every transfer from a private hatchery to a fish farm required a transfer licence and, if so, whether such a licence was issued for Marine Harvest's transfer of the smolts which tested positive for PRV.

[4] In response to Ms. Morton's inquiry, Ms. Stacee Martin, DFO Co-Chair of the BC Introductions and Transfers Committee, advised that under DFO policies, the Pacific region was divided into nine Salmonid Transfer Zones, and that the regulatory scheme governing a specific transfer depended on whether or not the transfer was within a single Salmonid Transfer Zone or transited multiple Salmonid Transfer Zones. More specifically, Ms. Martin explained that transfers *between* Salmonid Transfer Zones require a transfer licence under the *FGRs*, whereas transfers *within* a single Salmonid Transfer Zone were regulated by the *Pacific Aquaculture Regulations*, SOR/2010-270 (*Aquaculture Regulations*). With respect to the transfer from the hatchery to the fish farm by Marine Harvest, Ms. Martin explained that this transfer was regulated by the *Aquaculture Regulations* because both the fish farm and the hatchery were situated within a single Salmonid Transfer Zone.

[5] Ms. Morton was concerned that the Salmonid Transfer Zone policy enabled the transfer of fish to occur under the regulatory authority of the *Aquaculture Regulations*, which provided, in her view, fewer safeguards against the transfer of fish than the *FGRs*. Ms. Morton therefore brought this application for judicial review. The application was framed, *inter alia*, on the ground that the condition in the licence granted to Marine Harvest authorizing the transfer of smolts from the hatchery to the farm was *ultra vires* the *Aquaculture Regulations*.

[6] As we will see, subsequent to the receipt of the applicant's memorandum of fact and law, the Minister resiled from the position that the license authorizing the transfer was governed by the *Aquaculture Regulations*. In his memorandum and at the hearing of this application, the Minister took the position that the authority to authorize the transfer derived from section 56 of

the *FGRs*. In consequence, the specific argument that the licence was *ultra vires* the *Aquaculture Regulations* became moot. Other grounds of challenge to the licence remained, however.

[7] The licence permits the transfer of fish by Marine Harvest subject to the satisfaction of certain conditions. The conditions governing the transfer of smolts from the hatchery to the fish-farms (essentially net-pens in the ocean) are set out in condition 3.1 of the licence. The issue is whether licence condition 3.1 meets or is consistent with the regulatory pre-conditions and requirements governing transfers established by section 56 of the *FGRs*.

[8] Subsection 22(1) of the *FGRs* stipulates that a licence condition cannot conflict with the *FGRs*. The applicant contends that the licence conditions conflict with the regulatory requirements that transferred fish "do not have any disease or disease agent that may be harmful to the protection and conservation of fish" (*FGRs*, section 56(b)). The applicant also says that the licence conflicts or is inconsistent with the regulatory requirements of section 56(c) that the release or transfer of fish "will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks." Further, Ms. Morton contends the licence condition allows the licensee to make transfer decisions which by regulation are reserved to the Minister, and thus are an impermissible delegation of the Minister's legislative responsibilities.

[9] For the reasons that follow, the application for judicial review is granted. I conclude that licence conditions 3.1(b)(ii) and 3.1(b)(iv) are inconsistent with the regulatory preconditions established by section 56 of the *FGRs* governing the transfer of farmed fish to the marine environment.

II. The regulatory scheme governing transfers

A. *The Fisheries (General) Regulations*

[10] The Minister's power to issue licences is found in section 7 of the *Fisheries Act*, RSC 1985, c F-14 (*Fisheries Act*). The section accords the Minister an "absolute discretion" to either "issue" or "authorize to be issued" licences for fisheries or fishing:

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

[11] Section 43 of the *Fisheries Act* reinforces the broad scope of the Minister's regulatory authority. This section allows the Governor in Council to make regulations for carrying out the purposes and provisions of the *Fisheries Act*, including:

(a) for the proper management and control of the sea-coast and inland fisheries;	(a) concernant la gestion et la surveillance judicieuses des pêches en eaux côtières et internes;
(b) respecting the conservation and protection of fish;	(b) concernant la conservation et la protection
[…]	[…]

(f) respecting the issue, suspension and cancellation of licences and leases;	(f) concernant la délivrance, la suspension et la révocation des licences, permis et baux;
(g) respecting the terms and conditions under which a licence and lease may be issued;	(g) concernant les conditions attachées aux licences, permis et baux;

[12] The *FGRs* establish an over-arching regulatory framework governing the management of the fishery. They also establish subcategories of licences, each of which is related to various aspects of the fishery. Thus, the key to understanding the scope of the Minister's discretion regarding a specific licence, such as the Shelter Bay licence, is to know which part of the *FGRs* applies, based on the activity or species in question. As the name of the regulations suggests, (*Fishery (General) Regulations*) the regulations apply generally, save where there is an inconsistency with more specific, listed regulations.

[13] Part VIII of the *FGRs*, the title of which is "Release of Live Fish into Fish Habitat and Transfer of Live Fish to a Fish Rearing Facility" is specifically directed to the transfer of fish, and, as noted earlier, is now conceded by the Minister to govern the transfer of smolts from the Dalrymple hatchery to the Shelter Bay fish farm. Section 54, found in Part VIII, stipulates that a licence is required to transfer farmed fish:

54. In this Part, "licence" means a licence to release live fish into fish habitat or to transfer live fish to a fish rearing facility.	54. Dans la présente partie, « permis » s'entend du permis autorisant la libération de poissons vivants dans leur habitat ou le transfert de poissons vivants dans des installations d'élevage.

[14] Section 56 establishes specific constraints on the Minister's discretion in respect of transfer licences. The Minister may only issue a licence if certain pre-conditions are met:

56. The Minister may issue a licence if	56. Le ministre peut délivrer un permis dans le cas où :
(a) the release or transfer of the fish would be in keeping with the proper management and control of fisheries;	(a) la libération ou le transfert des poissons est en accord avec la gestion et la surveillance judicieuses des pêches;
(b) the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and	(b) les poissons sont exempts de maladies et d'agents pathogènes qui pourraient nuire à la protection et à la conservation des espèces;
(c) the release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.	(c) la libération ou le transfert ne risque pas d'avoir un effet néfaste sur la taille du stock de poisson ou sur les caractéristiques génétiques du poisson ou des stocks de poisson.

[15] The interface between this regulatory requirement and the conditions in the licence granted to Marine Harvest are at the heart of this application. Broadly speaking, Ms. Morton contends that the licence conditions are inconsistent with the regulatory pre-conditions established by section 56 of the *FGRs*, and therefore run afoul of the requirement of subsection 22(1) of the *FGRs* that licence conditions cannot be inconsistent. Further, as noted earlier, she submits that the licence conditions constitute an unlawful delegation of ministerial discretion and ministerial responsibility for protection and conservation of the fishery to Marine Harvest. The respondents say that the licence conditions conform to the requirements of section 56.

[16] I conclude on three contextual points.

[17] The *FGRs* and the *Aquaculture Regulations* do not operate in separate silos – instead, the regulations work together to ensure the proper management of aquaculture. In the result, the licence granted to Marine Harvest is effectively an aggregate licence, addressing subject matter both within the ambit of the *FGRs* and the *Aquaculture Regulations*. That is, the licence granted to Marine Harvest provides both a transfer licence under the *FGRs* and an aquaculture licence under the *Aquaculture Regulations*.

[18] In 2009 as a result of *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136, aff'd 2009 BCCA 481, the regulation of finfish aquaculture on Canada's Pacific coast was confirmed to be within the exclusive jurisdiction of Parliament. Since that time, finfish aquaculture on Canada's Pacific coast has been regulated under the *Aquaculture Regulations* and

the *FGRs.* As the decision under review observes "the licences [now federal] were largely based on the manner in which the industry was regulated under the previous provincial regime…"

[19] I note, parenthetically, that there is a context to this issue. In 2012, the Honourable Justice Cohen submitted his final report from the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River. The Commission of Inquiry began its work in 2009, the year in which the Fraser River Sockeye fishery had experienced its lowest return since the 1940s. The Government of Canada sought to identify the reasons for the decline and to determine whether changes were needed to fisheries management polices (Canada, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, *The Uncertain Future of Fraser River Sockeye* (2012, vol 3 at 2). Significantly, Justice Cohen found that there is *some* risk posed to wild sockeye salmon from diseases on fish farms and ensuring the health of wild stocks should be "DFO's number one priority in conducting fish health work" (*Cohen Commission* vol 2 at 113 and vol 1 at 474).

[20] With the historical and legislative landscape set, I turn to the licence itself.

B. *The licence and appendix*

[21] As noted earlier, in correspondence with the applicant, DFO categorized the licence as being granted under the *Aquaculture Regulations*. This is unsurprising, given that the licence itself is titled "Finfish Aquaculture licence under the *Pacific Aquaculture Regulations*". It is now conceded that there is no authority to transfer fish in the *Aquaculture Regulations*. The *Aquaculture Regulations* are silent regarding the transfer of diseased fish.

[22] Condition 3 of the licence begins with the title “Transfer of Fish”. Condition 3.1 states “[t]he licence holder may transfer to this facility live Atlantic or Pacific salmonids from a facility possessing a valid aquaculture licence issued pursuant to section 3 of the Pacific Aquaculture Regulations” provided the transfer conditions are satisfied. This is precisely the type of transfer contemplated by Part VIII of the *FGRs* which defines a Part VIII licence as a licence “to transfer live fish to a fish rearing facility”. Given the importance of transfer decisions as evidenced by the overall scheme of the *FGRs*, it would be unreasonable to conclude that there was a *hiatus* in the regulatory scheme, such that transfers from the hatchery to the fish farm were unregulated. I conclude that condition 3.1 of the licence authorizing the transfer of fish is derived from Part VIII of the *FGRs* and that the terms of that licence must comply with section 56 of those regulations.

[23] Condition 3.1 of the licence provides for the transfer of fish (the subject of a transfer licence under the *FGRs*). The cultivation or capture of fish (the subject of an aquaculture licence under the *Aquaculture Regulations*) is addressed in other parts of the licence. Condition 3.1 reads:

> 3. Transfer of Fish
>
> 3.1 The licence holder may transfer to this facility live Atlantic or Pacific salmonids from a facility possessing a valid aquaculture licence issued pursuant to section 3 of the *Pacific Aquaculture Regulations* between the Fish Health zones described in Appendix VI, provided transfers occur within the same salmonid transfer zone as outlined in Appendix II and provided:
>
> > (a) the species of live salmonid fish are the same as those listed on the face of this licence;
> >
> > (b) the licence holder has obtained written and signed confirmation, executed by the source

> facility's veterinarian or fish health staff, that, in their professional judgment:
>
> > (i) mortalities, excluding eggs, in any stock reared at the source facility have not exceeded 1% per day due to any infectious diseases, for any four consecutive day period during the rearing period;
> >
> > (ii) the stock to be moved from the source facility shows no signs of clinical disease requiring treatment; and
> >
> > (iii) no stock at the source facility is known to have had any diseases listed in Appendix IV; or
> >
> > (iv) where conditions 3.1(b)(i) and/or 3.1(b)(iii) cannot be met transfer may still occur if the facility veterinarian has conducted a risk assessment of facility fish health records, review of diagnostic reports, evaluation of stock compartmentalization, and related biosecurity measures and deemed the transfer to be low risk.

[24] Both conditions 3.1(b)(iii) and 3.1(b)(iv) reference Appendix IV. Appendix IV is part of the licence and sets out what DFO has identified as eight "diseases of regional, national or international concern". The list includes seven specific fish diseases and one residual category encompassing "any other filterable agent either causing cytopathic effects in tissue culture or is associated with identifiable clinical disease in fish". Importantly, the preamble to Appendix IV states that the listed diseases "*can severely impact fisheries and affect regional and national trade so they warrant urgent notification and immediate attention*."

[25] Condition 3.1 applies to fish transfers that occur *between* fish health zones and *within* a salmonid transfer zone. These zones are established by DFO policy, and cover different

geographical areas. However, section 56 of the *FGRs* does not distinguish between salmonid transfer zones or fish health zones. The scope of the regulatory requirements, being law, cannot be limited by policy. As such, section 56 applies to *all* fish transfer decisions, regardless of zone, and therefore the licence condition 3.1 governing transfer must be consistent with section 56.

III. Standard of review

[26] The applicant characterizes the issues in this proceeding as questions of jurisdiction, and argues that as such the licence condition should be reviewed on a correctness standard. The Minister and Marine Harvest disagree. They submit that the Court should adopt a highly deferential approach to the Minister's determination.

[27] In determining the standard of review, the Minister places considerable emphasis on the fact that the underlying science involved in licencing the aquaculture industry is complex. Relying on *McLean v British Columbia (Securities Commission)*, 2013 SCC 76 the Minister says that his decision is presumptively reasonable, and that the onus is on the applicant to demonstrate otherwise. The Minister relied on the presumption, and apart from the decision and licence, produced no record.

[28] Marine Harvest, for its part, predicates its position on the Minister's broad discretion to issue fishing licences and to specify licence conditions pursuant to section 7 of the *Fisheries Act*. This provision empowers the Minister to issue or authorize to be issued licences for fisheries or fishing in "[his] absolute discretion." Section 7, according to Marine Harvest, is a complete answer to any inquiry, of any nature or degree, into the licence conditions. Marine Harvest's

position, distilled to its essence, is that the Minister can do what the Minister wants. Alternatively, Marine Harvest contends, based on the expert evidence, that the licence conditions are reasonable.

[29] There is no question that the Minister has broad authority pursuant to section 7 of the *Fisheries Act*. As noted in *Malcolm v Canada (Minister of Fisheries and Oceans)*, 2013 FC 363, aff'd 2014 FCA 130, leave to appeal to SCC refused, [2014] SCCA No 350, the Minister has "the widest discretion" to make fisheries policy decisions. This discretion may be exercised, for example, when granting or refusing to grant licences pursuant to the *FGRs* or the *Aquaculture Regulations*.

[30] Nevertheless, ministerial discretion is framed and controlled by the *FGRs*, section 22 of which prohibits licence conditions that are inconsistent with the *FGRs*. That is, ministerial discretion exists except where it has been prescribed by the law. As the Court of Appeal observed in *Matthews v Canada (Attorney General)*, [1999] FCJ No 830 (CA) "however largely expressed", the Minister's discretion in respect of licence conditions is limited and governed by the objectives of the *Fisheries Act* and its provisions. The Supreme Court made the same point, in precisely relevant terms, in *Comeau's Sea Foods Ltd. v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, where, at paragraph 36, Major J speaking for the Court said:

> It is my opinion that the Minister's discretion under s. 7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, *no regulations currently being applicable*. [Emphasis added]

[31] In *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3, the Supreme Court discussed the *indicia* required to rebut the presumption of reasonableness, few of which are present in this case. Based on the prevailing jurisprudence, the standard of review analysis must start from the premise that reasonableness applies to the review of the Minister's licencing decisions: also see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36; *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40.

[32] In my view, the question of whether the licence conditions are consistent with section 56 of the *FGRs* is to be assessed against a reasonableness standard. The Minister, through the imposition of conditions, is seeking to implement or render operational, the obligations imposed by sections 56(a), (b) and (c). A licence condition that is inconsistent or contrary to a regulatory obligation would be *ultra vires*, but it would also be unreasonable. As I characterize the issue before the Court, the question is whether the licence conditions are a reasonable articulation, or expression, of the mandatory requirements of section 56.

IV. Preliminary observations

A. *Piscine reovirus (PRV) and heart and skeletal muscle inflammation (HSMI)*

[33] HSMI is an infectious disease found in farmed salmon. It causes abnormal swimming behaviour and anorexia in fish. HSMI does not present observable symptoms until 5-9 months following the transfer of smolts to the ocean. There is no question that it is a threat to aquaculture operations. Mortality can range from 0% to 20% of the population, and in one reported case in Norway, the loss of an entire stock.

[34] First identified in Norway in 1999, HSMI is now prevalent throughout Norwegian salmon farming operations. HSMI was discovered in Scotland in 2005, and more recently in Chile and Canada.

[35] The causal relationship between PRV and HSMI has not been conclusively established. However, the weight of the expert evidence before this Court supports the view that PRV is the viral precursor to HSMI. Lengthy and extensive research efforts in Norway designed to identify viruses, other than PRV, which may be responsible for HSMI, have not identified any other agent. Although HSMI has not been found in wild salmon, PRV is now found in 14% of the wild salmon population of the Norwegian coast.

B. ***The record***

[36] Judicial review is focused on the decision itself. It is based on the material before the decision maker. As the Court of Appeal noted in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, as a general rule, the record before the court on judicial review is restricted to the evidentiary record before the decision maker.

[37] There are exceptions to this rule, one of which is to provide general background or context which might assist the court in understanding the issues. Much of the evidence tendered in this proceeding, and the use to which it is put, goes beyond the exception. Marine Harvest vigorously contests the causal relationship between HSMI and PRV, and seeks to establish there is no such causality. This misconceives the role of the Court on judicial review. The Minister

tendered no evidence, other than the page and one-half decision required by Rule 317 of the *Federal Courts Rules*. The Minister sheltered behind Marine Harvest's evidence. The Minister nonetheless, made unequivocal statements of science:

> HSMI has not been found in the Atlantic other than in Norway and Scotland. HSMI has never been diagnosed in any fish in the Pacific Ocean, including Pacific Salmon or farmed Atlantic Salmon.

[38] Given that Norway and Scotland are the two largest centers of farmed Atlantic salmon, the statement is more supportive of the applicant's view of the science. But that is not the point at this stage. The point is that assertions made in order to bolster the reasonableness of the Minister's exercise of discretion cannot be made without evidence.

[39] The Minister states that the onus is on the applicant to disprove that what the Minister says about science and the regulations is presumptively deemed reasonable. The Minister pleads that he was "guided by expert advisers" and that the licence conditions were based on "scientific criteria". But it is important to note that the Minister has said nothing about the science which might inform the reasonableness of the conditions. If the Minister wishes to establish that the discretion exercised took into account various factors and that there were relevant limitations in the science, the Minister, or ministerial officials, can say so. What the Minister cannot do is make unsupported statements of science. Nor can the Minister point to expert affidavits, drafted many months after the decision and infer that those considerations must necessarily have been taken into account by the Minister in the exercise of his discretion.

C. *The precautionary principle*

[40] The Minister contends that licence conditions 3.1(b)(i), (ii) and (iii) are reasonable and "take into account the reality of the current limitations of scientific knowledge and reflects a precautionary approach to fish transfers." That is, the conditions are intended, in the face of scientific uncertainty, to prevent transfers that may be harmful to the protection and conservation of fish. The Minister stresses that the licence conditions are so broad and in line with the precautionary principle that they result in healthy fish being held back from transfers. Notably, the Minister did not argue that licence condition (iv) was consistent with the precautionary principle; Memoranda of the Minister at paras 4, 58, 100-103.

[41] In light of this argument it is useful to consider the exact meaning of the precautionary principle and its application in a legal context. In *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40, Justice L'Heureux-Dubé adopted the precautionary principle and applied it as an element of statutory interpretation, noting at para 31:

> The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990):
>
> > In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
>
> Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, CEPA and the

> Precautionary Principle/Approach (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the Oceans Act, S.C. 1996, c. 31, Preamble (para. 6); Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33, s. 2(1)(a); Endangered Species Act, S.N.S. 1998, c. 11, ss. 2(1)(h) and 11(1).

[42] More recently, the Supreme Court of Canada considered the interface between the precautionary principle and an environmental regulatory scheme in *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52, at para 20. The Court referred to the principle as an emerging principle of international law, which informed the scope and application of the legislative provision in question.

[43] The precautionary principal recognizes, that as a matter of sound public policy the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to protect the environment, as there are inherent limits in being able to predict environmental harm. Moving from the realm public policy to the law, the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law: *Spraytech* at paras 30-31. However, except as discussed in Part VII, the legal contours of the principle need not be determined here, as this decision does not rest or depend on the application of the principle.

[44] Invoking the precautionary principle, the respondents submit that the licence conditions are intended, in the face of scientific uncertainty, to prevent transfers that may be harmful to the protection and conservation of fish. However, they also contend that that same scientific uncertainty with respect to whether PRV is the agent of HSMI justifies the transfer of PRV infected smolts. A lack of full scientific certainty is the very situation addressed by the

precautionary principle. The respondents' arguments with respect to the precautionary principle are inconsistent, contradictory and, in any event, fail in light of the evidence.

[45] The evidence before the Court demonstrates that there is a body of credible scientific study, conducted by respected scientists in different countries, establishing a causal relationship between PRV and HSMI. The evidence also indicates that there are scientists who question the link – but concede that no other disease agent has been identified as the culprit for HSMI. As noted previously, HSMI was first identified in Norway in 1999 and is now prevalent throughout Norwegian salmon farming operations. It has subsequently been found in Iceland, and more recently Chile. Extensive research in Norway designed to identify viruses, other than PRV, which may be responsible for HSMI, have not identified any other agent. Thus, although there is a healthy debate between respected scientists on the issue, the evidence, suggests that the disease agent (PRV) *may* be harmful to the protection and conservation of fish, and therefore a "lack of full scientific certainty should not be used a reason for postponing measures to prevent environmental degradation": *Spraytech* at para 31.

[46] In sum, it is not, on the face of the evidence, open to the respondents to assert that the licence conditions permitting a transfer of PRV infected smolts reflect the precautionary principle. The Minister is not, based on the evidence, erring on the side of caution.

[47] In making these observations about the precautionary principle, the Court is not arbitrating on the PRV/HSMI debate. Rather, the argument having been raised, and the assertion made that the conditions reflect a precautionary approach to aquaculture, the issue had to be

considered. To conclude, based on the evidence before me, the Minister cannot, in support of the reasonableness of the licence conditions and their nexus to the requirements of section 56, contend that they reflect a precautionary approach. I will return briefly to the precautionary principle as an aspect of the interpretation of subsection 56(b) of the *FGRs* later in these reasons.

[48] With these three preliminary observations made (the record, the scientific context and the precautionary principle) I turn to the question whether the licence conditions meet the threshold regulatory requirements. Before doing so, I reiterate that the standard of review is reasonableness, or, put otherwise, whether the conditions are a reasonable articulation of the regulatory preconditions. The answer to this question turns, not on whether PRV is, as a matter of scientific certainty, the viral agent of HSMI, nor whether fish that are PRV positive should be transferred; rather, the answer turns on the application of orthodox principles governing the interpretation of subordinate legislation.

V. Whether the licence conditions comply with section 56 of the *FGRs*

A. *Analytical framework*

[49] It is self-evident that a regulation that is inconsistent with the enabling substantive statutory provisions cannot carry out the purposes of the act (Denys C. Holland and John P. McGowan, *Delegated Legislation in Canada*, (Agincourt, Ontario: The Carswell Co. Ltd., 1989) at 182). Delegated legislation, such as the *FGRs*, has the same legal force as a statute and is interpreted using the same rules and techniques (Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007) at 11). Here, the inconsistency asserted is not between the act and the regulation, but the regulation and the licence. The same principles apply by analogy. Any

condition of the licence that conflicts with the substantive regulatory provisions cannot carry out the purposes of the regulatory scheme: *Matthews*.

[50] The point is made, perhaps unnecessarily given the well-established principles noted above, by subsection 22(1) of the *FGRs*, which directs that the Minister may not specify a condition in a licence that is inconsistent with the *Regulations*.

[51] The licence and its attached conditions cannot derogate from or be inconsistent with the *FGRs*. To draw an analogy, as Professor Ruth Sullivan explains in *Statutory Interpretation* at p 312, "the paramountcy of statutes over delegated legislation operates as a presumption" and in cases of conflict, "the statute is presumed to prevail." So too, the licence cannot grant that which the *FGRs* exclude. This applies with particular force where, as here, the language of the regulation requires certain pre-conditions be met before the Minister may issue a licence.

[52] The question of whether the licence satisfies its governing regulatory provisions requires analogy to the first principles of statutory interpretation. I rely on Driedger's modern principle of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983). In other words, a purposive, contextual and harmonious interpretation should be applied to section 56 of the *FGRs*: *Rizzo & Rizzo Shoes Ltd., Re* [1998] 1 SCR 27 at para 21.

[53] It is, however, imperative to remember that the standard of review is reasonableness, in this case, infused with deference given that this aspect of the applicant's argument asserts a substantive inconsistency between what the regulations require of the Minister, and the articulation of those requirements in the form of conditions on a licence.

B. *Section 56 of the FGRs*

[54] Section 56 under Part VIII of the *FGRs* provides for prerequisites to the issuance of a licence to transfer fish. The section 56 prerequisites apply prior to and during the currency of a licence. Importantly, the section 56 prerequisites do not govern the conduct of a licensee but rather *govern the conduct of the Minister* in issuing a licence to transfer fish under section 56. Section 56 states:

56. The Minister may issue a licence if	56. Le ministre peut délivrer un permis dans le cas où :
(a) the release or transfer of the fish would be in keeping with the proper management and control of fisheries;	(a) la libération ou le transfert des poissons est en accord avec la gestion et la surveillance judicieuses des pêches;
(b) the fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and	(b) les poissons sont exempts de maladies et d'agents pathogènes qui pourraient nuire à la protection et à la conservation des espèces;

(c) the release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.	(c) la libération ou le transfert ne risque pas d'avoir un effet néfaste sur la taille du stock de poisson ou sur les caractéristiques génétiques du poisson ou des stocks de poisson.

[55] In applying a statutory interpretation analysis, I look to the language of section 56(b). First, the *FGRs* do not define "disease" or "disease agent"; however, the licence defines "disease" as "an abnormality of form or function and can be caused by a suite of infectious, non-infectious and inherent factors." Further, and although outside of the legislative scheme, the final report of the Cohen Commission concluded that "a host fish is diseased if it is behaviourally or physiologically comprised" and a "pathogen" as an "agent (such as a virus, bacteria, or sea louse) that causes disease" (*Cohen Commission* vol 3 at 20).

[56] The plain meaning of the language "*any* disease or disease agent" suggests that the phrase is not limited to *only* those few diseases prescribed by policy as listed in Appendix IV. The Minister's legal duty under section 56 extends to *any* disease or disease agent that "may be harmful to the protection and conservation of fish." Interpreting section 56(b) in this manner is consistent with a purposive and contextual approach, as it supports conservation of the resource, the Minister's primary obligation under the *Fisheries Act*: *R v Marshall*, [1999] 3 SCR 533 at para 40. It is also consistent with the precautionary approach which the Minister says was taken into account. I will address this issue further in Part VII of these reasons.

[57] Again, a purposive, contextual and plain meaning analysis of the language "that ***may*** be harmful" suggests this phrase means any disease or disease agent that *might be harmful* to the protection and conservation of fish. This interpretive approach is again consistent with the precautionary principle, the essence of which is that where a risk of serious or irreversible harm exists, a lack of scientific certainty should not be used as a reason for postponing or failing to take reasonable and cost-effective conservation and management measures to address that risk (*Cohen Commission* vol 3 at 20). I note, in this regard, that although HSMI was first identified in 1999, it was in Scotland in 2005 and subsequently in Chile, it would be an unreasonable inference to draw from the evidence that it will not appear in farmed Atlantic salmon on the Pacific Coast.

[58] The precautionary principle has been applied in international agreements to which Canada is a party (such as the *Convention on Biological Diversity*), domestic legislation (for example the *Oceans Act* or the *Species at Risk Act*). The Supreme Court of Canada has also relied on the precautionary principle in interpreting regulations directed to public health and the environment: *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 30-32; *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 at para 20.

[59] In the language of "… the protection and conservation of fish", the word "protection" does not stand for "management"; rather, the word means "preservation": *Canada (Minister of Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA at para 114. Finally, section 2 of the *Fisheries Act* broadly defines "fish" to include *inter alia* parts of fish, and the eggs, sperm,

spawn, larvae, spat and juvenile stages of fish. Importantly, “fish” pursuant to Part VIII of the *FGRs* is not limited to wild fish, but includes non-native fish that are cultivated.

[60] With that said, I turn to the question whether the licence prescribes lower standards for when diseased fish may be transferred than required by section 56(b).

C. *Licence condition 3.1(b)(i)*

[61] Licence condition 3.1(b)(i) establishes clear, objective criteria governing transfers that are demonstrably linked to the Minister’s regulatory obligations under section 56. Condition 3.1(b)(i) allows for transfers only where mortalities from infectious diseases do not exceed 1% per day, for any four consecutive day period during the rearing period. This licence condition is a reasonable articulation of the subsection 56(b) requirements.

D. *Licence condition 3.1(b)(ii)*

[62] Condition 3.1(b)(ii) provides that a licensee may transfer fish if the stock “shows no signs of clinical disease requiring treatment.” Ms. Morton contends that, in two ways, condition 3.1(b)(ii) is narrower than section 56(b). First, condition 3.1(b)(ii) allows the licensee to transfer fish from a diseased stock provided that disease does not “require treatment”. Ms. Morton submits that whether treatment is needed for farmed salmon may have no nexus to the risk posed to the “protection and conservation of fish”. Second, condition 3.1(b)(ii) allows the licensee to transfer fish from a stock infected with a disease agent that has not yet presented as disease.

[63] Based on a purposive, contextual and plain meaning analysis of the language in both provisions, I agree with the applicant that condition 3.1(b)(ii) maintains a lower standard than that prescribed by section 56(b) of the *FGRs*. The condition contradicts the plain language of section 56(b). Section 56(b) stipulates that no transfer may take place if they have "any disease or disease agent" that may be harmful to the transfer of fish. The licence condition, in contrast, allows transfers unless the fish *show signs* of clinical disease requiring treatment.

[64] The PRV/HSMI relationship is a useful foil to demonstrate the discrepancy between the regulatory requirement and the licence. Clinical signs of HSMI are not manifest until 5-9 months following transfer of the smolts to the ocean. Section 56(b), on its face, anticipates testing for latent disease agents. The licence relieves Marine Harvest from this obligation imposed by law.

[65] Condition 3.1(b)(ii) requires that the stock to be moved from the source facility "*shows no signs* of clinical disease". Showing no sign of disease is certainly a lower threshold than the regulatory scheme demands, that is, that the fish "do not *have* any disease *or disease agent*." That is, the condition as presently stated allows for a transfer where the fish have a disease, or *disease agent*, but are not presenting or showing signs of such a disease. Condition 3.1(b)(ii) is inconsistent with and contrary to the section 56(b) regulatory obligation. Section 22 of the *FGRs* is engaged.

[66] Second, it is clearly within the Minister's discretion to establish licence conditions for testing fish stock to ensure that the fish "do not have any disease or disease agent that may be harmful to the protection and conservation of fish." However, no criteria are provided to Marine

Harvest within condition 3.1(b)(ii), as to what diseases may be harmful to the protection and conservation of fish. Importantly, the focus of this regulatory requirement is on "fish" and not the "stock". The regulation is directed to the health of the resource generally, and not the health of the farmed product or stock. According to condition 3.1(b)(ii), as presently drafted, it is unclear as to whether and how Marine Harvest's fish health staff must determine whether the fish have any disease or disease agent using objective, prescribed scientific measures, or, alternatively, whether all that is required is a quick glance in the tank to assess whether the fish are showing signs of disease. There is no nexus or scientific linkage between the regulatory requirement (directed to the protection of the resource) and the licence condition (directed to the stock).

[67] For this further reason, condition 3.1(b)(ii) maintains a lower standard than is required by the regulatory scheme and is thus inconsistent with section 56(b) of the *FGRs*.

E. ***Licence conditions 3.1(b)(iii)***

[68] Condition 3.1(b)(iii) provides that a licensee may transfer fish if "no stock at the source facility is known to have had any diseases listed in Appendix IV." As was previously noted, Appendix IV is part of the licence and sets out eight "diseases of regional, national or international concern" that according to the licence, "can severely impact fisheries and affect regional and national trade so they warrant urgent notification and immediate attention."

[69] In my view, condition 3.1(b)(iii) is consistent with section 56(b). Condition 3.1(b)(iii) precludes transfer where stock is known to have had any diseases listed in Appendix IV – that is,

where fish are known to have had any diseases that can "*severely* impact fisheries." This is a reasonable articulation of the section 56(b) requirement that a fish transfer occur only where the fish do not have any disease or disease agent that *may be harmful* to the protection and conservation of fish.

F. ***Licence condition 3.1(b)(iv)***

[70] Condition 3.1(b)(iv) allows the licensee to override conditions 3.1(b)(i) and 3.1(b)(iii) if the facility veterinarian has conducted a risk assessment of facility fish health records, a review of diagnostic reports, an evaluation of stock compartmentalization, and related biosecurity measures and deems the transfer "low risk".

[71] This condition also allows the licensee to transfer fish from stock known to have one of the diseases of *regional, national or international concern* that can "severely impact fisheries" in Appendix IV. This licence condition undoubtedly conflicts with section 56(b) of the *FGRs* and the regulatory duty imposed on the Minister to allow transfer only where the fish "do not have any disease or disease agent that may be harmful to the protection and conservation of fish." Further, the licence condition allows transfer of diseased fish on the assessment of the facility veterinarian that the transfer is of "low risk". Effectively, the condition circumvents the regulatory requirements under section 56 and licences Marine Harvest to transfer through less rigorous conditions than required by law.

[72] It seems almost too clear to state that the Minister cannot create any licence conditions which would in fact sidestep or nullify the *FGRs*. However, that is the effect of the override

provision in the licence. Licence condition 3.1(b)(iv) is inconsistent with section 56(b) of the *FGRs*. It is also unreasonable as it is, on its face, internally inconsistent. A transfer cannot be of low risk when it allows the transfer of fish with diseases which have the potential to "severely impact" the fishery at an international level.

[73] Licence condition 3.1(b)(iv) also fails for further reasons to which I now turn.

VI. Whether the delegation at issue was valid

A. *Whether delegation occurred*

[74] I have concluded that both conditions 3.1(b)(ii) and 3.1(b)(iv) are unreasonable as they are inconsistent with and contrary to section 56(b) of the *FGRs*. However, condition 3.1(b)(iv) also fails on a second ground, that is, the Minister has not properly delegated to Marine Harvest.

[75] The Applicant argues that the Minister is the decision-maker responsible for licensing and transfer decisions under section 56 of the *FGRs*, and that this authority cannot be delegated to the aquaculture industry. The licence, it is said, is inconsistent with section 56 because the licensee, rather than the Minister, decides whether a transfer of fish is permissible. According to the Applicant, ensuring that the decision-making authority under section 56 remains with the Minister minimizes the risk that less onerous fish health standards are imposed by industry, and ensures that the Minister's accountability under both statute and regulation to conserve and protect the fishery is not evaded.

[76] The Minister takes a different approach, and submits that it is common for licences to be issued with conditions that a licensee is required to follow when engaging in the licensed activity – without the direct supervision of the Minister. A section 56 licence, under which the licensee decides whether or not to transfer is consistent with the mandatory conditions set down by the *Regulations*. Finally, Marine Harvest argues that nothing in the *Fisheries Act* or either the *FGRs* or *Aquaculture Regulations* states that the Minister cannot use and allow industry to make section 56 decisions. There is no rule against administrative sub-delegation.

[77] As a result of the divergent arguments made by the parties, the first question is necessarily whether sub-delegation has occurred. In my view, it has. Section 43 of the *Fisheries Act* authorizes the Governor in Council to make regulations respecting the management and control of fisheries, the conservation of fish, and to issue licences. Section 56(b) of the *FGRs* delegates to the Minister the ability to issue a licence "provided that the fish do not have any disease or disease agents that may be harmful to the protection and conservation of fish."

[78] The Minister states that he has crafted licence conditions which fulfill the section 56(b) requirements. However, it is the licensee, Marine Harvest, who in practice determines whether those conditions have been met. That is, although the Minister issues the section 56 licence and determines the licence conditions, the Minister has sub-delegated to the licensee the ultimate determination as to whether a transfer is permissible.

B. *Whether delegation is permissible under the FGRs*

[79] Sub-delegation is "the granting by a delegate to another…of some part of the authority granted to the delegate by Parliament" (Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure before Administrative Tribunals* (loose-leaf) (Toronto: Carswell, 1988) (2012 updated) at 5-20). There is a general presumption against sub-delegation in administrative law, referred to as the latin maxim *delegatus non potest delegare*: a delegate may not re-delegate (John Willis, "Delegatus Non Potest Delegare" (1943) 21 Can Bar Rev 257).

[80] The presumption against sub-delegation does not apply, however, when the action is purely administrative or of such a character that no significant degree of discretion or independent judgment is involved. It only applies to discretionary decisions, legislative or adjudicative decisions: see *Forget v Quebec (Attorney General)*, [1988] 2 SCR 90. In the case at hand, the sub-delegate, Marine Harvest, has been given legislative authority in the form of a discretion to exercise independent judgment regarding the transfer of fish pursuant to condition 3.1(b) of the licence. As Marine Harvest has the ability to exercise discretion when deciding whether to transfer fish, the presumption against sub-delegation is engaged. However, the presumption against sub-delegation is just that, a *presumption*. It is not a rule of law, and is therefore rebuttable with either express or implied statutory authorization (*Brown and Evans*, at 13-17). Thus, the Minister may further delegate the authority granted to him by Parliament under section 56 of the *FGRs*, through express or implied authorization. There is no express authorization in the *FGRs* for the Minister to sub-delegate authority under section 56 to the aquaculture industry. As such, the question is whether the *FGRs* can be interpreted to impliedly authorize a sub-delegation of the Minister's authority.

[81] I do not think that the scope of section 56 is so narrow as to preclude the Minister from sub-delegating to the aquaculture industry. Section 56 can be interpreted to impliedly authorize sub-delegation of administrative and operational responsibilities if a pragmatic and functional approach is applied. I agree with Justice Dymond's analysis in *R v Cox*, 2003 NLSCTD 56, at para 70 that the size and complexity of DFO's mandate requires delegation of administrative functions, provided the criteria are objective, discernable and clear.

[82] Therefore, I find that the *FGRs* impliedly authorize the Minister to delegate to Marine Harvest. However, although sub-delegation is *permissible*, the question remains: did the Minister *properly* delegate to Marine Harvest?

C. *The Minister did not properly delegate to Marine Harvest*

[83] For the exercise of a delegated power to be proper, the delegation must provide for standards, rules and conditions to guide the decision-making process (*Vic Restaurant v Montreal (City)*, [1959] SCR 58, [1958] SCJ No 69 at 99). Subordinate legislation must contain decisional criteria that restrain the discretion given to the exerciser of the power (*Brown and Evans*, at 13-32 and 13-33). Applying this principle to the case at hand means that the licence must contain objective standards or criteria governing the exercise of discretion. Unlimited discretion cannot be conferred on a sub-delegate, and supervisory control over the delegate should be retained (Sara Blake, *Administrative Law in Canada*, 5th ed (Markham, Ontario: LexisNexis Canada Inc., 2011) at 145). Absent objective criteria, the Minister could be said to have abdicated the responsibilities imposed under section 56.

[84] In this regard, it is instructive to juxtapose what is required of the Minister by law and what is left in the discretion of the licensee. Recall that section 56 allows the Minister to issue a licence if:

a) The release or transfer of the fish would be in keeping with the proper management and control of fisheries;

b) The fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and

c) The release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks.

[85] These obligations may be delegated and given operational expression if the discretion exercised remains that of the Minister. The Minister does this, not by making individual transfer decisions (as counsel for the Minister suggests this would necessarily require) but rather by establishing objective criteria governing how the ministerial discretion, in the hands of Marine Harvest, is exercised. As we will see, the subjective and imprecise language of "low risk" in licence condition 3.1(b)(iv) falls short of that requirement.

[86] The transfer conditions cannot be reasonable in the absence of objective criteria. In my view, the standard of review, in this context, seeks only to find a reasonable correspondence or nexus between the obligations on the Minister under the *FGRs* and the expression or articulation of those obligations in the licence conditions. The absence of criteria to guide how "low risk" in condition 3.1(b)(iv) is to be interpreted is not reasonable.

[87] The delegation at hand is not proper for two reasons: first, because the licence improperly confers unlimited discretion under condition 3.1(b)(iv) onto the sub-delegate, without any standards or criteria for the exercise of discretion; and second, because the Minister has not retained supervisory control over the sub-delegate.

[88] Condition 3.1(b)(iv) of the licence confers unlimited discretion onto the sub-delegate, Marine Harvest. This provision allows a transfer of fish to occur even where the stock at the facility have any diseases listed in Appendix IV of the licence, or when their mortalities have exceeded 1% per day if the facility veterinarian, an employee of Marine Harvest, deems the transfer to be of "low risk". However, the licence does not at any point define or provide objective criteria with respect to "low risk". Nor is it clear as to whom or what the term "low risk" applies to – low risk to the farmed stock? Low risk to the wild stocks? Low risk to the consumers of fish? Nor is any timeframe indicated in respect of which the risk assessment is to be made. Subsection 56(b) authorizes transfer only if the fish do not have a disease or disease agent "that may be harmful to the protection and conservation of fish." This language, interpreted consistent with the Minister's over-arching mandate to preserve and protect the fishery, requires a long-term assessment of the implications of a transfer.

[89] Further, the delegation is also improper because the Minister has not retained supervisory control over the sub-delegate. Under condition 3.1(b)(iv) of the licence, Marine Harvest may transfer diseased fish without the knowledge, approval, or supervision of the Minister. This does not align with section 56 of the *FGRs*, nor does it align with the primary objective of the *Fisheries Act*. As the Supreme Court of Canada has held, the Minister's primary objective under

the *Fisheries Act* is the conservation of the resource, and "this responsibility is placed squarely on the Minister and not on aboriginal or non-aboriginal users of the resource": *R v Marshall*, [1999] 3 SCR 533 at para 40. If the Minister is to delegate under section 56, he must retain supervisory control over transfers of fish to ensure that the primary objective of resource conservation is met.

[90] The requirement of supervisory control arises from the face of the *FGRs* themselves. Sections 56(a), (b) and (c) are all directed to the protection, management and conservation of the fishery as a whole; matters which the fish health staff of a licenced facility cannot, in the absence of clear and objective criteria, have in mind. Indeed, counsel for the respondents conceded that in making an assessment as to whether the transfer was of "low risk", Marine Harvest's employees only considered the extent of the disease in the particular tank to be transferred.

[91] As previously stated, there is no criteria provided within the licence to guide the decision-making process as to the definition of "low risk". It is therefore left to the facility veterinarian, in his or her unlimited discretion, to define what is and is not "low risk". Condition 3.1(b)(iv) therefore authorizes transfers in the absence of criteria which relate to the obligation cast on the Minister under sections 56(a), (b) and (c). There is, therefore, no nexus or correspondence between the regulatory obligation on the Minister, and condition 3.1(b)(iv).

[92] The Minister points to the requirement that written confirmation that, in the opinion of the Marine Harvest fish health staff or veterinarian, the transfer conditions have been met, and that a copy must be kept on file.

[93] It is, perhaps, too obvious to state that a requirement to keep a record of a decision to transfer under condition 3.1(b)(iv), does not, in and of itself, allow for ministerial control. It comes too late. The stock will be in the marine environment and the associated risks engaged. Documentation may assist in ensuring accountability for decisions, but it bears no effective relationship to the clear legal obligation imposed by section 56 that there be *no* transfers if the fish have diseases or disease agents that may be harmful to the protection and conservation of fish. No amount of record keeping will justify the exercise of a delegated power that is not exercised according to clear, objective criteria.

[94] It is useful to return to first principles – what is delegated is an administrative function, something which can be executed in an operational environment. In the context of the *Fisheries Act*, this has particular resonance given that what is in issue is a statutory duty to protect and conserve the fishery, a responsibility which the Supreme Court of Canada confirms rests "squarely on the Minister". Here, however, considerable discretion is left in the hands of a private party to make risk decisions about a public resource. Documenting that decision does not, in and of itself, satisfy the requirement imposed by law that there be "no transfers that may be harmful to the protection and conservation of fish."

[95] I note, in conclusion, that the Minister led no evidence as to how either condition 3.1(b)(ii) or 3.1(b)(iv) might satisfy the regulatory requirements imposed on the Minister.

VII. The precautionary principle and licence conditions 3.1(b)(ii) and (iv)

[96] I have concluded that licence conditions 3.1(b)(ii) and (iv) are inconsistent with subsection 56(b) on the basis of first principles governing the interpretation of subordinate legislation. While not necessary to the disposition of this application, I return to the relationship between the precautionary principle and the licence conditions and what is a second basis for their invalidity. These two licence conditions are also inconsistent with subsection 56(b) in light of the precautionary principle.

[97] In my view, subsection 56(b) of the *FGRs*, properly construed, embodies the precautionary principle. First, subsection 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." The phrase "may be harmful" does not require scientific certainty, and indeed does not require that harm even be the likely consequence of the transfer. Similarly, the scope of "any disease or disease agent" in subsection 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).

[98] The consequence of interpreting subsection 56(b) consistently with the precautionary principle is that the licence conditions must also reflect the precautionary principle. As the licence conditions cannot derogate from or be inconsistent with subsection 56(b), they therefore cannot derogate from the precautionary principle. As noted earlier, the Minister did not attempt to justify that licence condition 3.1(b)(iv) was consistent with the precautionary principle, but confined his argument in this respect to licence conditions 3.1(b)(i), (ii) and (iii).

[99] In my view, the Minister's argument cannot stand. For the reasons given, conditions 3.1(b)(ii) and (iv) are inconsistent with section 56(b) and thus with the precautionary principle. The conditions dilute the requirements of subsection 56(b), a regulation designed to anticipate and prevent harm even in the absence of scientific certainty that such harm will in fact occur.

VIII. Conclusion and remedy

[100] The disposition of this application turns on orthodox principles of public law governing the interpretation and application of subordinate legislation. Speaking for the Court in *Bristol-Myers Squibb Co. v Canada (Attorney General)*, 2005 SCC 26, at para 26, Justice Binnie reminds us that the regulations are not to be considered in light of their own limited objects and factual context, rather, that the intent of the statute transcends the intent of the regulations. He continues, at paragraph 38, "This point is significant. The scope of the regulation is constrained by its enabling legislation." So too are the licences. Their terms are constrained by the statutory duty cast on the Minister and the regulatory pre-conditions and requirements governing transfers. Licences cannot be issued that do not conform to the legislation, and the Minister cannot improperly delegate his responsibilities under the *FGRs* for the protection and conservation of the fishery.

[101] The applicant does not seek to invalidate the entire licence; rather she seeks an order declaring the offending conditions invalid and severing them from the licence. I agree that a limited remedy is in the public interest. Licence conditions 3.1(b)(ii) and 3.1(b)(iv) do not meet the requirements under section 56 of the *FGRs*. Those conditions are of no force and effect and are severed from the licence issued to Marine Harvest.

[102] It is for the Minister and not the Court to devise licence conditions that are consistent with the standards required in section 56 of the *FGRs*. Therefore, I turn to the question whether the judgment of the Court should, in the public interest, be suspended, and to that end, draw analogy to suspensions of declarations in a constitutional law context.

[103] The Supreme Court of Canada considered the issue of suspension of declaratory relief in *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 166-169, weighing the consequences of immediate invalidity against the consequences of a suspended declaration. Ultimately, the Court held that although neither alternative was without difficulty, given that immediate invalidity would leave prostitution totally unregulated, moving "abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated" this "would be a matter of great concern to many Canadians." Therefore, the declaration of invalidity was suspended for one year.

[104] In the present case, while the consequences of immediate invalidity are not of the same order or dimension as in *Bedford*, the interrelationship between section 56 of the *FGRs* and Part VIII licence conditions will affect other licences. The Minister contends that as many as 120 licences, due to expire at the end of 2015 could be affected. Further, as licence condition 3.1(b)(iv) is declared of no force and effect there could be implications for existing aquaculture operations, including fish recently transferred to the marine environment. The applicant, on the other hand, urges a short suspension of judgement, as further delay increases the risk to conservation and the protection of fish. Ms. Morton notes that it is during the spring and fall migrations of salmon that increases proximity between farmed and wild salmon.

[105] The power to suspend judgment should be used sparingly (*Bedford*, para 167), and only where there is evidence of a compelling public interest. There are also limits to the *Bedford* analogy in this case. Here, there is an existing legal scheme in place governing the transfer of fish, namely Part VII of the *FGRs*. This declaration does not create a legislative hiatus; only portions of the licences are affected – all other aspects of the licence conditions remain in effect. Balancing these considerations, I am satisfied that a limited suspension of judgment is in the public interest. This judgment will be suspended for four (4) months from the date of its issue.

IX. Costs

[106] The genesis of this litigation, as described above, relates to the applicant's concern that Marine Harvest was transferring fish under the *Aquaculture Regulations* rather than the *FGRs* – a position maintained by DFO until it filed its memorandum of argument, no affidavit having been filed by the Minister. Accordingly, though the Minister correctly identified condition 3.1 as relating to a transfer licence pursuant to the *FGRs*, DFO initially represented to the applicant that condition 3.1 related to an aquaculture licence. The applicant's concerns about the licence being regulated under the *Aquaculture Regulations* when condition 3.1 related to the transfer of fish merely reflected the applicant's understanding of the licence as she was informed by DFO. This confusion, originating with DFO's position regarding the regulatory scheme underlying the licence, contributed to many red herrings in this case which distracted from the central issue: whether the transfer conditions in section 3.1 of the licence are consistent with the requirements under section 56 of the *FGRs*. These considerations reinforce the appropriateness of the usual rule that costs are awarded to the successful party.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1) The application for judicial review is granted, with costs.

2) Licence conditions 3.1(b)(ii) and 3.1(b)(iv) of the licence issued February 28, 2013 to Marine Harvest Inc. are inconsistent with the regulatory pre-conditions imposed on the Minister of Fisheries and Oceans by section 56 of the *Fishery (General) Regulations* and are declared invalid and to have no force and effect.

3) This judgment is suspended for four (4) months from the date of its issue.

4) Costs are awarded to the applicant. If the parties cannot agree on costs, submissions of no more than five (5) pages may be made on quantum of costs within ten (10) days of the date of this decision. The order in respect of costs is not suspended.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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