Federal Court  Cour fédérale

Date: 20210405

Docket: T-129-21
T-127-21
T-128-21
T-132-21

Citation: 2021 FC 293

Ottawa, Ontario, April 5, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

MOWI CANADA WEST INC.,
CERMAQ CANADA LTD.,
GRIEG SEAFOOD B.C. LTD., AND
622335 BRITISH COLUMBIA LTD.

Applicants

and

THE MINISTER OF FISHERIES, OCEANS
AND THE CANADIAN COAST GUARD

Respondent

ORDER AND REASONS

I. Overview

[1] A policy decision on the renewal of 19 salmon aquaculture licences in the Discovery Islands (a group of islands located between Vancouver Island and the British Columbia [British

Columbia or B.C.] mainland) needed to be made by the Minister of Fisheries, Oceans and the Canadian Coast Guard [Minister] before they expired on December 18, 2020. Aquaculture, in particular salmon farming in the Discovery Islands has been the subject of public discussion and debate for some time, as have the efforts on the part of the Government of Canada to develop its long-term policy in the area. One has only to read the Cohen Commission's Final Report of 2012 to understand the complexities, uncertainties and challenges which permeate the industry.

[2] A step forward in the development of Canada's long-term policy in the area is reflected in the Prime Minister's mandate letter of December 13, 2019 to the Minister which stated, among other things, that he expected the Minister to work through established legislative and regulatory processes to deliver on some top priorities, including in particular, that the Minister should "[w]ork with the province of British Columbia and Indigenous communities to create a responsible plan to transition from open net-pen salmon farming in coastal British Columbia waters by 2025 and begin work to introduce Canada's first-ever Aquaculture Act."

[3] The Court is seized with separate motions for an interlocutory injunction against the Minister and the Department of Fisheries and Oceans [DFO] filed by two of the applicants to the underlying proceedings, Mowi Canada West Inc. [Mowi] and 622335 British Columbia Ltd. [Salstream] pursuant to Rule 373 of the *Federal Courts Rules*, SOR/98-106.

[4] The underlying proceedings are applications for judicial review filed on January 18, 2021 by each of the four applicants, all holders of marine finfish aquaculture licences and operators of salmon farming facilities located in the Discovery Islands, who seek to challenge a decision

rendered by the Minister which purports to phase out existing salmon farming sites in that area by the end of June 2022, and restrict the transfer of live fish between hatcheries and saltwater sites, and between saltwater sites, located within the Discovery Island during the phase-out period. The four separate judicial review applications have been joined.

[5] For the reasons that follow, I am granting the request for injunctive relief.

II. Facts

[6] Mowi is a company incorporated in British Columbia which has, along with its predecessors, operated Atlantic salmon aquaculture facilities within B.C. for over 30 years. In addition to operating its own fish hatcheries and processing plants in B.C., Mowi's ten licenced aquaculture sites located within the Discovery Islands constitute approximately 30% of its business. The Mowi sites relevant to the present motions are Big Tree Hatchery located south of Sayward, Port Elizabeth, Larsen Island, Sonora Point, Okisollo, Phillips Arm and Hardwicke.

[7] Saltstream operates a single Chinook salmon farming facility in Doctor Bay, in the Discovery Islands. Through a related company, it also operates the adjacent fish hatchery which supplies the juvenile Chinook salmon to be grown out in the saltwater pens at Doctor Bay Farm.

[8] Farmed Atlantic salmon are grown from eggs which are cultivated from broodstock and transferred to hatcheries where they are kept in incubators until they hatch. The recently-hatched juvenile salmon (called fry) are transferred into large freshwater rearing tanks until they develop into "parr". The parr remain at the hatcheries for a period of approximately one year and when

they reach the appropriate level of development, they naturally undergo smoltification (the process of physical and physiological changes required to make the transition to saltwater), and become “smolts”.

[9] The next phase of the process is extremely time sensitive – the smolts must then be transferred from the freshwater rearing tanks to saltwater pens within approximately one week of smoltification or they will die. Once transferred to saltwater sites, the smolts continue to grow for approximately 18-24 months until they reach optimal marketable size, although an operator may choose to harvest the fish earlier once they have reached a minimal saleable weight.

[10] In addition, and in order to control the spread of a particular parasite that is prevalent with Atlantic salmon grown in the area, hatchery smolts are often transferred from their freshwater rearing tanks to saltwater smolt-entry sites (nursery farms) for 6 to 8 months before being transferred to grow-out sites in the Discovery Islands.

[11] When the fish reach maturity and are ready to be harvested, they are loaded onto purpose-built harvest vessels and transported to processing plants in B.C.

[12] Raising and harvesting each generation of Atlantic salmon involves a five year cycle, with long-term planning and a number of constantly moving parts, making it extremely difficult if not impossible without serious consequences to deal with unexpected upheavals in an operator’s operational and regulatory matrix.

[13] The transfer of fish from one site to the next is a continuous process. In addition to the various provincial and federal licences required to be obtained by salmon farm operators, including a marine finfish general operating licence (aquaculture licence) issued under section 3 of the *Pacific Aquaculture Regulations*, SOR-2010-270 [PAR], enacted pursuant to the *Fisheries Act*, RSC 1985, c F-14 [Act], an operator must therefore also regularly obtain a release or transfer licence from DFO pursuant to section 56 of the *Fishery (General) Regulations*, SOR/93-53 [FGR], and the National Code on Introductions and Transfers of Aquatic Organisms [Code]. These transfer licences permit the transfer of live fish, either from hatcheries or nursery farms to saltwater grow-out farms, or between saltwater farms.

[14] Transfer licences and the movement of fish from site to site are a necessary and integral part of the salmon aquaculture industry, without which the process of raising salmon cannot move forward.

[15] Under section 56 of the FGR, the Minister has broad discretion in respect of the issuance of transfer licences where certain preconditions are met (subsection 7(1) of the Act; *Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334 at para 14 [*Namgis*]). Section 56 of the FGR provides:

The Minister *may* issue a licence if	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	b) les poissons sont exempts de maladies et d'agents

may be harmful to the protection and conservation of fish; and	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.
[Emphasis added.]	[Je souligne.]

[16] Aquaculture licences for sites in the Discovery Islands are issued on an annual basis; in this case the aquaculture licences held by Mowi and Saltstream were due to expire on December 18, 2020.

[17] On September 28, 2020, the Minister announced that DFO would be consulting with First Nation communities regarding the future of salmon aquaculture sites within the Discovery Islands and that these consultations would *"inform the government's decision on whether or not to renew aquaculture licences in the area, prior to the December-2020 deadline."*

[18] Following consultations and exchanges between the Minister, several Discovery Island First Nations and aquaculture companies operating in the Discovery Islands, the sufficiency and extent of which I should mention is in dispute, a memorandum [Note] was prepared by the Deputy Minister for the Minister, the purpose of which was *"to seek a decision on the issuance of licences for 19 finfish aquaculture sites located within the Discovery Islands (DI) in British Columbia (BC) which are expiring on December 18, 2020."*

[19] It is also common ground amongst the parties that the reference to "licences" in the Note was with respect to the possible renewal or reissuance of aquaculture licences beyond December 18, 2020.

[20] Of the 19 aquaculture facilities identified as being within the Discovery Islands, Mowi operates 10 licenced sites, Cermaq Canada Ltd. [Cermaq] operates three, and Grieg Seafood B.C. Ltd [Grieg Seafood] and Saltstream each operate one site. I should also mention that there is some debate as to whether the Hardwicke site operated by Mowi which is included in the 19 sites addressed by the Note is actually within the Discovery Islands, however a determination on this issue is not necessary for the purposes of the present motions.

[21] The Note included background information, a synopsis of the options available to the Minister, recommendations on whether or not to reissue the aquaculture licences in question as regards the 19 sites, and a request that a decision be made by the Minister by December 15, 2020 so as "to ensure that there is no lapse in licensing of the currently licenced sites".

[22] On December 16, 2020, the Minister indicated on the Note that she did not concur with the recommendations set out therein and, rather, expressed her decision as follows:

> Instead, I affirm the direction as discussed in the December 11, 2020 bilateral meeting with the DM:
>
> > My decision is for a temporary (18 month) renewal of aquaculture licences for facilities operating in the Discovery Islands. All farms in this area must no longer have fish in pens by June 30th, 2022.
> >
> > - During the period between licence renewal and June 30th, 2022, no hatchery smolts will be introduced.

- The intent of allowing time to grow out and harvest fish already in pens is to avoid culling in order to meet timelines.

[23] On December 17, 2020, the press release regarding the Minister's expressed decision stated that the intention was to:

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

[24] The "backgrounder" to the December 17, 2020 public announcement stipulated the following with respect to the issuance of section 56 of the FGR transfer licences;

> To implement the approach, issuance of Section 56 *Fishery (General) Regulations* (FGR) Introductions and Transfers licences would cease moving forward. Farm operations have been informed that the intention is to no longer issue Section 56 FGR licences, and that the expectation is that the farms will not be licenced to operate after June 30 2022. Restricting the issuance of these licences for the 19 DI sites, would result in no further fish transferred in the DI farm sites. At this time, no changes to condition of licence are contemplated.
>
> […]
>
> Ceasing the transfer of fish into DI sites could result in instances where fish currently rearing in hatcheries or in smolt-entry sites would need to be accommodated at other farm sites or voluntarily culled by the operator.
>
> [Emphasis added.]

[25] Where multiple aspects of a decision concern the same parties and arise from the same facts and decision-maker, the Court will usually consider them as a single decision (*Barry Group Inc. v Canada (Fisheries, Oceans and Coast Guard)*, 2017 FC 1144 at para 28), and treat them

together in the same application for judicial review, notwithstanding Rule 302 of the *Federal Courts Rules* (*Lessard-Gauvin v Canada (Attorney General)*, 2016 FC 227 at para 6).

[26] The Minister states that the Note, which recorded her expressed decision on December 16, 2020 is the document that is used by her and her Deputy Minister to communicate the internal decision, while the December 17, 2020 press release is the operational decision. It is common ground between the parties that both should be considered together for the purposes of the present motions and underlying proceedings [collectively, the Minister's Decision or Decision].

[27] In accordance with the Minister's Decision, both Mowi and Saltstream had their aquaculture licences regarding their facilities within the Discovery Islands (including Mowi's Hardwicke site) extended to June 30, 2022.

[28] As regards the present motions for injunctive relief, Mowi and Saltstream contend that the Note was meant to relate only to whether the renewal of the aquaculture licences was to be permitted and that it was not meant to have any bearing on the more operational issue of section 56 of the FGR transfer licences – in fact the Note made no analysis or recommendation regarding the treatment of section 56 of the FGR fish transfer licences during the aquaculture licence renewal period other than to say they would be necessary.

[29] Under the subject heading dealing with the non-renewal of aquaculture licences, the Note simply mentions the existence of juvenile fish in hatcheries destined for Discovery Island farms

that would need to be culled if the aquaculture licences were not renewed, and that once the temporary renewals of the aquaculture licences were issued, DFO would still need to issue section 56 of the FGR transfer licences "for those smolts in the hatcheries in the current production cycle to be transferred to the farms to be grown out and harvested." Mowi and Saltstream contend other than those two brief statements, there is no mention of section 56 of the FGR transfer licences in the Note or in the attachments that were apparently before the Minister at the time she expressed her decision on December 16, 2020, nor any analysis or review of the impact of terminating the issuance of such licences, although supposedly DFO was aware of those impacts.

[30] There is evidence in one of the affidavits relating to concerns expressed by a group of First Nations that they would not consider the introduction of new fish in the area. However, the area of concern seemed to be the Okisollo Channel, and neither Phillips Arm, Hardwicke nor Doctor Bay Farm are in Okisollo Channel.

[31] It would seem that DFO was at least somewhat aware of the impact the ceasing to move forward with all section 56 of the FGR transfer licences would have on industry operators. As mentioned, the backgrounder to the public announcement on the next day, December 17, 2020, included mention of the fact that "[c]easing the transfer of fish into DI sites could result in instances where fish currently rearing in hatcheries or in smolt-entry sites would need to be accommodated at other farm sites or voluntarily culled by the operator."

A. *Mowi's operations*

[32] With their aquaculture licences renewed to June 30, 2022, Mowi had to move forward with its production plan. On January 6, 2021, as part of its current raising and harvesting cycle, Mowi applied for a licence to transfer up to 100,000 Atlantic salmon smolts from its Big Tree Creek hatchery site to its saltwater site at Sonora Point on March 1, 2021 [Sonora Point Application]. According to Mowi, all regulatory conditions for a transfer licence had been met, and although admittedly discretion nonetheless resides with the Minister under section 56 of the FGR, it was a routine application that in the past had been regularly granted.

[33] However, on February 5, 2021, Mowi's Sonora Point Application was met with a response from the ITC coordinator at DFO that "[a]s it is the policy of the Government of Canada that no new fish may now be introduced into Discovery Islands facilities, we have to advise that a refusal of your application is being considered. That said, in order to assess your application fairly, all relevant factors associated with your application will be considered, including whether to make an exception to the government's policy." [Emphasis added.]

[34] The Minister claims this response to Mowi's Sonora Point Application to be a procedural fairness letter because DFO is inviting Mowi to make submissions notwithstanding the new policy.

[35] Mowi submitted the requested information regarding its Sonora Point Application on February 9, 2021, and on February 26, 2021 the Minister herself, in a letter addressed to Mowi, advised them that the Sonora Point Application was refused. This was, it would seem, the first

time that Mowi saw one of its transfer licence applications be refused solely on the basis of the location of the receiving site.

[36] Concurrently, on February 16, 2021, Mowi submitted two additional section 56 of the FGR transfer licence applications, the first to transfer up to 600,000 Atlantic salmon from its nursery site at Port Elizabeth to its saltwater site at Phillips Arm on March 30, 2021 [Phillips Arm Application] and the second to transfer up to 800,000 Atlantic salmon from its nursery site at Larsen Island to its saltwater site at Okisollo on March 30, 2021 [Okisollo Application].

[37] On February 24, 2021, Mowi received letters with respect to its Phillips Arm and Okisollo Applications similar to the February 5, 2021 letter it received with respect to its Sonora Point Application. After being informed that the Minister refused the Sonora Point Application and that DFO was considering the refusal of Mowi's Okisollo Application, Mowi scrambled to make whatever changes it could to its production plan; it withdrew its Okisollo Application and was forced to eventually euthanize 920,000 Atlantic salmon smolts that could not be accommodated elsewhere in its facilities.

[38] On March 6, 2021, Mowi made further submissions with respect to its Phillips Arm Application; that application is still pending.

[39] In light of the necessary changes to its production plan brought on by the Minister's Decision and the refusal of its Sonora Point Application, Mowi intends now to also submit a further section 56 of the FGR transfer licence application for the transfer up to 582,000 Atlantic

salmon from its Shelter Pass nursery site to its Hardwicke saltwater site [Hardwicke Application].

[40] It is the Phillips Arm and Harwicke Applications which are the subject of the present motion for injunctive relief.

B. *Saltstream's operations*

[41] The Doctor Bay Farm is a much simpler operation, a family-owned business established in 1980 that includes a hatchery and a single saltwater facility. In addition, Saltstream harvests Chinook salmon, a species of Pacific salmon. Because Pacific salmon species do not raise the same concerns about infestation and parasites as do Atlantic salmon, the Doctor Bay Farm has not been subject to the same stringent monitoring and reporting regime as Mowi and the other Atlantic salmon farms.

[42] Similar to Atlantic salmon, Chinook broodstock spawn in October of each year, their eggs are then collected and transferred to an incubation facility and fertilized. Once they hatch early in the New Year, the fry remain until March at which time they are moved to the hatchery's freshwater tanks where they spend 12 to 14 months until smoltification, thus permitting them to live in saltwater. The smolts are then transferred to the saltwater pens at Doctor Bay Farm where they grow to marketable size and are harvested; the grow-out period is usually 18 to 24 months.

[43] Saltstream has only one facility, at Doctor Bay, which includes the hatchery and saltwater pens. There is no opportunity to transfer fish to other facilities as may be available to other operators. Any cessation of the transfer of fish will be catastrophic to its operations.

III. The relief sought

[44] Although setting aside the Minister's Decision is the goal of the underlying applications for judicial review, and putting aside for the moment Mowi's request for a stay of the Minister's Decision as regards the issuance of an aquaculture licence to allow it to de-rig its Phillips Arm site after June 30, 202, neither Mowi nor Saltstream seek an injunction regarding the Minister's Decision to terminate all salmon farming within the Discovery Islands by June 2022.

[45] Rather, the objective of the present motions is to restrain the implementation of the Minister's Decision only insofar as it interferes with the issuance of the three section 56 of the FGR transfer licences at issue, being, as stated earlier, a vital and necessary part of the fish farm operations for which their aquaculture licences were issued.

[46] In particular, and save as regards the de-rigging of its facility at Phillips Arm, Mowi is only seeking to suspend the component of the Minister's Decision which impacts its two pending section 56 of the FGR transfer licence applications for the transfer of fish from nursery farms to its facilities at Phillips Arm and Hardwicke. Mowi is not seeking any relief in respect to any other pending or proposed transfer licence application, although it is also seeking to be relieved of its obligation to provide an undertaking for damages in the event the injunction is granted.

[47] For its part, Saltstream is seeking an exemption from the Minister's Decision, and an order staying the implementation of that same aspect of the Minister's Decision, in respect of an application for a transfer licence which Saltstream says it must make by end of June 2021 for the transfer of this year's hatchery smolts into its grow-out saltwater site at Doctor Bay Farm. Other than being relieved of its obligation to provide an undertaking for damages, Saltstream seeks no further relief.

[48] I should mention that the Minister's Decision provides that existing fish at Discovery Island sites can complete their growth-cycle and be harvested beyond June 30, 2022. This of course is predicated on no new fish being transferred into those sites. In any event, should I grant the injunction they seek, both Mowi and Saltstream accept that they will have to remove all fish from their respective sites by June 30, 2022 regardless of their harvestable size, subject only to any possible changes that may be brought on in the event their applications for judicial review are by then granted.

[49] I should also make clear that neither Mowi nor Saltstream is looking to secure an outcome, as argued by the Minister, and seeking mandatory orders in the form of *mandamus* compelling the Minister to issue fish transfer licences required under section 56 of the FGR. Rather, they are only seeking an order suspending the operation of the Minister's Decision in relation to three transfer licence applications, allowing those applications to be processed in accordance with the statutory scheme set out in the FGR and the Code without the fettering, as they claim, of the Minister's discretion under section 56 of the FGR as a result of the Minister's Decision.

[50] In short, Mowi and Saltstream are seeking an order to maintain what they claim to be the *status quo* in relation to the three transfer licence applications.

[51] Grieg Seafood takes no position on either motion, Cermaq supports Mowi and Saltstream, and the Minister, as expected, argues that the motions must fail.

[52] I should also mention that in addition, by order dated March 18, 2021, Prothonotary Aylen granted leave to Alexandra Morton, David Suzuki Foundation, Georgia Strait Alliance, Living Oceans Society, and Watershed Watch Salmon Society [collectively, the Conservation Coalition] to intervene with respect to the present motions, with permission to file written representations and make oral submissions addressing only the issue of balance of convenience.

IV. Legal test

[53] The test for granting an interlocutory injunction is not in dispute. As set out in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 [*Metropolitan Stores*] and confirmed in *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 [*RJR-MacDonald*], for the Court to grant an interlocutory injunction, the moving party must show that:

1. there is a serious question to be tried;
2. the moving party would suffer irreparable harm if the relief is not granted; and
3. the balance of convenience does not weigh against granting the injunction.

[54] This is a conjunctive test and the moving party must establish each of these elements for the injunction it seeks to be issued.

V. Standard of Review

[55] The applicable standard of review is relevant in a motion for interlocutory injunction only insofar as it assists the Court in determining whether there is a serious issue to be tried. For that purpose, the applicable standard of review for the substantive aspects of the Minister's Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]; *Morton v Canada (Fisheries and Oceans)*, 2019 FC 143 at paras. 110-111 [*Morton 2019*]). Questions of procedural fairness are reviewable on the standard of correctness (*Morton 2019* at para 340; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79).

VI. Analysis

[56] Given the similarities in the motion brought by Saltstream and the relief being sought by Mowi, I will consider the applicability of each step of the *RJR-MacDonald* test to both motions together.

A. *Is there a serious issue to be tried?*

[57] Generally, the threshold regarding the determination of whether there exists a serious issue to be tried is a low one, where the Court should not engage in an extensive review of the merits of the underlying application; the motion's judge need only be satisfied that the underlying application is neither frivolous nor vexatious (*RJR-MacDonald* at pp 338-339).

[58] The Minister takes the position that her Decision was a matter of public policy and that each element of that Decision (phasing out of salmon farming facilities by June 30, 2022,

cessation on moving forward with fish transfer licences and mandating that all farms be free of fish by June 30, 2022) are individual components of such policy. In addition, the Minister argues that the component of the policy calling for the cessation of section 56 of the FGR transfer licences was intentional, and an integral part of her transition plan toward the phasing out of salmon farming in the area by June 30, 2022.

[59] Mowi and Saltstream take the view that although the broader considerations regarding the closing of the salmon aquaculture farming industry in the Discovery Islands may be seen as a matter of government policy, the component of the Minister's Decision relating specifically to restrictions on the issuance of fish transfer licences is not a matter of policy, but rather the exercise of a statutory power.

[60] In their notices of application for judicial review, both Mowi and Saltstream have raised substantive and procedural objections to the Minister's Decision. From a substantive perspective, they claim the Minister's Decision cannot be supported by the record, was based on irrelevant considerations, was inconsistent with the applicable regulatory and policy framework, and particularly as regards the cessation of all section 56 of the FGR transfer licences, amounted to a fettering of the Minister's discretion, particularly as it applied to her discretion in relation to the issuance of such licences. Mowi and Saltstream argue that the component of the Minister's Decision relating to the future issuance of fish transfer licences was not simply adding policy considerations to the regulatory requirements, but rather ordered the complete and immediate cessation of the issuance of such licences.

[61] From a procedural perspective, they claim that the Minister's Decision was arbitrary, and although aware of the Minister's ongoing consultation process and possible upcoming policy changes in respect of the operations of aquaculture farms in the Discovery Island, neither Mowi nor Saltstream were given any notice that the component to the Minister's Decision relating to the immediate cessation of the issuance of transfer licences was being considered. Mowi and Saltstream also claim that that component of the Minister's Decision was not the subject matter of the Note that was prepared for her by her Deputy Minister – the Note having dealt solely with the possible renewal of aquaculture licences beyond December 2020 – and the Minister's extension to include the immediate cessation of all section 56 of the FGR transfer licences was unnecessary for the fulfilment of what seems to be the greater policy decision to discontinue aquaculture fish farming within the Discovery Islands by June 30, 2022. Consequently, they claim to have been blindsided with the announcement of the Minister's Decision, which caused and, if the injunction is not granted, will continue to cause a major upheaval to their operations through to June 30, 2022.

[62] Although taking issue with the position of Mowi and Saltstream, the Minister none the less concedes that there are serious issues to be tried; clearly the issues relate to the Minister's obligation and ability to regulate fish transfers within Discovery Islands (*Namgis* at para 84). However, she argues that I should none the less scrutinize those issues at an elevated threshold because the relief being sought by Mowi and Saltstream would defeat the transition plan towards her overall policy and thus in fact be tantamount to granting judicial review as regards the specific component dealing with what the Minister characterizes as the prohibition of transfer

licences; the underlying judicial review applications would therefore become moot (*Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 [*Ahousaht*]).

[63] Alternatively, the Minister argues that the relief sought in these motions goes beyond what is being claimed in the judicial review applications.

[64] I accept that there are different thresholds for the determination of whether there is a serious issue to be tried depending upon the nature or consequences of the injunctive relief being sought. As stated by Mr. Justice Gascon in *Ahousaht*:

> [78] As I have stated in *Okojie*, I am of the view that the serious issue to be tried can give rise to one of three different thresholds (*Okojie* at paras 69-87). The usual and general threshold is a low one, in which case the court should not engage in an extensive review of the merits, once the motion judge is satisfied that the underlying application is neither frivolous nor vexatious (*RJR-MacDonald* at pp 338-339). An elevated threshold however applies "when the result of the interlocutory motion will in effect amount to a final determination of the action" (*RJR-MacDonald* at p 338). These situations call for a more extensive review of the merits at the first stage of the analysis, and they have often been referred to as requiring a "likelihood of success" in the underlying application. For mandatory interlocutory injunctions, the SCC has established in *CBC* that a heightened threshold of a "strong *prima facie* case" applies, and has expressly stated that, in such cases, a "strong likelihood" of success needs to be demonstrated for assessing the strength of the applicant's case (*CBC* at paras 15, 17).
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> [Emphasis added.]

[65] As stated earlier, the Minister considers all components of her Decision to be part of the policy, and in particular, views the cessation of moving forward with section 56 of the FGR transfer licences as part of her transition plan in the exercise of her discretionary authority on the development of such policy. As such, the Minister argues that her Decision is not subject to judicial review, save in the case of bad faith, arbitrariness or where the decision was based upon

irrelevant considerations, as set out by the Supreme Court of Canada in *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 [*Maple Lodge Farms*]. The Minister cites Justice McIntyre's statement that:

> the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.
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> (*Maple Lodge Farms*, para. 7).

[66] I am not convinced that an elevated threshold is to be applied in this case.

[67] First, this is not a case where the result of the interlocutory motion will be tantamount to a final determination of the underlying applications for judicial review. Those applications seek to set aside the Minister's Decision, including the closing of salmon aquaculture farming in the Discovery Islands past June 30, 2022. On the other hand, the present motions seek a suspension of one of the components of the Minister's transition plan, *to wit*, the immediate prohibition of the issuance of section 56 of the FGR transfer licences as regards three specific pending and proposed applications.

[68] Nor is this a case where an injunction would "impose such hardship on one party as to remove any potential benefit from proceeding to trial" (*Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214 at para 71; *RJR-MacDonald* at para 51). Even on the Minister's characterization of that component of her Decision, of which I am not immediately convinced, I see nothing that would suggest that the granting the relief sought by

Mowi and Saltstream would render the judicial review applications moot; the policy of closing the salmon aquaculture industry in the Discovery Islands will continue to be fought through the underlying judicial review application. The limited nature of the relief sought in this case will not "amount to a final determination of the action" (*RJR-Macdonald* at page 338).

[69] Nor am I convinced that the relief sought in the present motions by Mowi and Salstream go beyond what is being sought by way of judicial review. To the contrary, the relief aligns very well with the conclusions sought in their underlying application.

[70] Moreover, I cannot agree with the Minister that Mowi and Saltstream are seeking a mandatory injunction. On the contrary, they are not looking to impose any conditions upon the regulatory process inherent in the issuance of transfer licences as provided for in section 56 of the FGR other than to remove the application of the Minister's Decision. In essence, they are seeking to turn back the clock to just prior to the Minister's Decision as regards the regulatory process and determination criteria relevant to the issuance of such licences, and this only as regards the three identified transfer licence applications.

[71] In addition, I cannot see how this Court's decision in *Maple Lodge Farms* assists the Minister in the context of the present motions. The "statutory discretion" that Justice McIntyre was speaking of was not in respect of the development of ministerial policy, but rather the Minister's discretion under the governing regulations to issue import permits under what was then the *Export and Import Permits Act*, RSC 1970, c E-17. As was made clear by this Court in *Ecology Action Centre Society v Canada (Attorney General)*, 2004 FC 1087 [*Ecology Action*],

the proposition for which *Maple Lodge Farms* stands applies to legislative acts, and that the adoption of policy is more in line with an administrative act (*Ecology Action* at para 21).

[72] Neither Mowi nor Saltstream is seeking judicial review of a refusal by the Minister to issue a transfer licence, so the question of how the Minister exercised her discretion under section 56 of the FGR is not in issue.

[73] In any event, Mowi and Saltstream argue that the component of the Minister's Decision barring the issuance of any further section 56 of the FGR transfer licences was made without adherence to statutorily mandated natural justice and based on factors irrelevant or extraneous to the statutory purpose. I see nothing frivolous or vexation in those arguments.

[74] The other issue in *Maple Lodge Farms* was whether the Minister's policy guidelines for the issuance of import permits under the governing statute fettered his statutory discretion under the governing regulations, and whether the Minister's exercise of his discretion was reasonable. The Supreme Court stated clearly that although a Minister can properly and lawfully formulate general requirements for the granting of licences, those guidelines cannot confine the Minister's discretion accorded under regulations with respect thereto.

[75] Here, Mowi and Saltstream say the Minister did just that; although Mowi and Saltstream take issue with the assertion by the Minister that the component of her Decision relating to the prohibition of any further transfer licences was mere policy guidelines, on the Minister's theory that such was the case, Mowi and Saltstream argue that the pronouncement of those guidelines

have the effect of fettering the Minister's discretion to issue transfer licences pursuant to section 56 of the FGR.

[76] I must say that I did notice what may be somewhat of an inconsistency with the Minister's argument in that, on the one hand, she was arguing that an injunction would defeat the purpose of the transition plan for her overall policy which includes barring any further section 56 of the FGR transfer licences being issued, but also argued before me that her Decision was but a non-mandatory policy guideline to be taken into consideration in the separate regulatory process regarding the issuance of section 56 of the FGR transfer licences, and thus could not fetter her discretion as regards the issuance of future transfer licences.

[77] Whether non-mandatory policy guidelines or a mandatory statutory imperatives, the backgrounder to the December 17, 2020 press release and the component of the Minister's Decision which stipulates "that no new fish of any size may be introduced into the Discovery Islands facilities" during the phase-out period has had a definitive impact on the processing of section 56 of the FGR transfer licence applications, as noted in the case of Mowi's Sonora Point Application.

[78] It seems to me that the questions of (1) whether the component of the Minister's Decision as regard the prohibition on the issuance of transfer licences is a non-mandatory policy guideline or a mandatory statutory imperative, (2) whether the Minister's Decision fetters her discretion under section 56 of the FGR to prospectively issue transfer licences, (3) whether such a decision was arbitrary and pronounced in disregard of the principles of natural justice, and (4) whether the

Minister's Decision relied upon considerations irrelevant or extraneous to the statutory purpose, are all issues that our Court will be grappling with in the judicial review proceedings.

[79] Under the circumstances, the lower threshold applies for determining whether there is a serious question to be tried. I find that Mowi and Saltstream have both shown that their applications for judicial review include a number of challenges to the Minister's Decision that are neither vexatious nor frivolous, and have a basis in administrative law, including on the grounds of reasonableness, procedural fairness, and jurisdictional error.

[80] I asked the Minister's counsel in what way the cessation of all section 56 of the FGR transfer licences furthers the overall policy of ending salmon aquaculture in the area by June 2022. She stated that it was within the Minister's statutory authority to weigh those considerations and come up with her decision, that the Minister was within her rights to set policy that would have an impact on the issuance of transfer licences, and that she would certainly be within her rights to close down the salmon aquaculture industry in an area. And that although the Court, the Minister argues, may not necessarily agree with it, it is not for the Court to substitute its opinion for that of the Minister – the question to be asked is whether the Minister acted within her statutory authority, which according to the Minister, she did.

[81] I agree that the Minister is empowered with broad discretion to enact policies with respect to Canada's fisheries (*Morton v Canada (Fisheries and Oceans)* 2015 FC 575 at para 29) and it is not for the Court to substitute its opinion for that of the Minister, however, that is not the point as regards the present motions. Decisions of government are subject to judicial review,

with such review being undertaken on the basis varying standards depending on the nature of the decision. Here, Mowi and Saltstream are saying that the component which the Minister says is part of her overall policy is, rather, a matter of the exercise of statutory power which has been fettered by the Minister's Decision, without any reasoning to be found in the material before her that could reasonably inform her decision as regards the ban on the issuance of section 56 of the FGR transfer licences.

[82] Although the information before the Minister at the time she made her decision shows consultation with stakeholders on the greater policy imperative regarding the future salmon aquaculture in the Discovery Islands, including First Nations concerns with the continuation of salmon farm operations in the area, the evidence regarding concerns over the continued issuance of fish transfer licences was limited to a single statement that First Nation communities:

> […] insist upon all 21 farms in the DI to be immediately removed, with licences issues (*sic*) only to permit the farming of current stocks before decommissioning.

[83] Morever, one of the affidavits filed in support of the Minister's position states, as regards meetings with the First Nation communities:

> During the meetings with the Minister, none of the Chiefs expressed support for the continued operation of salmon farms in the Discovery Islands under the current arrangements. There were nuances in terms of the level of support for immediate removal versus support for transition as well as contemplation of a difference governance model that would better involve First Nations in decision-making" When asked if they could support a decision that would move towards not restocking the farms in the Discovery Islands areas as well as not licencing the farms in that area, all of the Chiefs indicated that they could support that approach.
>
> [Emphasis added.]

[84] The Minister argues that we can infer that the First Nation communities that were consulted did not want to see any further transfer of new fish within the existing pens. However, another reading of the evidence would suggest that the concern regarding the continued issuance of transfer licences during the phase-out period was not first raised by the First Nation communities, but rather emanated from a suggesting from the Minister. I suspect further clarification is required.

[85] In any event, I have not been shown anything to suggest that the specific issue regarding the continuation of transfer licences was ever brought to the attention of industry, including Mowi or Saltstream, during the limited discussions that took place with the Minister prior to the issuance of her Decision; without determining the propriety of what may be a failure in communication, I can certainly understand Mowi and Salstream crying foul.

[86] The Minister further argued that section 56 of the FGR transfer licence applications in question are not before the Court, that the issuance and review of such licences involves a different regulatory process which the Minister was fully aware of, and thus that it was premature to decide whether the Minister fettered her discretion; there can be no issue of fettering of discretion, argues the Minister, when her Decision was not in respect to any pending section 56 transfer licences application; such applications involve a licencing process which was separate to the Minister's Decision.

[87] I appreciate that the issuance of transfer licences involves a separate regulatory process under the PAR, but the argument of Mowi and Saltstream was that the component of the

Minister's Decision of no longer issuing transfer licences was an exercise of statutory power, and was made although no transfer licence application was before her; the Minister's Decision purported to decide not only the applications for replacement aquaculture licences – a matter that was before her for a decision – but also any future applications which might be made for transfer licences. In doing so, Mowi and Saltstream argue that the Minister thereby fettered her discretion otherwise available under section 56 of the FGR in respect of future transfer licence applications.

[88] The evidence, in particular the February 5, 2021 letter from DFO to Mowi stating clearly that the policy regarding the issuance of transfer licences was that "no new fish may now be introduced into Discovery Islands facilities" and that Mowi would have to henceforth convince DFO "whether to make an exception to the government's policy", suggest that the "intent" of the Minister did have a direct impact on DFO's consideration of section 56 of the FGR transfer licences beyond the elements otherwise considered in respect thereto.

[89] As stated earlier, the Minister argues that the February 5, 2021 letter from DFO to Mowi was the exact opposite to fettering, and that although DFO actually applied the Minister's Decision as a guideline to the future issuance of transfer licences, it afforded Mowi procedural fairness by seeking input from Mowi, prior to rendering a final decision on the issue, to make submissions why an exception to the policy should be made.

[90] In *Ishaq v Canada (Citizenship and Immigration)*, [2015] 4 FCR 297 [*Ishaq*], this Court was asked to determine a challenge to a policy guideline governing citizenship ceremonies which required the removal of the niqab prior to taking the oath. The Minister of Citizenship and

Immigration responded by saying, as the Minister is arguing before me, that the policy was just a non-binding guideline which can only give rise to an expectation that it will be followed and thus cannot fetter the discretion of the citizenship judge, and that in this case, the challenge was premature on account of the fact that no actual imposition of the guideline was at issue before the Court. Mr. Justice Boswell in *Ishaq* cited the Federal Court of Appeal in *Thamotharem v Canada (Citizenship and Immigration)*, 2007 FCA 198 at para 63, which recognized that "the validity of a rule or policy itself has sometimes been impugned independently of its application in the making of a particular decision."

[91] As was the case in *Ishaq,* it seems to me that applicants should be able to know what to expect when they engage a regulatory process especially where, as is here, there is a significant investment in time and financial resources to apply for a section 56 of the FGR transfer licence, and although that regulatory process is separate from policy determination, it is appropriate to directly challenge the policy regardless of whether the underlying application for judicial review relates to a decision purportedly made in application of that policy (*Ishaq* at para. 41).

[92] As to whether it is best for the Minister to grant exceptions rather than having the Court provide for them, I am not convinced that the Court is not the appropriate place for such a request under the circumstances (*Via Rail Canada Inc. v Cairns*, 2003 FCA 319 at para 20).

[93] Here, and as argued by Mowi and Saltstream, the very words of the Minister are clear: no new fish of any size may be introduced into the Discovery Islands facilities. Although I need not decide in the present motion whether the Minister did fetter her discretion, I think it is enough to

say that there seems to be an overlap between her Decision and the manner in which section 56 of the FGR transfer licences are being processed under their separate regulatory regime.

[94] The Minister argued her policy did not render section56 of the FGR fish transfer applications a foregone conclusion, and that regardless of her policy, due consideration would nonetheless be given to section 56 of the FGR transfer licence applications under the separate administrative process applicable to such applications, and pointed to her letter of February 26, 2021 where she denied the Sonora Point Application to establish that she continued to have an open mind on the subject. Putting aside for the moment that the letter underscored the broader policy concerns surrounding salmon aquaculture in the area, before me, the Minister also conceded that the intent of the policy was that no further section 56 of the FGR transfer licences would be issued. If that is the case, it is certainly arguable that that component of the policy could or would have the effect of rendering irrelevant all other existing considerations or factors that would normally go into the assessment of section 56 of the FGR transfer licences.

[95] In any event, whether there was fettering or whether the Minister simply issued non-binding policy guidelines to be added to the mix in considering future section 56 of the FGR transfer licences is a serious issue to be tried, and it seems to me that the fact that there is no section 56 of the FGR transfer licence before the Court and that the underlying applications in this case do not seek the judicial review of any specific section 56 of the FGR transfer licence application is, with all due respect, a red herring.

[96] I am satisfied that Mowi and Saltstream have met the first prong of the three part test set forth in *RJR-MacDonald* for the issuance of an interlocutory injunction.

B. *Would the applicant suffer irreparable harm if the interlocutory injunction were not granted?*

[97] As a preliminary comment, I should mention that all parties, including the interveners, have filed substantial materials setting out at length the role that all stakeholders, including the Minister, First Nation communities, and fish farm operators play as stewards of the aquaculture industry in Canada, and the importance of science and indigenous traditional knowledge as guiding lights in the development of the fishery and the greater environmental policies for this country.

[98] However long term policy imperatives regarding the expansion, restriction or management of the salmon aquaculture industry, and any discussions, commissions, reports and meetings regarding the broader question of the future of salmon aquaculture in the Discovery Island, are beyond the scope of the present motions; the motions before me seek to suspend what Mowi and Saltstream view as the Minister's prohibition on the issuance of section 56 of the FGR transfer licences within the Discovery Islands as such prohibition relates to three specific transfer licence applications.

[99] Consequently, as regards the issue of irreparable harm, the focus of the analysis must be on the potential harm caused to the applicants by the granting or failure to grant the injunctions, not any possible harm caused by the aquaculture industry as a whole or by the Minister's Decision at large. While the evidence and arguments concerning the long-term management of

the aquaculture industry are important within the broader context of the consultation process for the development of salmon aquaculture policy in Canada, and may be relevant to the underlying applications for judicial review, they are less relevant to the issues before me in respect of the present motions.

[100] Mowi argues that if its motion is not granted, it will suffer significant financial losses because it will not be able to transfer 1.18 million salmon smolts to its Discovery Islands sites at the required time. As there are no other sites to which it could transfer the fish, they will need to be culled, with the resulting losses of about $26 million, including $11,204,730 being what has been spent on the fish to date, $14,380,000 in expected future net profit upon their sale, as well as approximately $480,000 to cull the fish, including the cost of medication, transport, and disposal. Mowi also argues that it will have to lay off at least 78 full-time equivalent [FTE] employees, and will have to cancel or significantly reduce its commitments to local suppliers and contractors.

[101] Mowi further argues that this harm, while quantifiable financial loss, is irreparable because it cannot be awarded damages on judicial review and there is no civil cause of action on which it could seek compensation. Therefore, even if it is successful with its judicial review application, it will not have a right to compensation.

[102] Saltstream argues that if the scheduled May 2021 smolt transfer is pushed beyond July 2021, it will have two options, both of which will result in irreversible and irreparable harm. First, it can euthanize the fish, leaving it with no fish to sell from the spring of 2023. Second, it

can hold them in freshwater tanks pending determination of its application for judicial review, which will delay their grow-out and result in the incursion of higher costs of production for fewer marketable fish, as more fish will have reached sexual maturity before harvesting, making them unsaleable. The second option may also result in the depletion of the Doctor Bay Farm water supply leading to a permanent loss of natural resources, itself irreparable harm (*MacMillan Bloedel Ltd. v Mullin*, [1985] 3 WWR 577 (BCCA). Such an option would result in having to euthanize the fish in any event, as well as the failure of the business and its entry into insolvency, necessitating layoffs.

[103] The Minister does not dispute that financial losses will occur as a result of any refusal to issue section 56 of the FGR transfer licences in this case, but argues that the harm could have been avoided and was self-inflicted due to Mowi's and Saltstream's failure to have a contingency plan in place to mitigate against policy changes in the Discovery Islands and to proceed expeditiously with their underlying applications.

[104] The Minister contends that aquaculture operators in the Discovery Islands were put on notice in 2012 with the release of the Cohen Commission's Report that changes were being considered and that there was a risk, in line with Recommendation 19 of the Cohen Commission Report, that the farms would be shut down by September 2020 unless the Minister found that aquaculture sites posed no more than a minimal risk of harm to wild sockeye salmon populations. They should have therefore put in place contingency plans for when this eventuality would occur.

[105] However, Recommendation 19 may have been overtaken by events. Although the information before the Minister when she rendered her decision included a report prepared by a group of First Nations which reiterated the risk posed to wild Pacific salmon highlighted by the Cohen Commission, Recommendation 19, there is nothing to suggest that the Minister would necessarily have found in 2020 that aquaculture sites would pose more than a minimal risk of harm to wild sockeye salmon populations, and in September 2020 DFO in fact determined that they did not. Counsel for the Minister had to concede that the industry and the Minister may have now moved beyond Recommendation 19 of the Cohen Commission Report, and in December 2020 the Minister shifted to different considerations in the development of a more long term plan for the area.

[106] In any event, and more to the point, the evidence also includes nothing to suggest that those same operators should have been aware that the cessation without prior warning or discussion with industry of the issuance of transfer licences, an integral part of their operations, would suddenly take place. In short, there was nothing to suggest that Mowi and Saltstream should have been on notice that there may have been an overnight prohibition on the issuance of transfer licences.

[107] The Minister has, therefore, failed to convince me that Mowi and Saltstream should have had contingency plans in the event transfer licences would be halted, and that the harm was therefore caused by their failure to be able to quickly implement such a plan; from what I can tell from the evidence, the salmon aquaculture industry works on the basis of long-term planning with definitive development plans, and being able to turn on a dime is not part of its DNA.

[108] The Minister also argues that Mowi and Saltstream delayed the filing of their motions for injunctive relief and did not pursue their judicial review applications with urgency. She states that there was a delay in bringing the underlying applications and that urgency was not conveyed to the Minister. The Minister also argues that if the schedule which had called for the hearing of the underlying applications to take place in July 2021 had been insisted upon by Mowi and Salstream, no harm would have occurred.

[109] I am not convinced. The Minister's decision was announced on December 17, 2020 and the applicants applied for judicial review on January 18, 2021. Mowi's first transfer licence application was denied on February 24, 2021 and the motion for injunction was filed on March 8, 2021. I find that this does not constitute delay. In any event, there was never confirmation from the Court that the judicial review could be heard in July 2021 or earlier, let alone whether there could have been a decision rendered by then. In addition, Mowi and Saltstream have led evidence demonstrating that they require months of advance preparation to rig the pens and prepare for the transfer of fish. Waiting until July 2021 was not an option, nor was investing the substantial sums to rig their sites in the hopes of having their applications for judicial review granted – that would have been financially irresponsible.

[110] Mowi and Salstream have made it clear that they would need a decision from this Court by April 5, 2021 if they are to begin the fish transfer process in time. Before me, Minister's counsel conceded that she may have been overly optimistic in suggesting that the underlying applications for judicial review could have been heard and decided upon by April 5, 2021.

Consequently, it is not the timing of Mowi's and Saltstream's motions for these injunctions nor the judicial review hearing date that will result in the irreparable harm at issue.

[111] In *RJR-MacDonald*, the Supreme Court stated that irreparable harm is harm which "either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR-MacDonald* at para 64). Moreover, the Federal Court of Appeal in *Apotex Inc v Wellcome Foundation Inc* (1998), 82 CPR (3d) 429, established that where financial harm "could threaten the very viability of the business concerned" it is irreparable.

[112] Finally, in *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 [*U.S. Steel*], the Federal Court of Appeal established that the second step of the *RJR-MacDonald* test is met only where there is clear and non-speculative evidence adduced that irreparable harm will follow if the motion is denied and that "[i]t is not sufficient to demonstrate that irreparable harm is 'likely' to be suffered".

[113] In this case, the uncontroverted evidence is clear, both as regards the financial loss to Mowi, and the high likelihood of the closing of the Doctor Bay Farm for Saltstream, if transfer licences are not available to them in respect to the three applications in question.

[114] I should mention that such losses may of course occur notwithstanding the issuance of an injunction if the Minister nonetheless decides under her statutory authority to refuse the issuance of the transfer licences in question even without reference to her Decision. However, an

injunction would remove the impact of her Decision on the section 56 of the FGR decision-making process. In the end, although an injunction may not ultimately secure the avoidance of irreparable harm, what can be said with some certainty is "that irreparable harm will follow if the motion is denied" (*U.S. Steel* at para 7).

[115] As to the prospects of not recovering such losses, the Supreme Court in *Canada (AG) v TeleZone Inc*, 2010 SCC 62, held that no damages can be awarded on judicial review unless the application has been converted into an action. Even if it were possible for Mowi and Salstream to convince this Court to convert their applications for an injunction into an action in damages, there will continue to remain a question as to the appropriate cause of action. Although disputed by Mowi and Saltstream, the Minister remains steadfast that her Decision is a matter of public policy. As such, the nature of the Minister's Decision also makes it difficult to bring a claim for damages (*Welbridge Holdings Ltd v Greater Winnipeg (Municipality)* (1970), [1971] SCR 957).

[116] Mowi and Saltstream have both sufficiently demonstrated, on the basis of uncontested affidavit evidence, that they will suffer significant financial harm. They have also established that this harm is not capable of being compensated by damages as no damages can be awarded in judicial review and there is reasonably no civil cause of action pursuant to which it can challenge the Minister's Decision. In addition, Saltstream's evidence shows that the viability of its business could be at risk, which is irreparable harm in itself.

[117] Mowi and Saltstream have satisfied me that the harm they will suffer if the injunctions are not granted is irreparable. I am therefore satisfied that Mowi and Saltstream have met the

second prong of the three part test set forth in *RJR-MacDonald* for the issuance of an interlocutory injunction.

C. *Does the balance of convenience weigh against the granting of the injunction?*

[118] At the balance of convenience stage of the analysis and in addition to the damage each party alleges it will suffer, the Court must also consider the effects of allowing the injunctions on the interests of, and harm to, parties other than the applicants, including the effect a decision on the motion will have upon the public interest. Again, the focus of the analysis must be on the effects that would be caused by the granting or failure to grant the injunctions, not any possible harm caused by the aquaculture industry as a whole or by the Minister's Decision at large.

[119] The Minister argues that there is harm to the public interest where the courts usurp the Minister's legislative and executive roles which would amount to governing by interlocutory order, and that such harm must be taken into consideration where the Minister has exercised her discretion in the development of policy. I would tend to agree, however I also think it true to say that the degree of harm to the public interest must be weighed taking into account the level of staff analysis and review that informed or supported such policy decisions.

[120] There is no doubt that it is the Minister's role to exercise discretion as required under the Act, decide policy, and manage the fisheries. To that end, the Minister has decided to phase out salmon aquaculture in the Discovery Islands by June 2022. However, it has not been explained to me why the prohibition of transfer licences was necessary as part of a transition plan in the

furtherance of this policy other than to say that it was within the Minister's statutory authority to make that decision.

[121] That statutory authority may well exist, but it must be exercised within permissible legal limits. Here, there is a serious issue as to whether the material before the Minister when she made her Decision was sufficient to have her turn her mind to the consequences that would emanate from the immediate cessation of the issuance of section 56 of the FGR transfer licences. For the purposes of assessing any harm that may occur to the public interest in the event of a stay of that particular component of the policy, I think it important that I be satisfied that the proper material allowing the Minister to even come to a decision on the issue was before her, regardless of how one feels about the issue.

[122] The Minister also argues that a stay of the particular component of her policy dealing with transfer licences would harm reconciliation efforts with First Nations. I have no doubt of the importance of a fulsome and meaningful consultation process being undertaken with First Nation communities in the area – Canada is in the end developing fishery policy within the traditional lands that they claim. Although reconciliation efforts is a factor weighing against the issuance of an injunction, on the evidence before me, it is difficult to find in the record any meaningful consultation with First Nation communities regarding the possible prohibition of the issuance of transfer licences, beyond a brief statement as outlined earlier that the First Nations would not oppose a plan that would include phasing out the farms after current stocks were depleted.

[123] The Conservation Coalition argues that there are two categories of factors that weigh against the granting of the injunctions. First, it would improperly control the Minister's discretion by directing her to consider certain factors and ignore others, thus setting a precedent that limits the Minister's ability to conserve wild salmon by constraining and prescribing the factors she must consider in licensing the transfer of fish to fish farms.

[124] While I agree that it is in the public interest to preserve the Minister's discretion to grant transfer licences, that is exactly what Mowi and Saltstream are seeking to do. They argue that the injunctive relief they are seeking actually aligns with the public interest in that they are seeking to allow their section 56 of the FGR applications to be processed in accordance with the statutory scheme, however, the Minister has improperly fettered her discretion by deciding to "cease moving forward" with such applications. They are not asking for a particular result in the licencing process, only that the Minister be required to consider their applications without regard to her Decision. This certainly leaves open the possibility of the Minister properly exercise her discretion as set out in section 56 of the FGR without having that decision predetermined.

[125] In addition, the Conservation Coalition argues that the weight given to the harm to the public interest should not be diminished on the basis that the present motions seek a discrete exemption rather than a suspension, due to the precedential value of this case demonstrated by Cermaq's participation in support of the present motions and the number of other sites in the area. It argues that granting an injunction could lead to a cascade of transfer applications as the Supreme Court warned against in *Metropolitan Stores Ltd.*, and therefore a cascade of requests for injunctions. It concedes that the risk of such an onslaught of request relates more to Mowi's

motion for injuncitive relief than to Saltstream's application, given Saltstream's unique position raising Chinook salmon.

[126] I agree that the Supreme Court in *Metropolitan Stores Ltd.* observed that public interest considerations would weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this "is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely." (*RJR-MacDonald* at p 346) [emphasis added].

[127] However, we are dealing here with a request for a limited exemption, a situation where the Minister's Decision is "in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public." (*Metropolitan Stores* at p 147). The fact that Cermaq and Grieg Seafood may be supporting the present motions does not signal the coming onslaught of a cascade of section 56 of the FGR transfer licence applications. Each operator's situation is different, and although Mowi and Salstream may possibly meet the requirements of an interim injunction does not mean that other operators will do so as well.

[128] The Conservation Coalition states that stocks of wild sockeye salmon have never been more imperiled and that, despite DFO's report, the science is unsettled as to whether the transfer of fish into the Discovery Islands poses more than a minimal risk of harm to wild salmon populations. While much of the Conservation Coalition's argument deals with the evidence of

harm caused by the aquaculture industry generally, it notes that First Nations have expressed that the fewer fish being farmed in the Discovery Islands, the less risk there will be to wild salmon populations. This purports to demonstrates that harm will result if the injunction is granted and the transfers allowed.

[129] It may well be, looking at the industry as a whole, that salmon aquaculture has played a role in the decrease in wild salmon populations over the years; I leave that issue to the Minister and the stakeholders to deal with. However as stated earlier, the degree of harm that is relevant to the issue before me is that relative increase, or delta, in harm that may result if the injunctions are granted. I do not think the evidence shows that the transfer of fish is a neutral operations in relation to environmental concerns, however little effort has been made before me to address the specific "harm differential" involved in transfer operations; it may well be that it is impossible to assess.

[130] The only evidence before me is that today, salmon aquaculture in B.C. poses "no more than a minimal risk" to wild salmon. As regards transfer operations, as of March 5, 2021 the DFO website deemed the transfer of Atlantic salmon to licenced B.C. aquaculture facilities from local sources (other licenced B.C. hatcheries and saltwater sites) to be low risk. In addition, the only other evidence before me relating to the risk assessment matrix is that the regulatory process involved in the issuance of section 56 of the FGR transfer licences requires that as a condition to the issuance of such licences, a health attestation of the fish being transferred must be completed by a licenced veterinarian.

[131] The component of the Minister's Decision regarding transfer licences seems to concern only a procedural step in the raising of farmed salmon, and I have not been convinced that the temporary injunction requiring the Minister to consider three transfer applications without applying this prohibition impacts negatively on the legitimacy of public institutions nor the greater policy of phasing out aquaculture by June 2022, especially considering the undertakings of Mowi and Saltstream to have the fish removed by then if their judicial review applications have not been granted.

[132] Mowi argues that there is little to weigh against the injunction since the only scientific evidence before the Minister concluded that the farms were well managed and risk to wild salmon was low. It further argues that the transfer of one more annual cohort of fish into the Phillips Arm site was consented to by the Kwiakah First Nation (the Philips Arm site being withing their traditional territory), establishing both that there was no uniform opposition of First Nations to the aquaculture industry and that the Minister's claim that granting the injunction would harm reconciliation should also apply to not granting it.

[133] Saltstream argues that its environmental record is sound and it has had no issues with sea lice, and that in any event, the concerns regarding the danger to wild salmon populations relates more to the farming of Atlantic salmon rather than Pacific salmon which is what they farm. It further argues that its site will be operational with fish in it for the remainder of the licencing period, until at least June 30, 2022, and there will be little environmental effect by transferring new fish into the site during that time. Saltstream emphasizes that the stay it seeks is an exemption, rather than a suspension, and argues that the relative impact of exempting the Doctor

Bay Farm's upcoming smolt transfer on the public interest in seeing the Decision enforced is negligible, given the overall scale of the impact of the Minister's Decision.

[134] The Supreme Court's asserted in *RJR-MacDonald* that the government does not have a monopoly on the public interest, and therefore I must also consider the harm that not granting the injunction will cause on the broader economy of northern Vancouver Island.

[135] The evidence includes statements by Mowi that if the injunction is not granted, it will be required to lay off employees and to reduce spending on local businesses. Ancillary harm to local economies, uncertainty to third party contractors, and employees and their families, and overall disruption of key regional industries can prove determinative with respect to the balance of convenience (*Lax Kw'alaams Indian Band v British Columbia (Minister of Forests)*, 2004 BCCA 306).

[136] The substantial evidence before me includes affidavits of a variety of local politicians and business owners, including owners of indigenous businesses, from Vancouver Island to highlight the financial harm that will be done to the community and its residents if aquaculture workers are laid off and spending on local businesses reduced, especially during a global pandemic in which economic opportunities are scarce.

[137] Specifically dealing with the losses that will result from not issuing the injunctions, Mowi asserts that if the transfer licences are not issued, it will have to layoff 78 fulltime positions if the Philips Arm and Hardwicke Applications are not issued, and if it is unable to stock these farms it

will need to cancel or significantly reduce its planned spending of over $50 million with local suppliers of goods and services, including First Nations businesses, needed at Philips Arm and Hardwick in 2021 and 2022.

[138] Simply applying for licences to transfer the fish to other sites is not possible without negatively impacting Mowi's production plan and the further culling of fish. From what I understand, the operational grid is intertwined and there is little slack in the system, and operators cannot simply tweak one aspect of the grid without significant impact to the other parts.

[139] Mowi and Saltstream contend that the granting of the injunction will bring some certainty to local businesses for the time being who have been thrown into confusion by the Minister's Decision as it will give them time to consider its potential impacts and begin preparing for that possible phasing-out of operations within the Discovery Islands, but allowing them to stay in business until the judicial review applications can be determined.

[140] Neither Mowi nor Saltstream are arguing that an injunction will allow them, and the local businesses, employees and their families who depend on the operations at Phillips Arm and Harwicke, to avoid the impact of what may be the eventual phasing-out of salmon aquaculture in the Discovery Islands if their judicial review applications are denied, however they argue it will give them and the community of suppliers that have been built around those operations a reprieve from the immediate impact of unrecoverable financial losses, at least until the underlying applications are decided upon.

[141] While aquaculture in the Discovery Islands may pose a risk to wild salmon populations generally, it has not been established that the risk from allowing the transfer of fish into three sites is great enough to weigh against granting the injunction. In addition, these concerns do not appear to apply to the Chinook salmon on Saltstream's Doctor Bay Farm site.

[142] The harm to Mowi and Saltstream, as well as their employees, their families and other businesses in the community, in particular First Nations businesses, will be real and substantial if the injunction is not granted, and if Mowi and Saltstream are not permitted to proceed with the transfer of fish they require to undertake as part of their operations; in these most trying of times, given how Canadians are looking to navigate the realities of the global pandemic, these factors outweigh the public interest factors.

[143] In the end, and as stated by the Supreme Court in *Google Inc. v Equustek Solutions Inc*., [2017] 1 SCR 824 at para 25: "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific."

[144] I have taken into consideration the importance of maintaining the Minister's discretion in developing fishery policy, the importance of First Nations concerns and the need for reconciliation, the environmental risks avoided in, and financial impact associated with, denying the injunction. On the whole, the balance of convenience does not weigh against granting the injunctions.

[145] With all three prongs of the test set forth in *RJR-MacDonald* for the issuance of an interlocutory injunction being satisfied, it follows that the injunctions should be granted.

D. *Enjoining the Minister from applying her Decision to prohibit the extension of Mowi's aquaculture licence beyond June 30, 2022 for de-rigging the Phillips Arm site*

[146] In addition to being required to operate aquaculture facilities, an aquaculture licence is required to transport and set-up its equipment (rigging) at, or dismantling and removing such equipment (de-rigging) from, its facilities. As stated earlier, Mowi is seeking an order staying the Minister's Decision in as much as it prohibits the issuance of further aquaculture licences that may be necessary to permit Mowi to de-rig its Phillips Arm and Harwicke sites promptly after June 30, 2022.

[147] As I mentioned to Mowi during the hearing, I see no urgency for the issuance of such an order. I am not convinced that in the event its underlying judicial review applications are dismissed that the Minister will refuse to allow the equipment at those sites to be removed.

E. *Should Mowi's requirement to provide an undertaking for damages be waived?*

[148] Rule 373(2) of the *Federal Courts Rules* provides:

373(2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.	373(2) Sauf ordonnance contraire du juge, la partie qui présente une requête pour l'obtention d'une injonction interlocutoire s'engage à se conformer à toute ordonnance concernant les dommages-intérêts découlant de la délivrance ou de la prolongation de l'injonction.

[149] Mowi and Salstream both argue that the requirement to provide an undertaking for damages should be waived as there is no credible evidence that the Minister will incur any damages by virtue of the injunction.

[150] In *Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214 at paragraph 68, the Federal Court of Appeal held that the Court should not waive the undertaking requirement without "some evidence with respect to compelling circumstances that warrant a limited undertaking or no undertaking", in particular with respect to its ability to pay.

[151] Saltstream has adduced evidence of its financial hardship, and in *Commodore v Canada (Attorney General)*, 2001 FCA 387, the Federal Court of Appeal recognized financial inability to provide an undertaking for damages. Mowi presented no such evidence here.

[152] In *Randall v Caldwell First Nation of Point Pelee & Pelee Island Band Council* (2000), 189 FTR 182, 96 ACWS (3d) 722 (Fed TD), only one set of plaintiffs in a joint action were able to provide an undertaking for damages. This Court held that there was no justification for placing the entire burden of the undertaking upon that one set of plaintiffs and so exercised its discretion not to require the undertaking. Here, Saltstream is financially unable to provide an undertaking for damages and there is no justification for Mowi to bear the entire burden.

[153] However in public law cases, applicants seeking injunctions have often been relieved of the obligation to provide an undertaking for damages, in particular where there was doubt, as

there is here, that the respondent would suffer financial damages in the event the injunction was granted and the underlying application for judicial review dismissed (*University of Alberta* . *Alberta (Human Rights Commission)*, 1988 CanLII 3511 (AB QB) at para 112).

[154] In both *Musqueam* and *Commodore*, the Federal Court of Appeal also held that the failure to provide an undertaking for damages is but a factor that weighs against the granting of injunctions at the balance of convenience stage of the test. However, in this case neither the Minister nor the Conservation Coalition has alleged that any quantifiable harm would occur should the motions be granted, and no evidence has been led to demonstrate how any damages may be incurred. This does not alter my finding that the balance of convenience weighs in favour of granting the motions.

[155] In the end, I find compelling circumstances in favour of exercising my discretion so as not to require either Mowi or Saltstream to provide an undertaking for damages.

VII. Conclusion

[156] For the reasons set out above, it is in the interests of justice that I issue the requested injunctive relief as regards the application of the Minister's Decision on the three pending and proposed applications under section 56 of the FGR.

[157] Mowi's request for an order enjoining the prohibition on the issuance of further aquaculture licences set out in the decision in respect of any licence that may be necessary to permit the removal of Mowi's equipment is dismissed.

[158] The requirement that Mowi and Saltstream provide an undertaking as to damages pursuant to Rule 373(2) of the *Federal Court Rules* is waived.

ORDER in T-129-21; T-127-21; T-128-21 AND T-132-21

THIS COURT ORDERS that:

1. The component of the Minister's Decision as defined herein to cease the transfer of fish into licensed aquaculture facilities is enjoined in respect of:
   i. an application by Mowi Canada West Inc. to transfer fish into its Hardwicke site (AQFF 122910) on or before August 31, 2021;
   ii. an application by Mowi Canada West Inc. to transfer fish into its Phillips Arm site (AQFF 122926) on or before July 31, 2021 and
   iii. an application by 622335 British Columbia Ltd. to transfer smolts into its Doctor Bay Farm saltwater pens on or before July 31, 2021.
2. Neither Mowi West Canada Inc. nor 622335 British Columbia Ltd. shall be obliged to provide an undertaking for damages.
3. The Minister of Fisheries, Oceans and the Canadian Coast Guard is condemned to pay costs to Mowi Canada West Inc. and 622335 British Columbia Ltd. in the amount of $4,500, inclusive of disbursements and taxes.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-129-21 T-127-21 T-128-21 T-132-21
STYLE OF CAUSE:	MOWI CANADA WEST INC., CERMAQ CANADA LTD., GRIEG SEAFOOD B.C. LTD., AND 622335 BRITISH COLUMBIA LTD. v THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD
PLACE OF HEARING:	HEARD BY WAY OF VIDEOCONFERENCE BETWEEN MONTREAL, QUÉBEC, VANCOUVER, BRITISH COLUMBIA AND OTTAWA, ONTARIO
DATES OF HEARING:	MARCH 24 AND MARCH 25, 2021
ORDER AND REASONS:	PAMEL J.
DATED:	APRIL 5, 2021

APPEARANCES:

Aubin Calvert	FOR THE APPLICANT 622335 British Columbia Ltd.
Roy Millen Rochelle Collette	FOR THE APPLICANT Mowi Canada West Inc.
Kevin O'Callaghan Dani Bryant	FOR THE APPLICANT Cermaq Canada Ltd.
Keith Bergner Michelle Casey	FOR THE APPLICANT Grieg Seafood BC Ltd.
Jennifer Chow James Rendell Jake Holm	FOR THE RESPONDENT

Margot Venton Kegan Pepper-Smith Andhra Azevedo	FOR THE Conservative Coalition

SOLICITORS OF RECORD:

Hunter Litigation Chambers Law Corp. Vancouver, British Columbia	FOR THE APPLICANT 622335 British Columbia Ltd.
Blake, Cassels & Graydon LLP Vancouver, British Columbia	FOR THE APPLICANT Mowi Canada West Inc.
Fasken Martineau Dumoulin LLP Vancouver, British Columbia	FOR THE APPLICANT Cermaq Canada Ltd.
Lawson Lundell LLP Vancouver, British Columbia	FOR THE APPLICANT Grieg Seafood BC Ltd.
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT
Ecojustice Vancouver, British Columbia	FOR THE Conservative Coalition