

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ALEXANDRA B. MORTON, PACIFIC COAST WILD SALMON SOCIETY,
WILDERNESS TOURISM ASSOCIATION, SOUTHERN AREA (E)
GILLNETTERS ASSOCIATION, and FISHING VESSEL OWNERS'
ASSOCIATION OF BRITISH COLUMBIA

PETITIONERS

AND:

MINISTER OF AGRICULTURE AND LANDS, THE ATTORNEY GENERAL
OF BRITISH COLUMBIA, on behalf of THE PROVINCE OF BRITISH
COLUMBIA, and MARINE HARVEST CANADA INC.

RESPONDENTS

AFFIDAVIT OF TREVOR SWERDFAGER

I, Trevor Swerdfager, Director General, in the City of Ottawa, Province of Ontario
MAKE OATH AND SAY AS FOLLOWS:

Introduction

1. I am employed in the Department of Fisheries and Oceans Canada ("DFO") as the Director General, Aquaculture Management Directorate ("AMD"), Fisheries and Aquaculture Management Sector at 200 Kent Street, Ottawa, Ontario, Canada. As such I have personal knowledge of the facts and matters deposed to in this Affidavit except where the same are stated to be based on information and belief, and where so stated I verily believe them to be true.

2. I was appointed to this position on October 29, 2007 and have served in it continuously since that time. My role is to provide national policy and program design

leadership and coordination for the DFO's aquaculture program. I lead a group of 32 staff in Ottawa and have functional guidance responsibilities with respect to regional aquaculture operations. DFO has six regional units: Newfoundland and Labrador, Gulf, Maritimes, Quebec, Central and Arctic, and Pacific Region. Each of these regional units includes a Habitat Sector, a Science Sector, and a Fisheries and Aquaculture Management Sector within which is housed the "Regional Aquaculture Coordinator Office" ("RACOs"). The RACOs do not report to me on a line basis; instead they receive functional guidance from my office on matters of policy, general strategy and key issues.

Education and Experience

3. I hold a Bachelor of Environmental Studies from the University of Waterloo, Ontario (1985), a Certificate of French as Second Language from the University of Nice, France and Master's of Arts, Geography from the University of Ottawa, Ontario (1988).

4. Prior to joining DFO, from February, 2006 to October 2007, I was the Senior Advisor, Sustainability for the Forest Products Association of Canada ("FPAC"), a forest industry association based in Ottawa, Ontario, Canada. Prior to my work with FPAC I served in a variety of positions with Environment Canada over a period of 18 years. From October, 2002 to February, 2006, I served as the Director General, Canadian Wildlife Service.

5. I have extensive experience in the development, passage and implementation of regulations under the *Migratory Birds Convention Act*, the *Wildlife Trade Act*, the *Canada Wildlife Act* and the *Species At Risk Act*. From September, 2000 to September 2002, I was the Regional Director, Environmental Conservation Branch, Environment Canada, Pacific Region based in Vancouver, British Columbia ("BC"). Prior to that I held a variety of positions in Environment Canada regional offices in Edmonton, Alberta, Sackville, New Brunswick, Nepean, Ontario and at national headquarters in Ottawa.

Background

6. On May 5, 2008, Alexandra Morton et al (the "Petitioners") filed a petition in the British Columbia Supreme Court seeking declarations that certain provincial legislation involved in regulating finfish aquaculture was *ultra vires* the Province of British Columbia under the Constitution Act, 1867 and that certain pending decisions of the Minister of Agriculture and Lands on behalf of the Province of British Columbia to re-issue aquaculture licenses to Marine Harvest, a major salmon farming company operating in BC, were *ultra vires*.

7. The petitioners alleged that the provincial legislation was *ultra vires* the Province on the ground that the subject matter fell within the exclusive jurisdiction of the Parliament of Canada under subsection 91(12) of the Constitution Act, 1867.

8. On February 9, 2009 the British Columbia Supreme Court ruled that the activity of finfish aquaculture is a fishery which falls under exclusive federal jurisdiction pursuant to sub-section 91(12) of the Constitution Act, 1867 - Sea Coast and Inland Fisheries and, in effect, struck down the provincial regulatory regime over finfish aquaculture (the "BCSC Decision"). The Court found that the Finfish Aquaculture Waste Control Regulation, enacted under the Environmental Management Act SBC 2003 to regulate waste discharge from marine-based finfish farms is *ultra vires* provincial jurisdiction. This Regulation has been struck down as a result.

9. The Court further "read down" subsections 13(5), 14(1) and 26(2)(a) of the BC Fisheries Act and subsections 1(h) and 2(1) of the Farm Practices (Right to Farm) Act to apply only to the cultivation of marine plants. The effect of this "reading down" is that the BC Aquaculture Regulation promulgated pursuant to the BC Fisheries Act applies only to the cultivation of marine plants. The Regulation currently provides for the issuance of aquaculture licenses and the regulation of a range of operational matters including, the establishment of net cage design parameters, the maintenance of inventory records, release and escape prevention measures, production limits, species

composition, records of drug use and other information reporting, fees and other sundry operational issues. In recognition of the fact that the net effect of the Court's decision is to create a substantial regulatory void with respect to the aquaculture industry in British Columbia, the Court suspended its decision for twelve months to allow for the development of a new regulatory regime.

10. On October 21, 2009 the British Columbia Court of Appeal (the "BCCA") heard an appeal in this matter. The issue of jurisdiction over the regulation of aquaculture was not raised. The BCCA addressed the narrow issue of whether provincial legislation could immunize fish farms from civil liability in nuisance and remitted the matter back to the BC Supreme Court. Please find attached at Exhibit A a copy of the decision.

11. In light of the BCSC Decision, it was clear that only the federal government has the authority to establish the comprehensive regulatory regime needed to ensure that the industry in British Columbia is appropriately regulated and managed. Accordingly, since the release of the BCSC Decision, DFO, in conjunction with the Department of Justice ("DOJ"), has undertaken work in four main areas with the goal of developing such a new regime. These areas are:

- (a) legal and policy analysis;
- (b) dialogue with the Government of British Columbia;
- (c) regulatory development; and
- (d) federal program design and implementation planning.

12. The purposes of this affidavit are to:

- a) describe the impact of the decision and the work DFO has undertaken to date to respond to it (Please find attached Exhibit B for an itemized chronology of key meetings, briefings, etc in this regard. I have created this document for this affidavit.);

- b) describe the work that remains to be done in developing a new regulatory regime; and
- c) to set out a proposed timeline for the enactment and implementation of a new federal aquaculture regulatory regime (Please find attached at Exhibit C a chart I have created to explain the projected timeline required).

Impact of the Decision

13. The magnitude of the impact of the BCSC Decision on aquaculture governance for DFO is monumental. For over thirty years, DFO has been working collaboratively with British Columbia and other provinces to jointly manage and regulate the Canadian aquaculture industry. This work has been undertaken using the legislation, regulations, policies and common understandings in place today and has entailed governments undertaking the roles and responsibilities that flow from these arrangements. Federal and provincial programs and priorities have been structured to take into account these arrangements and have been staffed, resourced and operated on that basis.

14. The BCSC decision alters the regulatory landscape in such a way that requires a fundamental re-design of the entire current day aquaculture regulatory regime. It requires the establishment of new regulatory and administrative arrangements for addressing a wide range of functions including:

- receiving licence applications
- making farm site decisions
- issuing and tracking licences
- collecting licence fees
- developing and mandating standards for net cage design, escape prevention and ongoing operations

- establishing standards and norms for shellfish harvesting techniques, timing and transportation
- collecting, storing and publishing information regarding industry operations
- communications and outreach
- enforcement and compliance
- research
- site inspections, habitat monitoring, compliance monitoring
- farm operator interaction

15. The scale of the regulatory changes required is substantial. The new regime will have to comprehensively address an industry whose wholesale values of sales in 2007 exceeded \$500,000,000 flowing from over 80,000 tonnes of production in BC alone.

16. Aquaculture directly employs 2,100 people in full-time positions along coastal BC while providing a substantial number of spin-off jobs, and supports processing, transportation, and retail operations throughout the province and beyond. It employs a large number of First Nations people and engages or affects up to 203 First Nations across the province.

17. The aquaculture industry is active on over 300 sites throughout British Columbia under the terms of approximately 700 provincial leases and permits as well as federal *Navigable Waters Protection Act* permits and *Fisheries Act* harmful alteration, disruption or destruction ("HADD") authorizations. Attached as Exhibit D is a map showing the location of shellfish aquaculture sites in British Columbia. Attached as Exhibit E is a map showing the location of finfish aquaculture sites in British Columbia.

18. The decision struck down the core of this management regime – the provincial licences issued under the *BC Fisheries Act* and the pollution management provisions of the *Finfish Aquaculture Waste Control Regulation*. Replacing these provisions is not a simple matter. As is explained below, it requires the establishment of an entirely new regulation and licence regime, securing new resources to support its implementation,

recruiting, hiring, re-locating, training and housing the professional staff required to administer it and the implementation of a comprehensive transition plan to migrate the hundreds of existing provincial licences and permits to the new regime. This is a major undertaking indeed.

1. Legal and Policy Analysis and Mandate development

19. Securing a Cabinet mandate for DFO to move forward with the development of response to the decision began almost immediately upon the release of the decision and was completed in early October, 2009.

20. In order to provide some context to this process, I have detailed below the legal and policy analysis that was carried out to develop the appropriate new legal and policy mandate. As outlined in Exhibit B, a series of meetings were organized and held for this purpose starting immediately after the Judgment.

21. The process began with a careful legal and policy analysis of the decision and its implications both for the federal government including of course the Department of Fisheries and Oceans but also other departments such as Transport, Agriculture and Environment. In addition, analytical attention was devoted to a consideration of the implications for the finfish and shellfish aquaculture operators in BC. Although the decision very clearly applies only in BC, given the DFO's national mandate, the DFO analysis also considered the potential implications for the industry in other provinces. Similarly, work was undertaken to analyze the potential implications of the decision for First Nations in BC both from an operational perspective in terms of First Nations owned or operated aquaculture sites and from the broader perspective of the implications of the decision for aboriginal and treaty rights.

22. While many of the issues raised in the decision are well understood by lawyers they are not matters that are routinely considered by line staff working in the aquaculture management domain. Considerable time was initially required for DFO to work with the

legal community to ensure that DFO fully understood the legal implications of the decision.

23. With our initial legal foundation in place we then examined what instruments could be used to address the legislative void created by the BCSC Decision. In this context both federal and provincial legislative and regulatory tools were carefully examined. Many of the issues to be addressed had never been raised before and required careful analysis. In particular, the interaction between various sections of the Fisheries Act and potential new regulatory actions by the federal government needed to be carefully worked out and analyzed. From a policy perspective, DFO also had to devote considerable thought and energy to determining what the various ramifications of the decision were both for British Columbia and more broadly for aquaculture in Canada.

24. The court direction combined with the results of the legal analysis set the stage for a review and analysis of the various policy and program options open to DFO given the revised legal playing field. In this context, DFO devoted careful attention to identifying and evaluating various potential responses to the decision. Some of this analysis necessarily involved discussion with the provincial government. These meetings are set out in Exhibit B.

25. A key input to this policy analysis work was input from external interested parties. As outlined in the attached chronology in Exhibit B, over the course of the spring a variety of meetings were convened with First Nations, industry associations and companies and environmental groups to seek their views on the decision, its implications for their interests and their preferences regarding federal responses to the decision. We met with the First Nations Fisheries Council on May 14, 2009. The Fisheries Council was appointed by the BC First Nations Leadership Council, consisting of the Union of BC Indian Chiefs, the First Nations Summit, and the BC Assembly of First Nations, to address common fisheries issues, priorities, and concerns. As such, they represent the interests of First Nations fisheries organizations. We conducted further consultations with First Nations groups on June 15 and 16, 2009, with 20 – 30

groups in attendance. DFO also met with industry representatives from the BC Shellfish Growers Association, Mainstream Salmon, Creative Salmon, Pacific Organic Seafood Association, BC Salmon Farmers Association, Canadian Aquaculture Industry Alliance, Cooke Aquaculture, Marine Harvest Canada and Grieg Seafood on March 31, May 13, and July 27, 2009. Meetings with the Coastal Alliance for Aquaculture Reform ("CAAR") and its constituents, the David Suzuki Foundation, the Georgia Strait Alliance, the Living Oceans Society, the T. Buck Suzuki Environmental Foundation, the Watershed Watch Society, the Raincoast Conservation Foundation and the Friends of Clayoquot Sound were held on March 31 and June 17, 2009.

26. Given this general legal and policy analytical context, the remainder of this section describes the specific steps we undertook following the release of the BCSC Decision.

27. On February 9, 2009, I met with Michelle D'Auray, Deputy Minister DFO, Claire Dansereau, Associate Deputy Minister, DFO and Larry Pedersen, Deputy Minister BC Ministry of Agriculture and Lands ("BCMAL") to briefly review the decision and to discuss its potential implications. Over the next two weeks, internal discussions were held to further digest the BCSC Decision's content, impact and next steps that should be taken. On March 2, 2009, I further briefed DFO's newly appointed Deputy Minister, Claire Dansereau, on the next steps we should be taking. On March 23, 2009, I also verbally briefed the Assistant Deputy Minister of Fisheries and Aquaculture Management, DFO, David Bevan, on the direction AMD would be recommending with regards to the BCSC Decision.

28. On March 2, 2009, I sought legal advice from DOJ on the implications to federal/provincial management of the aquaculture sector by the Decision, implications for DFO and its responsibilities under the *Fisheries Act*, R.S. 1985, c. F-14, as well as the scope of response that DFO could undertake. The complex nature of the issues raised defied simple and rapid responses from the Department of Justice. Responses to various aspects of the issues were received over the course of the spring and into the

summer. However, taken together, they began to frame the legal ground rules within which policy options for responding to the BCSC Decision could be developed.

29. As the legal analysis was under way in mid-March, 2009 I met with the provincial government through the venue of a federal-provincial working group jointly chaired by myself and Mr. Harvey Sasaki, Assistant Deputy Minister, BCMAL (the "Working Group"). We met in Vancouver and Victoria on March 30, April 14 and May 12, 2009.

30. The Working Group concluded that whatever option was selected for responding to the decision, a Canada – BC agreement formally setting our mandates, roles, responsibilities and program implementation measures was essential to establishing a new aquaculture regime going forward. From the DFO perspective, it also became clear that in order for the DFO to enter into negotiations leading to such an agreement, a mandate to do so was required from federal Cabinet.

Federal Mandate

31. Seeking a Cabinet mandate requires the development of a "Memorandum to Cabinet" ("MC") which involves an elaborate formal process in the federal government. The first step is to develop departmental cohesion around a preferred approach. In this regard, on April 3, 2009 I briefed the DFO Policy Integration Committee, a senior management body chaired by the DFO's Assistant Deputy Minister, Policy. The Committee's mandate is to engage all sectors of DFO in developing options for the Departmental Management Committee chaired by the Deputy Minister. I briefed the Committee on the issues and the general outlines of the proposed MC.

32. Following this meeting, my group moved forward in developing a formal MC which was presented in summary form to the Departmental Management Committee chaired by the Deputy Minister and including all of DFO's Assistant Deputy Ministers and Regional Directors General on May 6, 2009 and again on May, 13, 2009. Following the receipt of the approval of this Committee, the document was then shared with

central agencies (Privy Council Office, Finance and Treasury Board Secretariat who I also then briefed on May 14, 2009). Based on feedback from these central agencies, the document was then revised and circulated to all other federal departments for comment and review. A formal inter-departmental briefing regarding the MC was held in May 2009; approximately 15 federal Departments were represented. The MC was then signed by the Minister and submitted for consideration by Cabinet for consideration over the summer.

33. It was originally expected that this process would result in the approval of a Cabinet mandate by mid-summer that would allow negotiations to begin in early August. However, as the summer wore on it became apparent that the provincial government would not be in a position to begin negotiations on the timeline originally envisaged.

34. A provincial election occurred on May 12, 2009 and a new government was elected. The new provincial Cabinet was sworn in on June 10, 2009. Importantly, a new provincial Minister of Agriculture and Lands, who is responsible for aquaculture, was sworn in at this time. Neither the new Minister, nor the Cabinet he is a part of could be expected to immediately start addressing major policy and legal issues such as those raised by the BCSC decision. As a result, negotiations with BC could not begin in the summer.

35. On September 2, 2009, the provincial Minister contacted my Minister to advise her that the provincial Cabinet had reached the conclusion that it would transfer or cede all ongoing management responsibility for finfish aquaculture to the federal government, that it would not accept any delegation or contracting of services from the federal government regarding the administration of any new federal regulation or program and that it would continue to exercise responsibility for shellfish aquaculture. Provincial Deputy Minister Larry Pederson contacted my Deputy Minister Claire Dansereau to convey the same message at the officials' level.

Updated Federal Mandate

36. This provincial announcement represented a substantial change in what we understood to be the likely provincial policy stance. It necessitated a re-consideration of the federal approach to the issue. Accordingly, on September 10, 2009 I was directed to prepare another Memorandum to Cabinet for my Minister to return to Cabinet with an updated and revised set of recommendations based on the new provincial position. As noted above, the MC process is normally at least several months in duration. However, given the looming court deadline, the normal process was sharply compressed and an MC was finalized for Cabinet consideration in the first week of October.

37. As a direct result of this process, on October 30, 2009, the Minister of Fisheries and Oceans formally announced that she had secured a mandate from Cabinet to develop a new regulation for the management of aquaculture in BC and to open negotiations with BC regarding the establishment of a Memorandum of Understanding ("MOU") on Aquaculture. Attached as Exhibit F is a copy of the public announcement. This announcement represented the key milestone in finalizing a policy approach and path forward for the federal government in responding to the BCSC decision and the positions of other parties with respect to it. The remainder of this Affidavit focuses primarily upon the steps required to pursue the design, consultation and implementation of the new regulation.

2. Dialogue and Negotiations with the Government of British Columbia

38. It is our view that in order to provide governments, industry and all interested parties with clarity regarding roles and responsibilities for the governance of aquaculture in BC, a new aquaculture MOU between Canada and BC is required. As noted in Exhibit C, it is estimated that the negotiation of the MOU with BC will be completed by the end of December, 2009.

39. Now produced and shown to me and marked Exhibit G to this Affidavit is a copy of the Canada – British Columbia Memorandum of Understanding on aquaculture signed by the governments in 1988 (the 1988 MOU). Attached as Exhibit G is a copy of the 1988 MOU. The 1988 MOU sets out the respective roles and responsibilities of Canada and the Province for the management of aquaculture in British Columbia. The 1988 MOU was established on the basis of the understandings in place at the time with respect to the various roles of the two governments and the existing understanding of the constitutional and legal context for aquaculture. The BCSC decision substantially alters these understandings. Thus, while the decision has not invalidated the 1988 MOU, it has changed the foundations upon which it is based and rendered it useless for the new regime necessitated by the decision.

40. That being said, it is clear that the provincial government by virtue of its roles with respect to the leasing and other aspects of the sector's operations retains a significant role in the overall management of aquaculture in BC notwithstanding the expansion in federal responsibilities contemplated in the decision. The sector will continue to be a matter of shared jurisdiction with each government operating within its particular mandate. Therefore, clarity regarding the mandates, roles and program activities of the federal and provincial governments will be essential to ensuring that there is no overlap and duplication between the activities of the two governments and to providing certainty to program staff, industry, environmental non-governmental organizations ("ENGOs") and others regarding how the sector will be managed.

41. A new Memorandum of Understanding setting out these matters is seen as essential by the federal government for these reasons. (It is our understanding that the provincial government shares this view.) Accordingly, on October, 22, 2009, the Minister of Fisheries and Oceans formally announced the federal intention to negotiate a new MOU with BC. However, the issues are quite complex. First, they involve more than just two Departments. From the federal perspective, the negotiations are led by DFO but must represent the interests and concerns of other affected Departments notably Environment Canada, Transport Canada and the Canadian Food Inspection Agency

whose mandates deal with environmental, navigation and food safety aspects of the aquaculture sector. Similarly broad based engagement is required within the provincial government.

42. Second, though the agreement is very clearly a government to government arrangement, it has the potential to significantly affect a wide range of interested parties inside and outside the aquaculture sector. Therefore, whilst the agreement will not be the subject of formal consultation with these parties, both governments will engage in informal dialogue processes with affected parties regarding the key issues and the various strategic options being contemplated in the discussions. Of particular note in this context is the strong interest other provincial governments have expressed in the development of the agreement. It clearly will only apply in British Columbia. However, given the possibility that similar developments could occur elsewhere in Canada, the content of the Canada – British Columbia agreement is being watched with keen interest by other provinces as well and the federal government has made commitments to keep them apprised of developments at the senior management level.

43. Third, the subject matter of the agreement is quite wide ranging and complex. The agreement will include not only general overarching statements of mandate but also descriptions of roles and responsibilities regarding licensing, environmental monitoring, communications, enforcement, reporting, data management, decision making systems, amendment formulas and other matters.

44. These complexities notwithstanding, progress has been made in developing an MOU. On behalf of the federal government, I led negotiation sessions with BC on October, 27, 2009. Similar sessions are scheduled for November 2nd and 3rd as are informal consultations with other provinces with respect to the agreement. Our expectation is that an MOU could be finalized for presentation to Ministers for signature by mid-December.

45. The completion of this MOU is a very important contributor to the finalization of a new regulatory regime for aquaculture in British Columbia. As outlined in the sections below, the federal government is pursuing the development of a new aquaculture regulation for British Columbia and the design of a new program for administering it. The regulation and program are being structured so as to ensure that the federal government meets its mandated responsibilities as described by the court. That being said, they will also be designed to ensure that the government is able to deliver on whatever it agrees to with the Province of British Columbia. Completion of the MOU is, therefore, a key factor in finalizing the regulatory program.

3. Regulatory Development – Public Consultation Phase

46. As noted in Exhibit C, and explained below, based on my experience, soliciting the views of all parties interested in the new regulation will require four months running from early October to the end of February, 2010.

47. Regulations are typically vehicles for implementing legislation, policy, technical standards, programs and so on. Thus, before the regulation itself can be developed, the policy, program or other initiative it is designed to implement, must be finalized. The time and process required to complete this *policy development phase* varies hugely depending on the scope and complexity of the issue at hand. The issues to be addressed can range from highly specific and technical standards and requirements through to the broader and more strategic policy plane. Regardless, the federal approach to regulation development requires that those affected by and interested in a potential regulation have input to the design of the regulation.

48. In the British Columbia aquaculture context, finalizing a Cabinet approved general strategic direction has been undertaken as described above and has confirmed the government's commitment to establishing a regulatory program pursuant to the *Fisheries Act*. DFO's mandate is to develop a regulation that would, in essence, fill the regulatory void created by the BCSC decision and comprehensively addresses

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aquaculture in British Columbia. When brought into force, it will have a significant direct impact on the governance of the aquaculture industry in BC and could set important precedents for the governance of the industry elsewhere as well.

49. The regulation will be of considerable interest to all members of the aquaculture industry as it will regulate a sizeable portion of their ongoing operations for the foreseeable future. All the salmon farming companies in the province, shellfish farming companies, individual aquaculture operators and other private sector interests in the various support services to the industry will be heavily implicated by the new regulation and are likely to wish to contribute to its design. Equally, given the potential that the new regulation could establish precedents for other jurisdictions in Canada, several aquaculture companies with operations outside of British Columbia have indicated to DFO that they would like to be given an opportunity to learn about the proposed regulation and to offer comments on its design.

50. Given the nature of the public debate surrounding aquaculture in British Columbia, it will also be of considerable interest to the non-governmental community. The very legal action which gave rise to the BCSC was, in part, driven by members of the environmental community who will quite likely wish to have input to the regulatory design. Similarly, the Coastal Alliance for Aquaculture Reform ("CAAR") and its several constituent members, as well as several national environmental organizations have expressed strong interest in the regulation and an expectation that they will be able to contribute to its design phase.

51. Finally, as noted in the resolutions of the BC First Nations Fisheries Council, First Nations are highly interested in the aquaculture domain in British Columbia and have very clear expectations that they will be effectively consulted in the development of any new regulatory regime established pursuant to the decision. There are 203 First Nations in BC we expect may be interested in these consultations. These expectations have been conveyed to me personally by First Nation leaders during workshops held in

Vancouver and Campbell River this past June and to other officials DFO as well as our Minister in writing since that time.

52. Given this range of interests in a new regulation it is clear that under normal circumstances, consultations with interested parties regarding its structure and content would be required. Simply tabling a fully drafted regulation with the public and seeking comments on its details would deny all parties an opportunity to comment on and influence the general structure, policy thrusts and key details of the new regulation. Such an approach would not be in keeping with the federal regulatory development paradigm, would be unlikely to engender support for the new regime and could create legal risks imperiling the entire regulation on the grounds that First Nations in particular were not adequately consulted in its development.

53. Balanced against this very clear need for public consultation and engagement in the policy phase of the regulation development process is the equally pressing reality that the BCSC decision has struck down substantial portions of the provincial regulatory regime and made clear its expectation that it will be replaced by a federal regime.

54. Given the nature of aquaculture generally and its place in the public policy debate in British Columbia in particular, policy oriented consultations regarding the broad framework for a new regulation could go on for a very long time. Based on my experience, if we were creating these regulations without a court deadline, we would allow one year for consultation. In light of the court deadline, I recommend we engage in a compressed policy consultation process beginning in early November and concluding at the end of February.

55. Under such a scenario, highly focused, professionally facilitated consultation sessions engaging industry, environmental groups and other members of civil society would be convened in Vancouver, Victoria and elsewhere in BC. Given the level of interest in this issue outside British Columbia, one or more sessions would also be

convened in eastern Canada.

56. Given the interests and legal rights of BC First Nations, via processes developed in consultation with First Nations leadership, similar sessions would be convened with interested First Nations and organizations.

57. Completion of this policy phase by the end of February would put the government in a solid position to commence the detailed drafting of regulatory text with the benefit of having completed an MOU with BC as described above and a comprehensive, albeit compressed public engagement process regarding the policy foundations for a new regulation. This process is described in the following section.

3. Regulatory Development – Drafting of legal text

58. As outlined in Exhibit C, based on my experience the policy consultation and legal drafting, in French and English of the new regulation and related Regulatory Impact Analysis Statement (RIAS) will require a total of six months and both will be completed for pre-publication in the Canada Gazette Part I by early May, 2010. Following a 60 day public review period and approximately three months of analyzing feedback received, a revised regulation and RIAS will be completed by October, 2010.

59. Federal regulations, regardless of subject are developed according the process set out in the Cabinet Directive on Streamlining Regulation (“CDSR”). Now produced and shown to me and marked as Exhibit H is a copy of the CDSR. Application of the process laid out in the Directive is not discretionary; it has the force of law and must be obeyed by all regulatory departments. It sets out the steps that DFO must follow in developing a new regulation for aquaculture in British Columbia.

60. The main purpose of the Directive is to ensure that all aspects of the regulatory subject are considered and that the government’s regulatory power results in the greatest net benefit to Canadian society. It sets out a formal process with strict

procedural steps and timeframes from the initial regulatory planning stage to the *Canada Gazette Part II* stage in which the final regulation is published. Once the initial public consultation and policy development phase is completed, the typical time-frame for the entire process for developing a new regulation is approximately 18 months and includes the following steps:

- Regulatory planning – this includes what is known as the “Regulatory Triage” stage during which the potential regulation is assessed to determine its potential complexity, the legal issues it poses, risks it addresses or creates and the likely nature of public interest in the subject matter.
- Drafting regulatory text – this includes the assignment of Department of Justice regulatory drafters and the development of the full text of the regulation. As part of this process, the regulatory content is compared against all other existing federal legislation and regulations to ensure that consistency amongst them all is maintained. Finally, the text must be developed in French and English concurrently with careful attention devoted to cross-referencing both versions to ensure absolute consistency between them.
- Completion of a Regulatory Impact Assessment Statement (“RIAS”) which sets out the anticipated financial, social, environmental and other direct and indirect impacts of the regulation both nationally and more regionally if appropriate. This phase is normally completed concurrently with the regulatory text drafting process.
- Treasury Board approval for pre-publication – this phase involves bringing the completed regulatory text forward for consideration by the Treasury Board, the Cabinet committee responsible for regulatory matters. Appropriate explanatory material and cover memos are prepared to

accompany the regulation and it and all the material is shared with other potentially affected federal departments for final comment and review. The normal Cabinet document security protocols and procedures are followed with respect to the package.

- Pre-publication in the *Canada Gazette, Part I* – this phase includes publication of the full regulatory text for public review. This is the first occasion on which the public sees the fully developed regulatory text though via the policy phase described above, the public is engaged in its development. The *Canada Gazette Part I* review period is normally one month in duration though it can be extended in instances where substantial public interest and commentary is anticipated.
- Review of comments and updating the proposal after pre-publication – this phase involves a review of the feedback of any commentary received and the modification of the regulatory text as need be. The time required for this phase obviously varies according to the amount of feedback received but normally requires approximately one 1 month.
- Final approval by Governor in Council – this phase involves presenting the final regulations for final approval by the Governor-in-Council. This process normally requires approximately five days.
- Registration and Publication in the *Canada Gazette, Part II* – this element brings the process to a close with the publication of the final regulation. The regulation will also stipulate when it comes into force. It could come into force immediately or after a period of time determined by the Government.

61. In anticipation of receiving a Cabinet mandate to begin the development of a regulation, I launched the “regulatory triage” phase of this process in early May 2009.

This process has been completed and the Treasury Board Secretariat is aware a regulation is forthcoming and is familiar with the various risks and issues it is likely to pose. As a result, the regulation is now on DFO's annual regulatory workplan filed with the Treasury Board Secretariat.

62. Upon finalization of the Cabinet mandate as described above, I commenced the process of establishing a regulatory drafting team within the DFO and the drafting instructions to guide its work. The instructions are necessarily somewhat general at this point as the detailed policy content will unfold as the consultation process proposed above unfolds. However, the drafting team has been established and has commenced its review of other potentially implicated federal statutes and regulations. Drafting of boilerplate clauses and simple definitions will begin in late November 2009 with a view to ensuring that the skeleton of the regulation is completed by the time the policy phase concludes.

63. At this point, DFO has not finalized its views regarding what the detailed content of the regulation should be. Numerous questions regarding various approaches to licencing, enforcement, standards and so on remain and it is DFO's preference to hear the views of those affected by the regulation before making decisions of its own. Thus, it is difficult to predict with precision how long it will take the legal drafting team to finalize a proposed regulation after its initial skeletal outline is completed. However, based on our analysis of what will likely have to be addressed in the regulation and its complexity, our estimate is that following the conclusion of public policy consultations, it will require two months to finalize the proposal in French and English. Therefore, our estimate is that the regulation will be ready for pre-publication in *Canada Gazette Part I* by approximately May 1, 2010.

64. Accompanying the regulatory proposal will be a comprehensive Regulatory Impact Analysis Statement. As noted in the Cabinet Directive federal regulatory policy requires that the potential impact of all regulations be considered as part of any decision on whether or not to pass a proposed regulation. The RIAS describes the intent of the

regulation, what it is likely to achieve and what its overall impact on Canadians and various sectors of society is likely to be. As part of this assessment, a formal cost-benefit analysis of the regulation is conducted and its results form part of the RIAS. Impacts of the regulation on the economy and on the environment are also to be considered. Preparation of the RIAS for the new regulation has begun at the conceptual level and will be finalized as the content of the regulation is confirmed.

65. As noted above, the normal public comment and review period for a regulation and related RIAS published in *Canada Gazette Part I* is 30 days. Such a period could be observed in this instance. However, given the anticipated degree of interest in the regulation in British Columbia and nationally and the fact that it is not simply a modification or update of an existing regulation, it is unlikely that a 30 day review period will meet the needs of those affected by the regulation. While an extension of this review period is necessarily a somewhat arbitrary decision, normal federal regulatory policy is to extend the period to 60 days for potentially controversial or high interest regulations of this nature. Thus, it is our intent to allow for a 60 day review period.

66. Upon completion of the review period, the comments received will be analysed by DFO and changes to the regulatory proposal will be considered. While every effort will be made to develop a regulatory proposal that will enjoy widespread support, the history of aquaculture in British Columbia strongly suggests that there will be numerous and contradictory comments on the proposal and the supporting RIAS and that analyzing them and producing an appropriately amended regulation and RIAS will not be possible in a one month time frame. Instead, it is anticipated that three months will be required to finalize the regulation for publication in *Canada Gazette Part II*. This will complete the regulatory process by early October, 2010.

4. Making the new regulation operational

67. Once a new regulation is in place, DFO will require a new "British Columbia Aquaculture Program" to administer it. This new program will be established by

December, 2010.

68. This new program would include activities such as:

- receiving licence applications.
- making site decisions
- issuing, collecting fees, tracking operations and tracking licences
- developing and mandating standards for net cage design, escape prevention and other ongoing operations
- collecting, storing and publishing information regarding industry operations
- communications and outreach
- enforcement and compliance
- research
- site inspections, habitat monitoring, compliance monitoring
- liaison with farmers, other government agencies, First Nations, stakeholders etc.

69. The provincial government currently devotes approximately \$6.6M and 50 people to this suite of activities. Due to our own particular organizational design and operational norms, DFO will not seek to simply replicate the provincial program but it is expected that DFO will require approximately the same level of resources to undertake the activities listed above. Taken together, these activities will constitute the new British Columbia aquaculture program.

70. Establishing a new program of this scale is a major undertaking, the likes of which DFO has not embarked upon for quite some time. It will require developing a program design, accountability frameworks, reporting mechanisms, financial systems, an organizational structure, classifying positions according to federal work description procedures, obtaining office space, office furniture and other similar logistical matters. In addition, it will require the recruitment of approximately 50 new people, the largest single recruiting action DFO has undertaken in decades. This will entail posting job advertisements, conducting interviews, issuing letters of offer, allowing time for

successful candidates to quit their current jobs, re-locate to DFO offices and be trained in their new roles.

71. At general scale, some of the preliminary work required to develop such a program and prepare for its implementation has already begun. A general program plan has been developed internally and will be continuously refined and updated as the new regulation and MOU it is intended to implement take shape. Human resources professionals are engaged in organizational design work and job classifications. Analysis is under way regarding existing DFO data management systems and the extent to which they can meet the projected demands of the new aquaculture program. Site inspection protocols are being developed. Existing fisheries enforcement programs are being reviewed to determine how best to couple the new aquaculture enforcement related needs to them.

72. A variety of similar tasks will continue to be undertaken over the next several months. However, before the new program can be fully implemented, three significant undertakings must be completed. First, given that the new program is intended to implement the new regulation, it essential that the key content of the regulation be finalized and the program tailored to implement it. To be sure, some elements of the program design can be undertaken in anticipation of the likely regulatory content and as noted above, some of this work is in fact under way. Moreover, it is unlikely that the regulation will undergo major changes necessitating wholesale program design changes after the *Canada Gazette Part I* posting stage. That said, it will be impossible to finalize the program design until at least the pre-publication phase of the regulation is completed.

Treasury Board

73. Second, although the government has generally allocated resources for the implementation of the new program, a Treasury Board Submission setting out in detail how these resources will be spent, how the program will be structured and how

performance of the program will be measured and evaluated will be required before resources are released into DFO budgets.

74. A Treasury Board Submission is a Cabinet document that is produced according to a fixed procedure that normally requires approximately four months to complete. Submissions vary in length and complexity according to the scope of the program and related resources being addressed. However, the submissions typically set out the context for the program, its rationale, its key anticipated results, its accountability frameworks and its reporting mechanisms. Submissions are reviewed by financial officials in the affected departments (in this case DFO and perhaps other federal agencies), the Treasury Board Secretariat and other central agencies. The Submission is then finalized in a format suitable for Cabinet consideration with all appropriate document formatting, security and handling procedures being observed. It is then submitted to the Minister for signature and in turn forwarded to the Privy Council Office for inclusion in the Treasury Board meeting agenda. Once approved by the Treasury Board, resources can then flow to the program once they are confirmed in the budgetary process of Parliament.

75. In this case, the Submission will have to address all of these matters in a fashion flowing from the new regulation. It will have to describe the new regulation, what activities are required to administer it, how resources will be allocated to those activities and how they will be accounted for and reported upon. Some of the preliminary drafting of the Submission can begin as the regulation and related program take shape. However, it cannot be finalized until the detailed nature of the regulation has become clear. Accordingly, the Treasury Board Submission will be submitted in the spring with a view to having the resources required flow to DFO as soon as possible in the new fiscal year. At Exhibit C I estimate this process being completed by September 2010.

76. Third, in addition to this program design phase, work will also be required to develop a transition plan for moving from the current regime to the new one. Given that the Court has read down the British Columbia Aquaculture Regulation that provides the

authority to issue aquaculture operating licenses in the province, all existing licences will be rendered invalid as soon as the decision takes effect. To ensure that the industry continues to function smoothly, the approximately 700 licenses issued by the Province will have to be reviewed and new federal licenses issued. Given that the new federal licences do not exist, and will not exist until the new regulation comes into force, this transitional rollover process cannot be completed in advance of the regulation. Work is currently under way to ensure that the federal government has the information it needs to move forward with the licence transfer process and to establish the licence application and issuance processes and so on. However, given the amount of work involved in reviewing and approving each and every licence, and recognizing that this work will be to be undertaken by existing staff in addition to their existing regular duties, it is estimated that this licensing process will be completed by early November, 2010.

77. Finally, in order to administer the new regulation as described above DFO will have to recruit approximately 40 – 50 people many of whom will require highly specialized skills and expertise. Hiring processes in the federal government can be cumbersome and slow; it is unlikely that a major recruitment of this nature can be completed in less than six months. As noted above, planning for this recruitment effort has already begun; work descriptions are being prepared, organization charts developed and so on. However, no matter how much advance planning work is done, formal recruitment activities cannot be launched until the regulation is finalized, a Treasury Board Submission is approved and resources flow to pay the new recruits, house them in offices and equip them with what they need to do their jobs and train them. This does not mean that no recruiting efforts will be made until all of the Treasury Board process is complete. Anticipatory staffing actions will be launched; office space booked and so on beginning next spring. But none of these activities can be completed until Board approvals are in place and money is released into the DFO budgetary allocations. Moreover, the nature of the recruiting exercise will require people to re-locate, make the transition from current jobs to the new ones and so on. Accordingly, we estimate that the program will not be fully up and running with appropriately trained staff in place until early December, 2010.

Consequences If An Extension Is Not Granted

78. Given that the BCSC decision has read down the *BC Fisheries Act* and struck down the *Finfish Aquaculture Waste Control Regulation*, the consequent regulatory void is substantial indeed. Over 700 licences are issued to aquaculture operators under these instruments, addressing by their terms and conditions the majority of the following matters:

- receiving licence applications
- making farm site decisions
- issuing and tracking licences
- collecting licence fees
- developing and mandating standards for net cage design, escape prevention and ongoing operations
- establishing standards and norms for shellfish harvesting techniques, timing and transportation
- collecting, storing and publishing information regarding industry operations
- communications and outreach
- enforcement and compliance
- research
- site inspections, habitat monitoring, compliance monitoring
farm operator interaction

79. As outlined above, in my experience a new federal regulation which fills this void cannot be consulted upon, drafted, reviewed by the public, brought into force and made operational by the present court deadline of February 11, 2010. The industry would in essence be left to function in the absence of set of rules and regulations for doing so.

80. This situation would also pose substantial potential risks to the public of BC and to the environment of the province. The absence of an appropriate regulatory regime

would severely curtail the ability of the government to monitor and enforce the behaviour expected of aquaculture operators.

81. Further, the industry has several billion dollars invested in BC in the form of capital equipment, offices, processing plants, support services and so on. These investments have of course been made on the assumption that BC presents a stable business environment with a predictable, fair and enduring regulatory regime. The absence of such a regulatory regime puts these investments at substantial risk.

Summary

82. The impact of the BCSC Decision on the aquaculture regime in British Columbia is monumental. It in essence requires the complete re-design of the regulatory system for an industry that generates approximately half a billion dollars in annual sales, employs approximately 2,100 people directly and thousands others indirectly, and operates on hundreds of sites under the terms of several hundred leases, permits and other approvals.

83. In the months after the decision, the federal government undertook a substantial amount of legal and policy analysis to more fully understand the decision and options available to the government to respond to it. The government met informally with parties affected by the decision, spoke to other provinces about it and worked closely with the government of British Columbia to carefully determine the scale and scope of provincial programming affected by the decision. As the provincial position with respect to responding to the decision was clarified following the May provincial election, appointment of a new Minister and release of a new provincial Budget, the government moved quickly to ratify a mandate for DFO to develop a new regulation and related MOU with BC.

84. The Government has formally announced its intent to develop a new aquaculture regulation for British Columbia. Exhibit C outlines the steps DFO considers necessary

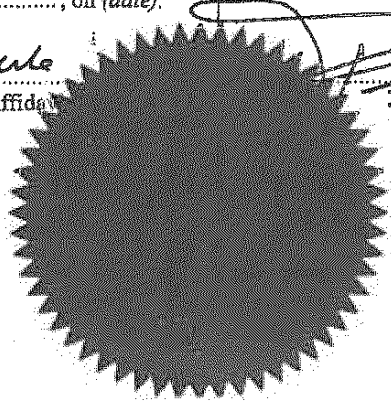
to the development of a well designed regulation and an effective program for making the regulation operational. The regulatory process involves a public consultation phase which is dramatically shorter than it would be under normal circumstances but still allows for focused contributions to the design process. It includes time to draft the legal text of the regulation based upon the feedback received in the consultation phase and an extended period for public comment on the proposed text of the regulation. Finally, it includes time for the government to digest the feedback received regarding its regulatory proposal and Regulatory Impact Analysis Statement and revise them accordingly for final publication in the *Canada Gazette Part II* in October, 2010.

85. Making this new regulatory regime operational is also a major undertaking. Some preparatory work related to the design of a new BC Aquaculture Program is under way. However, given that the Program's raison d'etre will be to implement the new regulation, its design cannot be finalized until the regulation itself is in the final design states. Moreover, the logistics and time requirements for purchasing new field equipment, office equipment, office space and the recruiting and training of staff, are such that a fully operational program capable of delivering quality service to Canadians cannot be established prior to December, 2010.

86. An extension of the Court's suspension of its decision to December 18, 2010 is, therefore, respectfully requested.

Sworn (or Affirmed) before me at the (City, Town, etc.) of
Ottawa
in the (County, Regional Municipality, etc.) of
Ontario, on Nov. 17 2009 (date).

Rita Mauer Adels
Commissioner for Taking Affidavits
(or as may be)



TREVOR SWERDFAGER

November 17/09

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Morton v. Marine Harvest Canada Inc.,
2009 BCCA 481

Date: 20091103
Docket: CA036905

Between:

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

Respondents
(Petitioners)

And

Marine Harvest Canada Inc.

Appellant
(Respondent)

And

Minister of Agriculture and Lands,
The Attorney General of British Columbia on behalf of
The Province of British Columbia

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Lowry

On appeal from the Supreme Court of British Columbia, Vancouver Registry,
February 9, 2009, 2009 BCSC 136, Docket S083198

Counsel for the Appellant:

C. Harvey, Q.C.
C. Watson
A. Scarth A/S

Counsel for the Respondents:

G.J. McDade, Q.C.
L.C. Glowacki

VANCOUVER

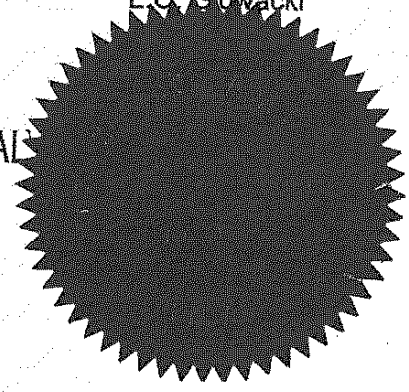
NOV - 3 2009

COURT OF APPEAL
REGISTRY

No-one Appearing on Behalf of the
Province of British Columbia

This is Exhibit "A" referred to in the
Affidavit of TREVOR SWERDFAGER
sworn before me at Ottawa
in the Province of Ontario this
17th day of NOVEMBER, A.D. 2009

Rita Marie Acube
A Commissioner for taking Affidavits
within the Province of Ontario



Place and Date of Hearing:

Vancouver, British Columbia
October 21, 2009

Place and Date of Judgment:

Vancouver, British Columbia
November 3, 2009

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Huddart

The Honourable Mr. Justice Lowry

Reasons for Judgment of the Honourable Madam Justice Newbury:

32

[1] By order dated February 9, 2009, Mr. Justice Hinkson granted the respondents a declaration that certain legislation – s. 26(2)(a) of the *Fisheries Act*, R.S.B.C. 1996, c. 149 and the *Aquaculture Regulation*, B.C. Reg. 78/2002 passed pursuant thereto; ss. 1(h) and 2(1) of the *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996, c. 131; and Reg. 256/2002 (*The Finfish Aquaculture Waste Control Regulation*) passed pursuant to the *Environmental Management Act* – was *ultra vires* the Province of British Columbia insofar as such legislation applied to finfish aquaculture. (The legislation continued to apply to marine plant life.) Section 26(2)(a) of the *Fisheries Act* had authorized the Lieutenant Governor in Council to make regulations for “safe and orderly aquaculture” and the Regulations had created a detailed scheme for the licensing, regulation and management of ‘fish farms’ in the Province, including the administering of “drugs” to captive fish, the monitoring of fish that escape from aquaculture facilities, and the management of waste produced in such facilities.

[2] Hinkson J. also made various ancillary declarations relating to renewal decisions that were pending before the Minister of Agriculture and Lands with respect to a tenure and a licence sought by the appellant Marine Harvest Canada Inc. (“MHC”) pursuant to the invalidated legislation. The operation of the declaration was suspended for 12 months from the date of judgment.

[3] The order followed the chambers judge’s conclusions, reached after a four-day hearing, that the dominant purpose of the impugned provincial legislation was to regulate aquaculture and that the effect of the legislation on the federal power to legislate with respect to “Sea Coast and Inland Fisheries” under s. 91(12) of the *Constitution Act* was not incidental. The judge rejected MHC’s argument that the legislation fell within the provincial jurisdiction over property and civil rights, the management of lands, or matters of a local and private nature. With respect to property and civil rights, he reasoned as follows:

The provincial jurisdiction over property and civil rights has been carefully identified as separate from the federal jurisdiction over the fisheries themselves, allowing the Provinces to regulate the "business of fishing" including fish processing and labour relations applicable to the fishing industry and the sale or disposition of fish once caught The power does not, however, extend so far as to permit a Province the "right to pass any laws interfering with the regulation and protection of the fisheries": *Robertson* at 123.

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

The provincial Crown does, of course, retain the ability to raise revenue by the taxation of activities within the Province, the granting of land tenures, and the licensing of the business of fishing through the provincial jurisdiction over property and civil rights. However, as held by Viscount Haldane at D.L.R. 319 of the *B.C. Fisheries Reference*, the Province does not have jurisdiction to license private fisheries. Nonetheless, I find that ss. 13(5) and 14 of the *B.C. Fisheries Act* are within the jurisdiction of the provincial Crown as their dominant purpose is to produce revenue based on the licensing of the business of fishing: see *Canada Western Bank* at para. 28.

The remainder of the challenged legislation concerns the management of a Fishery and cannot be enacted by both the federal Parliament and the provincial Legislature. It is not a subject which, to paraphrase *Hodge*, in one aspect and for one purpose falls within s. 92, and in another aspect and for another purpose falls within s. 91. The management of fisheries, as I have already said, is a matter of exclusive federal jurisdiction. [At paras. 170-73.]

As well, he rejected arguments that the legislation could be saved by the application of the "necessarily incidental" doctrine, the doctrine of interjurisdictional immunity, paramountcy or "subsidiarity".

[4] The Province of British Columbia, which was represented by counsel in the court below, has not appealed the chambers judge's order. However, MHC has appealed, not on the basis that the chambers judge erred in finding that the regulation of aquaculture generally is a matter for the Province, but on the narrow ground that fish farms are private fisheries and the fish in them are private property, and that two particular provisions of the invalidated legislation, ss. 1(h) and 2(1) of the *Farm Practices Protection (Right to Farm) Act*, relate solely to property and civil rights in the Province. Subsections 1(h) and 2(1) provide as follows:

1 In this Act:

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

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

...

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

- (a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation, and
- (b) the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.

Subsection (2) states:

The requirements referred to in subsection (1) are that the farm operation must

- (a) be conducted in accordance with normal farm practices,
- (b) be conducted on, in or over land
 - (i) that is in an agricultural land reserve,
 - (ii) on which, under the *Local Government Act*, farm use is allowed,
 - (iii) as permitted by a valid and subsisting licence, issued to that person under the *Fisheries Act*, for aquaculture, or
 - (iv) that is Crown land designated as a farming area under subsection (2.1), and
- (c) not be conducted in contravention of the *Public Health Act*, *Integrated Pest Management Act*, *Environmental Management Act*, the regulations under those Acts or any land use regulation.

[5] Even though ss. (2)(b)(iii) refers to the licensing scheme under the *Fisheries Act* which was declared *ultra vires* in its application to finfish aquaculture and ss.(2)(c) refers to regulations under the *Environmental Management Act*, Mr. Harvey on behalf of the MHC describes ss. 1(h) and 2(1) as essentially “tort law” that may

be considered and upheld independent of the aquaculture regulatory scheme. MHC intends to argue that its fish farm is not part of the "public fishery" and that the captive fish in the farm are privately-owned chattels. While the federal government may regulate a "fishing activity", MHC contends, it may not "regulate the private rights of others who may be injured by those activities" as that would be to "ignore the distinction between rights of property and legislative authority." [AF para. 57]

[6] ... The respondents object that MHC's argument on appeal was not raised below and therefore not dealt with by the chambers judge. The question of provincial jurisdiction in respect of "tort" or the law of nuisance did not arise because all parties below agreed, or at least proceeded on the assumption, that the entire provincial "regulatory regime" with respect to aquaculture would stand or fall as one. The respondents say it was never suggested that the constitutional validity of these provisions turned on whether the fish themselves are private property or not, or whether the right to the fishery is a private or public right, or even a proprietary right at all and that the cases now relied upon by MHC on the issue of 'ownership' of fish produced by aquaculture were not before the court below. The respondents referred us to MHC's written submissions before Hinkson J. where this point did not appear.

[7] Mr. Harvey responded that although the chambers judge had not dealt with the point now raised on appeal, he had referred in his reasons to ss. 1(h) and 2(1), and had at para. 159 rejected MHC's argument that fish farms constitute a private fishery lying beyond federal jurisdiction. Thus the chambers judge had stated:

... In the *B.C. Fisheries Reference* at D.L.R. 318, Viscount Haldane, the Lord Chancellor, held for the court that the fishery in tidal waters is a public fishery and that the federal government had the exclusive right to regulate it. He also held at 316 that "no public right of fishing ... can be taken away without competent legislation". Consequently, he held that only the federal government had the jurisdiction to grant private fishery rights in tidal waters.

Given this decision, finfish farms cannot constitute a private fishery, even if the fish in the pens are private property, unless the federal government grants such a private fishery to the fish farms or, as I will discuss in more detail below, validly delegates that power to the provincial government. [At paras. 159-60.]

Mr. Harvey conceded that one of MHC's options had been to return to the chambers judge below and seek a ruling on the point he now seeks to advance, but said it would be more convenient, at least for MHC, if this court were to deal with the issue.

[8] We advised counsel that we were all of the view the matter should be remitted to Mr. Justice Hinkson for determination. Whether the fish in an aquaculture facility are private property or not, the validity of ss. 1(h) and 2(1) of the *Farm Practices Protection (Right to Farm) Act* necessarily involves a consideration of the other legislation, and an understanding of the entire argument made below. The chambers judge has this understanding and is in a position to make any necessary findings of fact – something we are not best suited to do. Once the findings have been made, any rights of appeal can be properly exercised by recourse to this court in the usual way.

[9] For these reasons, we dismissed the appeal and ordered that the matter raised by MHC be remitted to the chambers judge below.

[10] With respect to costs, I would not accede to the suggestion of counsel for the respondents that special costs should be ordered against MHC. However, the Morton respondents should have their costs thrown away in this court. I would leave for the chambers judge the matter of costs in the Supreme Court.



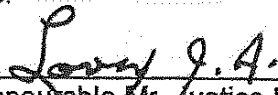
The Honourable Madam Justice Newbury

I Agree:



The Honourable Madam Justice Huddart

I Agree:



The Honourable Mr. Justice Lowry

Exhibit B

Table 1: Outlining the actions taken by the Department of Fisheries and Oceans' Aquaculture Management Directorate, in response to the British Columbia Supreme Court ruling that aquaculture is a federal regulatory jurisdiction.

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
1.	09-Feb-09	BCSC Ruling regarding Aquaculture Regulatory Jurisdiction in British Columbia.	The British Columbia Supreme Court ruled that the activity of finfish aquaculture is a fishery which falls under exclusive federal jurisdiction pursuant to sub-section 91(12) of the Constitution Act, 1867 - Sea Coast and Inland Fisheries.
2.	09-Feb-09	Aquaculture Management Directorate (AMD) Director General, Trevor Swerdfager, met with the DFO Deputy Minister, Michelle D'Auray, Associate Deputy Minister, DFO, Claire Dansereau, and Larry Pedersen, Deputy Minister BC Ministry of Agriculture and Lands (BCMAL)	The BCSC Decision was reviewed and implications discussed.
3.	02-Mar-09	Aquaculture Management Directorate (AMD) Director General, Trevor Swerdfager, met with the Deputy Minister, Claire Dansereau, regarding the BC Court Case	The Deputy Minister was briefed on the BC Supreme Court decision regarding aquaculture regulation in the Province.
4.	02-Mar-09	AMD Director General, Trevor Swerdfager held a conference call with Department of Justice representatives and the Pacific Regional Aquaculture Coordinator, Andrew Thomson.	Discussions were held on DFO's next steps with regards to the Decision.
5.	03-Mar-09	Formal request from Trevor Swerdfager to begin work on Aquaculture Regulation for BC to Senior staff, AMD	
6.	09-Mar-09	Teleconference re BC Court Case between Trevor Swerdfager, Paul Sprout (Pacific Regional Director General) and Faith Scattalon (Atlantic Regional Director General)	Trevor briefed the Pacific and Atlantic Region Director Generals on decisions made according to the BC Supreme Court decision on Aquaculture regulation in British Columbia

This is Exhibit " B " referred to in the Affidavit of TREVOR SWERDFAGER sworn before me at City of Ottawa in the Province of Ontario this 17th day of NOVEMBER, A.D. 2009
Rita Mauer Adenbe
 A Commissioner for taking Affidavits within the Province of Ontario

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
7.	16-Mar-09	Internal DFO Meeting between DFO AMD Stewardship and Regulatory Affairs	Discussions were held regarding the regulatory work plan that needed to be put into place for the creation of a BC aquaculture regulation
8.	18-Mar-09	Trevor Swerdfager held a teleconference with BC Provincial representatives	The group discussed options for next steps with regards to the future of aquaculture regulation in BC.
9.	20-Mar-09	DFO Internal Meeting: AMD Stewardship and Habitat	The group discussed regulatory options and how Habitat would play a role. AMD invited Habitat to participate in a DFO internal Aquaculture Regulatory Working Group.
10.	23-Mar-09	AMD (Trevor Swerdfager and Sharon Ford) met with the Assistant Deputy Minister (David Bevan) of Fisheries and Aquaculture Management	The ADM was briefed on next steps of AMD regarding the BC Court decision.
11.	24-Mar-09	Internal DFO Aquaculture Regulatory Working Group (1 st meeting)	Discussions focused on the future potential working group members and work plans to be developed.
12.	25-Mar-09	DFO – BC Provincial pre-meeting between Trevor Swerdfager and Harvey Sasaki and Al Castledine	The meeting was held to initiate conversation on regulatory transition.
13.	26-Mar-09	AMD meeting in preparation for DFO-BC meeting (Trevor Swerdfager, Sharon Ford, and Ed Porter)	The meeting was held to discuss approach to the upcoming federal-provincial meeting to be held in BC.
14.	30-Mar-09	DFO – BC provincial meeting	The meeting's purpose was to explore preliminary options for a path forward – neither government has a mandate to begin negotiations at this point.
15.	31-Mar-09	DFO-BC Industry initial meeting. See para 25 of Affidavit. Included representatives from the BC Shellfish Growers Association, Mainstream Salmon, Creative Salmon, Pacific Organic Seafood Association, BC Salmon Farmers Association, Canadian Aquaculture Industry Alliance, Cooke Aquaculture, Marine Harvest Canada and Grieg Seafood.	Industry members were briefed on the decision, options and next steps. They were also asked to provide advice on what they would like to see reflected in a new aquaculture management regime, what they would not like to see, and how they would like to be consulted.

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
16.	31-Mar-09	DFO-BC ENGOs initial meeting. Coastal Alliance for Aquaculture Reform ("CAAR") present. CAAR is a coalition of 7 ENGOs: the David Suzuki Foundation, the Georgia Strait Alliance, the Living Oceans Society, the T. Buck Suzuki Environmental Foundation, the Watershed Watch Society, the Raincoast Conservation Foundation and the Friends of Clayoquot Sound. See para 28 of Affidavit.	ENGO members were briefed on the decision, options and next steps. They were also asked to provide advice on what they would like to see reflected in a new aquaculture management regime, what they would not like to see, and how they would like to be consulted.
17.	03-Apr-09	DFO Policy Integration Committee meeting	Departmental representatives were briefed on the BC court decision and on proposed next steps to be taken by the federal government to respond to the decision.
18.	03-Apr-09	DFO Central Agencies Meeting	Trevor Swerdfager briefed Central Agencies on the Decision, options to this point, consultations being carried out and the need for a Memorandum to Cabinet in June to ask for a negotiation mandate.
19.	07-Apr-09	Internal DFO Aquaculture Regulatory Working Group – 2 nd meeting	The group was briefed on AMD's progress to date, regulatory options being developed, and consultation preparation. An internal to-do list was initiated to pull together necessary items and efforts in some related areas.
20.	09-Apr-09	AMD-Regional Aquaculture Coordinators meeting	The Regional Aquaculture Coordinators were briefed on regulatory options being considered.
21.	14-Apr-09	DFO-BC provincial meeting	Discussions were held on progress of consultation planning, options for regulatory regime, and developed external timelines and milestones.
22.	22-Apr-09	DFO Internal meeting – AMD and Pacific Region	Discussions were held on CEAA analysis, FAWCR, and Section 35 of the Fisheries Act – how they relate to developing an aquaculture regulation.

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
23.	21-Apr-09	Internal DFO Aquaculture Regulatory Working Group – 3 rd meeting	Discussions were held on internal timeline and milestone development, and the discussion document outlining proposed options for regulation.
24.	27-Apr-09	Internal DFO meeting – AMD and Economics and Statistics (“EAS”)	This was an initial meeting with EAS to discuss how fees would fit into a new aquaculture regulatory regime, current costing and cost benefit analysis development for an aquaculture regulation.
25.	28-Apr-09	Internal DFO meeting – AMD and Legal Services (re: MC)	AMD consulted with legal services to ensure that the legal needs of the MC being developed were met.
26.	28-Apr-09	Internal DFO meeting - AMD to discuss SEA requirements for MC	SEA requirements for the development of the MC asking for negotiating mandate were reviewed.
27.	28-Apr-09	Internal DFO Meeting – AMD and Finance (re:MC)	AMD consulted with Finance regarding financial needs of the MC being developed.
28.	29-Apr-09	Internal DFO Meeting – Interdepartmental Groups (re:MC technical issues)	The developed MC was reviewed and comments and edits were requested.
29.	30-Apr-09	Internal DFO meeting – Regions and Policy Groups (re:MC policy issues)	The developed MC was reviewed and comments and edits were requested.
30.	01-May-09	Internal DFO Meeting – MC Enablers	The developed MC was reviewed and comments and edits were requested.
31.	05-May-09	External – DFO and Environment Canada call (re:MC)	Discussions were held on Environment's role in developing options in response to the BC Supreme Court decision on aquaculture regulation.
32.	06-May-09	DFO Policy Integration Committee Meeting	Held to seek endorsement of DFO's response to BC Court case from DFO's primary policy review group.

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
33.	06-May-09	DFO Departmental Management Committee meeting	AMD briefed the Departmental Management Committee on the progress of actions being taken in response to the BC Court case on aquaculture and the development of a federal aquaculture regulation for BC.
34.	07-May-09	DFO-AMD and BC Provincial Representatives pre-meeting conferences call to discuss meeting agenda	Items for an agenda for the upcoming federal-provincial meeting were discussed. Also discussed were consultations strategies, fed-prov to-do list and the status of the regulatory options paper.
35.	12-May-09	BC Provincial Election	
36.	12-May-09	DFO AMD and BC Provincial representatives meeting	An update on both the federal and provincial progress in moving forward was given. Discussions were held on further consultation plans, and bilateral negotiation planning.
37.	12-May-09	DFO-Departmental Management Committee (DMC) Meeting	Trevor Swerdfager, Director General, AMD, briefed the DMC and confirmed policy direction with regards to the actions to be taken on the shift in BC's aquaculture regulatory regime.
38.	13-May-09	Internal DFO Aquaculture Regulatory Working Group – 4 th meeting	Updates and discussions focused on other internal meetings, internal to-do list progress and the status of legal opinions that had been requested.
39.	13-May-09	DFO-BC Industry meeting – See paragraph 25 of Affidavit.	Further discussion was held on the progress and plans for the new regulatory regime and feedback was received from industry on how they would like to be regulated.

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
40.	14-May-09	First Nations Fisheries Council Meeting See para 25 of Affidavit. The Fisheries Council was appointed by the BC First Nations Leadership Council, consisting of the Union of BC Indian Chiefs, the First Nations Summit, and the BC Assembly of First Nations, to address common fisheries issues, priorities, and concerns. As such, they represent the interests of First Nations fisheries organizations.	First Nations representatives were briefed on the decision to move forward with federally regulating aquaculture in BC and the proposed consultation plan. They indicated interest in being consulted further and advising on regulatory development.
41.	27-May-09	AMD internal meeting	Discussions were held on logistics next steps moving forward, organization of to-do lists, technical issues.
42.	28-May-09	Canadian Council of Fisheries and Aquaculture Ministers ("CCFAM") Adhoc Aquaculture ADM Committee meeting. All 10 provinces and 3 territories were represented.	AMD gave a briefing on the BC regulatory progress.
43.	03-Jun-09	AMD meeting with Patrick Cossette, Legal Services	Discussions were held on options available to delegate licensing of aquaculture sites in BC.
44.	03-Jun-09	Internal DFO Aquaculture Regulatory Working Group – 5 th meeting	The group was updated on the status of the MC, planned consultations, other internal meetings and a developed regulatory intentions outline document.
45.	08-Jun-09	Internal Engagement Conference Call – Regional Aquaculture Coordinators, AMD and Associates	A debriefing of what has been happening on the BC aquaculture regulatory changes was given to attendees by AMD representatives.
46.	10-Jun-09	New Cabinet sworn in.	
47.	11-Jun-09	Internal DFO - MC Enablers Costing Meeting	The group was debriefed on the June MC, particularly on the cost assumptions used for enablers. There was formation of an Enablers Costing Committee with discussions around preparations for the costing exercise for a follow-up September MC; and to notify enablers of expected next steps, and their deliverables.

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
48.	11-Jun-09	AMD meeting with Economics sector representatives to discuss User Fees Act application to regulatory changes	Discussions were based on the application of the User Fees Act in adding a fee regime to aquaculture licensing.
49.	15-Jun-09 16-Jun-09	First Nations' Initial Consultations. See para 25 of Affidavit.	First Nations were debriefed on the issues at hand, questions were taken and answered, and initial plans for further consultations were discussed.
50.	16-Jun-09	Internal DFO: AMD and LRA	Next steps were discussed with regards to the regulatory development process – preparation of a Triage, CBA and RIAS.
51.	17-Jun-09	DFO ENGO Consultations – CAAR. See paragraph 25 of the Affidavit.	Attendees were briefed on status of DFO's activities in response to the Decision and discussed how to move forward with continuing consultations.
52.	23-Jun-09	Internal AMD meeting (Regulatory Working Group)	Those working on the file internal to AMD discussed each person's role to streamline the approach being taken.
53.	30-Jun-09	Internal DFO: AMD and LRA	LRA edited the first draft of the Triage to be submitted to the Treasury Board Analyst.
54.	2-July-09	Completed Triage submitted to Treasury Board Analyst. See para 64 of Affidavit.	
55.	3-July-09	1st meeting of the DFO liaison group on BC Aquaculture Regulation in Response to Court Decision	The purpose of this group is to aid in communication between staff working on the various activity areas to streamline work and ensure inputs to others' work are timely.
56.	8-July-09	Bilateral Meeting between AMD and Environment Canada	Environment Canada representatives were debriefed on DFO actions to date on the BC aquaculture regulatory changes, and plans for the future.
57.	8-July-09	Meeting between AMD and Treasury Board Analyst	The developed Triage and to be developed Cost Benefit Analysis were discussed.

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
58.	10-July-09	Trevor Swerdfager, Director General, AMD meeting with Alexandra Morton	Meeting in Campbell River, BC –Ms. Morton on the status of developments with regards to the changing aquaculture regulatory regime for BC and DFO's position.
59.	16-July-09	Internal DFO Aquaculture Regulatory Working Group – 6 th meeting	Discussion focused on comments on Regulatory Intentions document.
60.	16-July-09	Pacific Region AMD met with Pacific Region Conservation and Protection Branch and Habitat Branch	Information was provided to the branch representatives on the proposed regulatory regime, questions were answered and preliminary discussions were held regarding differentiation of provincial staff duties, inclusions of Coast Guard in further discussions, possible C & P positions required. There was agreement to meet again.
61.	16-July-09	AMD meeting with Patrick Cossette	Discussed Legal Services comments on the Regulatory Intentions document.
62.	21-July-09	AMD meeting with Legislative and Regulatory Affairs	Discussed various issues surrounding regulatory development to be determined including ticketability, enforcement issues, and consequential amendments to other regulations.
63.	23-July-09	AMD staff meeting with Conservation and Protection representative.	Discussed measures of enforcement that will be required in compliance with the new BC regulation, how it should be delegated.
64.	24-July-09	2nd meeting of the DFO liaison group on BC Aquaculture Regulation in Response to Court Decision	Attendees shared progress on various initiatives under the regulatory development and matters related.
65.	27-July-09	DFO meeting with Industry Stakeholders (East Coast) – represented by the Canadian Aquaculture Industry Alliance. – see paragraph 25 of Affidavit.	General discussions were held and questions and comments were addressed with regards to the BC aquaculture regulatory initiative.
66.	28-July-09	AMD staff met with DFO External Charging staff (Kenneth Ketchum)	Discussions were held on program costing for the new regulatory regime.

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
67.	7-Aug-09	Pacific Region AMD internal engagement	Information and context was provided to all interested staff on the proposed change in regulatory regime, and questions were addressed.
68.	10-Aug-09	DFO Policy Integration Committee meeting	Departmental representatives were briefed on the progress of AMD with regards to the BC aquaculture regulatory initiative.
69.	10-Aug-09	Bilateral DFO meeting with Environment Canada	Further discussions were held on the regulatory intentions paper, and more focused discussions were held on how Section 36 will be included.
70.	11-Aug-09	Bilateral DFO meeting with CFIA (re: On Farm Food Safety Program incorporation)	Discussions were focused on how CFIA can aid in the inclusion of aspects of an On Farm Food Safety Program for the new aquaculture regulatory regime in BC.
71.	12-Aug-09	AMD staff met with Legal Services and Economic and Statistic branch representative	Discussions were held on how to approach the User Fees Act as it would apply to the new aquaculture regulatory regime for BC.
72.	13-Aug-09	AMD met internally (Ed Porter and Leonard Bergmame) regarding licence fees.	Discussions were held on the regulatory framework being proposed with regards to consultations and fees for the new proposed regulatory regime.
73.	13-Aug-09	AMD staff met with DFO External Charging staff (Kenneth Ketchum)	Further discussions were held on program costing for the new regulatory regime.
74.	14-Aug-09	3rd meeting of the DFO liaison group on BC Aquaculture Regulation in Response to Court Decision	Attendees shared progress on various initiatives under the regulatory development and matters related.
75.	19-Aug-09	AMD, C&P and Habitat HQ and Pacific Region, meeting	Discussions focused on the development of an enforcement program for the proposed new regulation.

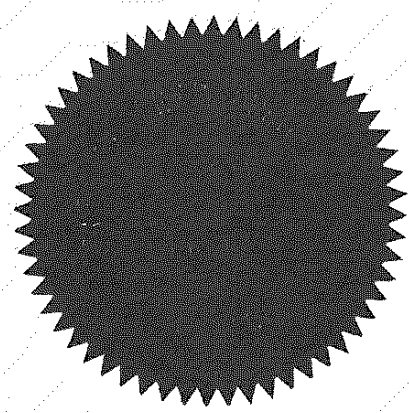
	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
76.	24-Aug-09	Internal DFO Aquaculture Regulatory Working Group – 7 th meeting	Comments were discussed on the updated Regulatory Considerations document.
77.	25-Aug-09	BC Information Management Working Group (DFO internal) meeting	Discussed development of a federal info management system, and the task of compiling a list of information that will need to go into the system.
78.	26-Aug-09	Bilateral DFO meeting with Environment Canada	Discussed Section 36 regulation for BC aquaculture and nationally.
79.	26-Aug-09	AMD staff met with Katerina Daniel of Resource Management Sector	Discussed the Integrated Fisheries Management Plan template.
80.	26-Aug-09	AMD meeting with EAS, CORE, LRA regarding Cost Benefit Analysis for regulatory development.	Discussed the direction to be taken in CBA development.
81.	28-Aug-09	4 th meeting of the DFO liaison group on BC Aquaculture Regulation in Response to Court Decision	Attendees shared their progress on various initiatives under the regulatory development and matters related.
82.	01-Sept-09	AMD HQ Director meeting with DFO Pacific Directors	Discussed next step approaches to consultation document development and general path forward.
83.	03-Sept-09	AMD meeting with HR	Discussions were held on staffing implications related to the switch in the delivery of BC aquaculture regulation.
84.	14-Sept-09	AMD Internal Meeting re: MC	AMD staff met internally to discuss plans for moving quickly to obtain MC approval, in accordance with tight timelines.
85.	14-Sept-09	AMD DG and staff meeting with Deputy Minister re:MC	AMD DG and staff met with the Deputy Minister to discuss main issues flagged by the MC and next steps.
86.	14-Sept-09	Director Generals meeting with AMD	DG comments from DFO sectors were invited on developed MC.
87.	14-Sept-09	AMD and Corporate Enablers	Discussions were held on MC costing.

	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
88.	16-Sept-09	Central Agencies & Interdepartmental Meeting	Combined Central Agencies and Interdepartmental meeting held to discuss MC.
89.	17-Sept-09	Habitat Aquaculture Management Meeting	AMD staff were engaged in a Habitat Manager's meeting to discuss upcoming changes for aquaculture regulation in BC and Habitat's role.
90.	23-Sept-09	5 th meeting of the DFO liaison group on BC Aquaculture Regulation in Response to Court Decision	Attendees shared their progress on various initiatives under the regulatory development and matters related.
91.	23-Sept-09	Internal DFO Aquaculture Regulatory Working Group – 8 th meeting	Those in attendance were briefed on the development of the MC and path forward.
92.	28-Sept-09	Memorandum to Cabinet presented to Operations Committee. See para 39 of Affidavit.	The developed MC was presented to the Cabinet Operation's Committee for approval.
93.	29-Sept-09 & 30-Sept-09	DFO HQ and Pacific Brainstorming meeting for BC Licensing Info Management System	DFO staff met to discuss the requirements for an aquaculture licensing information management system that would be required under a new federal regulatory regime.
94.	01-Oct-09	AMD HQ Staff meeting with Regional Staff	Discussions were held on the development of a Program Implementation Plan for a new federal aquaculture regulatory regime.
95.	06-Oct-09	AMD staff internal meeting regarding Implementation Planning	Those assigned to tasks in the development of the Program Implementation Plan were briefed on the plan's purpose and overall expectations.
96.	09-Oct-09	6 th meeting of the DFO liaison group on BC Aquaculture Regulation in Response to Court Decision	Attendees shared their progress on various initiatives under the regulatory development and matters related, paying particular attention to the development of an Implementation Plan.

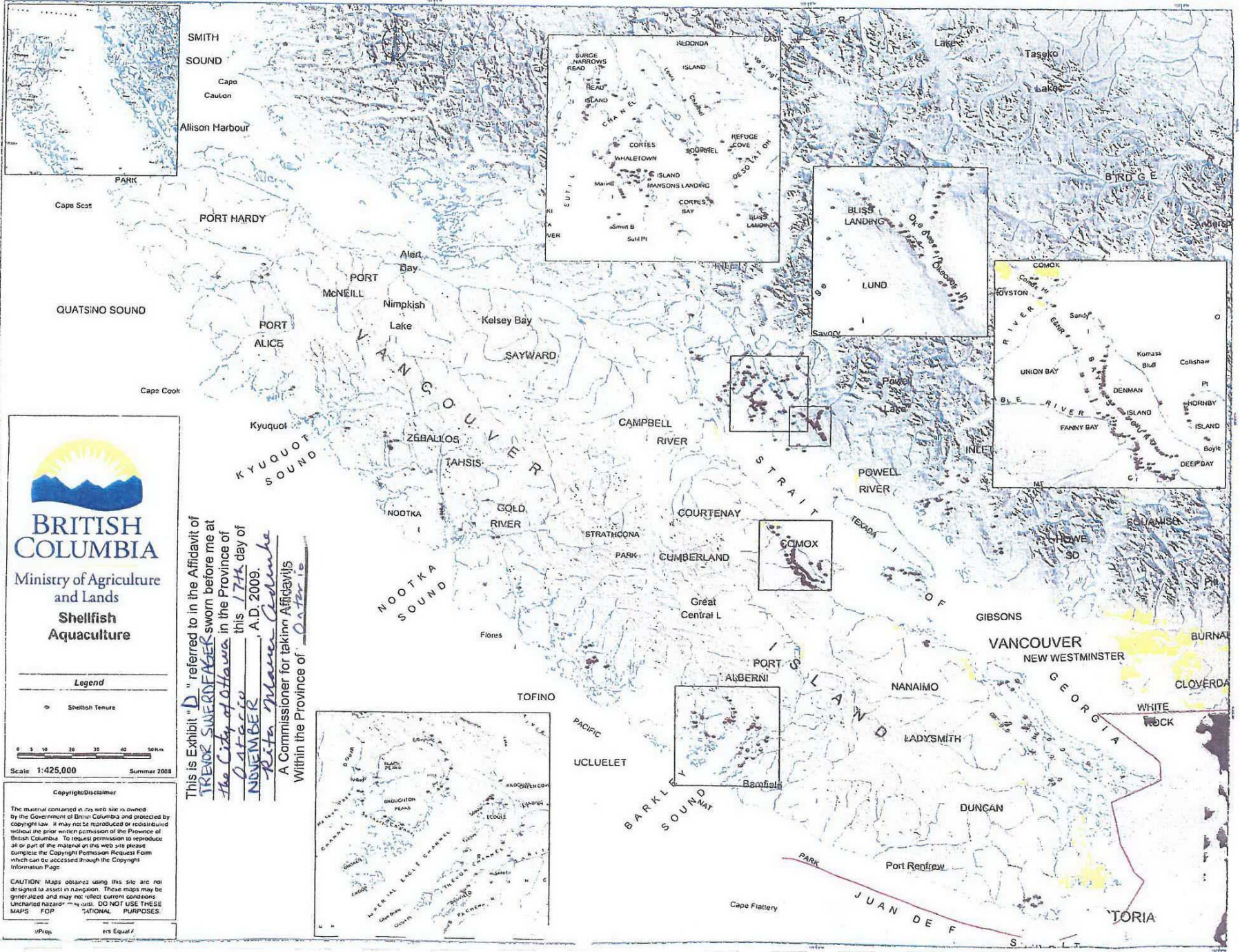
	<u>Date</u>	<u>Action Item</u>	<u>Comments / Summary</u>
97.	13-Oct-09	Leonard Bergmame, AMD meeting with Departmental Human Resources Representatives	Discussions were held on related Human Resources issues with regards to transition from a provincial to a federal regulatory jurisdiction for aquaculture.
98.	13-Oct-09	AMD Meeting with External Charging	Discussions were held on the process / potential of incorporating fees into the new federal aquaculture regulatory regime.
99.	16-Oct-09	7 th meeting of the DFO liaison group on BC Aquaculture Regulation in Response to Court Decision	Attendees shared their progress on various initiatives under the regulatory development and matters related, paying particular attention to the development of an Implementation Plan.
100.	16-Oct-09	1 st Meeting of the Regional Aquaculture Compliance and Enforcement Committee	Discussions were held on developing a Compliance and Enforcement Program to support the new Aquaculture Regulatory Regime federally.
101.	27-Oct-09	Trevor Swerdfager meeting with Harvey Sasaki and Lynn Bailey, Assistant Deputy Minister of BC Ministry of Environment.	Discussions were held on preparations for negotiating a federal / provincial Memorandum of Understanding for aquaculture in BC.
102.	30-Oct-09	Formal announcement from the Minister of Fisheries and Oceans that she had secured a mandate from Cabinet to develop a new regulation for the management of aquaculture in BC and to open negotiations with BC regarding the establishment of a Memorandum of Understanding ("MOU") on Aquaculture. See paragraph 37 of the Affidavit.	
103.	03-Nov-09	Trevor Swerdfager, Sharon Ford, Eric Gilbert, Jamie Smith, Harvey Sasaki: discussion with Canadian Aquaculture Industry Alliance	Roundtable discussion on Regulatory Development at Canadian Aquaculture Industry Alliance Annual General Meeting, Ottawa

Exhibit C – Regulation and Program Development Chronology

Activity	Affidavit Paragraph References	Time Required	Completion Date
Release of BCSC decision	8	n/a	February 9, 2009
Legal/policy analysis, initial consultation, securing Cabinet mandate	19-37	7 months	October, 2009
Negotiation of new BC-Canada MOU	38-45	2 months	December 31, 2009
Public policy consultation phase with industry members, ENGOs, First Nations	46-57	4 months	March 1, 2010
Analysis of consultations; drafting and translation of legal text (preliminary work will begin immediately)	58-63	2 months	May 1, 2010
Public review of pre-publication regulatory proposal and RIAS in <i>Canada Gazette Part I</i>	64-65	2 months	July, 2010
Analysis of feedback received, revision of regulation and RIAS, processing for final publication in <i>Canada Gazette Part II</i>	66	3 months	October, 2010
Program design, Treasury Board Submission	73-75	4 months	September, 2010
Transfer of licencing process from province to Canada	77	1 month	November, 2010
Staff recruitment, setup, training, transition plan implementation	76-77	6 months	December 2010



This is Exhibit " C " referred to in the Affidavit of TREVOR SWERDFAGER sworn before me at the City of Ottawa in the Province of Ontario this 17th day of NOVEMBER, A.D. 2009
Rita Mason Amluk
 A Commissioner for taking Affidavits within the Province of Ontario



BRITISH COLUMBIA
Ministry of Agriculture and Lands
Shellfish Aquaculture

Legend

- Shellfish Tenure

Scale: 1:425,000 Summer 2008

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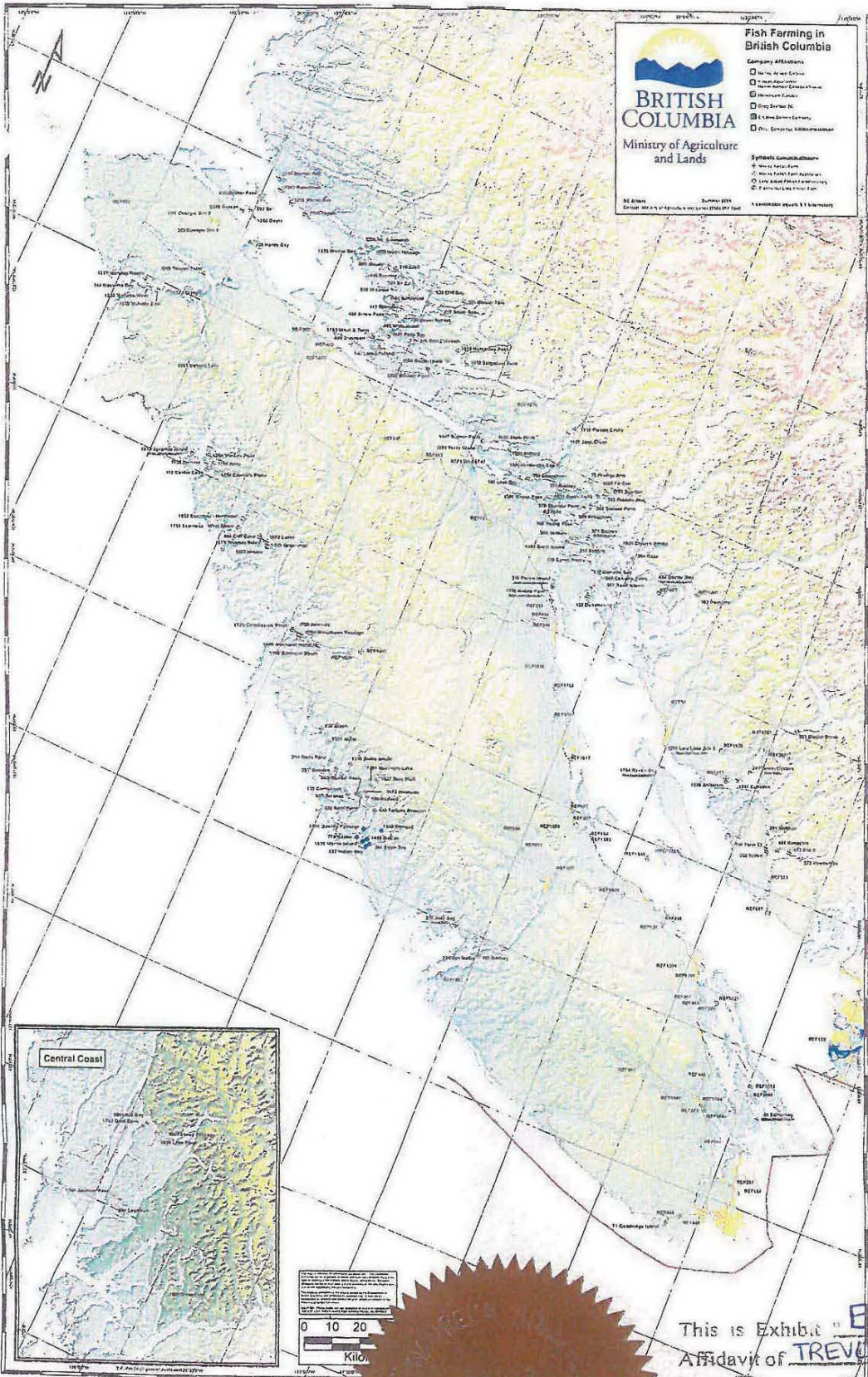
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This is Exhibit "D" referred to in the Affidavit of TRENOR SWERDEAGER sworn before me at the City of Ottawa this 17th day of NOVEMBER, A.D. 2009.

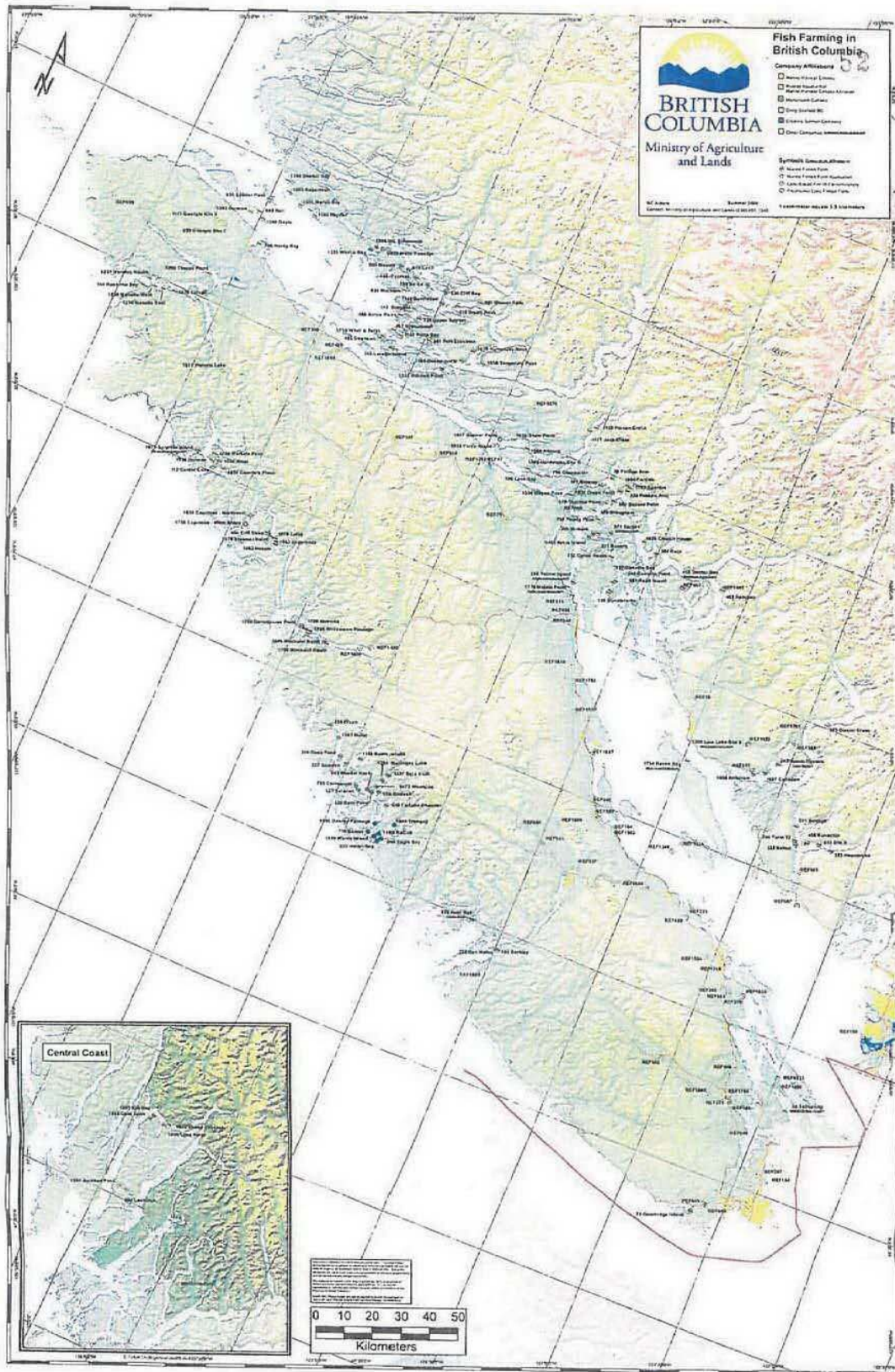
Rita Mauer Clarke
A Commissioner for taking Affidavits
Within the Province of Canada



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This is Exhibit "E" referred to in the Affidavit of TREVOR SWERDFAGER sworn before me at the City of Ottawa in the Province of Ontario this 17th day of NOVEMBER, A.D. 2009.
Rita Marie Connors
 A Commissioner for taking Affidavits within the Province of Ontario



This is Exhibit E referred to in the Affidavit of TREVOR SWERDFAGER sworn before me at _____ this _____ day of NOVEMBER A.D. 2009

A Commissioner for taking Affidavits within the Province of _____

Canada

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Proactive Disclosure

Date Modified: 2009-10-30

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Update: British Columbia Supreme Court (BCSC) Decision regarding management of aquaculture in B.C.

On February 6, 2009, the British Columbia Supreme Court (BCSC) held that the activity of finfish aquaculture is a fishery and falls under the exclusive jurisdiction of the federal government under the *Constitution Act, 1867*. Most of the challenged provisions of the B.C. provincial regulatory scheme for the management of aquaculture activities were found to be outside the jurisdiction of the Province of B.C. While the court found that most of these provincial provisions were invalid, it ordered that the current regulatory regime be maintained for 12 months to allow the federal government an opportunity to consider legislation of its own. The 12-month period ends on February 5, 2010.

While the decision of the BCSC is being appealed, the Department of Fisheries and Oceans (DFO) is moving forward to develop draft regulations under the *Fisheries Act* for the management of aquaculture in B.C. The federal regulatory development process takes time and consultation. DFO is taking a responsible course of action to establish a new legal framework for regulating the fisheries aspects of the B.C. aquaculture industry. Details of the public consultation process to support the development of the draft regulation will be made available within the next few weeks.

This is Exhibit A Affidavit of SNERDFAGER, TREVOR sworn before me at the City of Ottawa in the Province of Ontario this 17th day of NOVEMBER, A.D. 20 09
John P. ...
 A Commissioner for taking Affidavits with the Province of Ontario



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CANADA/BRITISH COLUMBIA MEMORANDUM OF UNDERSTANDING
ON AQUACULTURE DEVELOPMENT

THIS AGREEMENT made this 6 day of Sept 1988

BETWEEN THE GOVERNMENT OF CANADA (hereinafter referred to as
"Canada" represented by the Minister of Fisheries and Oceans)

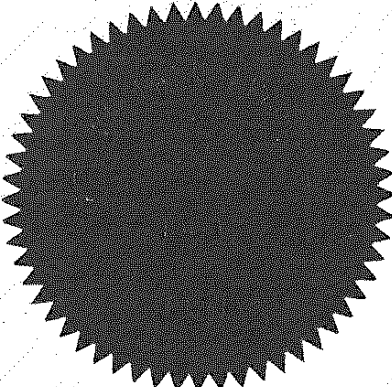
OF THE FIRST PART

AND THE GOVERNMENT OF BRITISH COLUMBIA (hereinafter referred
to as "British Columbia") represented by the Minister of
Agriculture and Fisheries

OF THE SECOND PART

This is Exhibit "P" referred to in the
affidavit of Alexandra B. Morton
sworn before me at North Vancouver
this 5th day of May 2008

R. Brown
A Commissioner for taking Affidavits
within the Province of B.C.



This is Exhibit "G" referred to in the
Affidavit of TREVOR SWEROPAGER
sworn before me at the City of Ottawa
in the Province of Ontario this
17th day of NOVEMBER, A.D. 2009
Rita Mauran Adamache
A Commissioner for taking Affidavits
within the Province of Ontario

WHEREAS Canada and British Columbia wish to establish a mutual agreement to advance the orderly growth and development of the aquaculture industry in British Columbia;

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AND WHEREAS both Canada and British Columbia have substantial interests in the prudent development of an economically sound aquaculture sector and the facilitation of investment therein;

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AND WHEREAS both Canada and British Columbia are interested in identifying and clarifying their respective roles in advancement of the aquaculture sector;

THEREFORE, without prejudice to their respective Constitutional powers, the parties hereby agree:

1. Definitions

- 1.1 "aquaculture" means the commercial culture or husbandry of aquatic plants or animals by the private sector, and excludes ocean ranching, spawn-on-kelp, bait-holding, and contracted Salmonid Enhancement Program activities;
- 1.2 "aquaculture facility" means lands or waters where aquaculture is conducted, including the buildings, improvements or fixtures situated thereon, and associated personal property such as ships, barges, tanks, cages or structures, but excludes fish processing facilities;
- 1.3 "plants" and "animals" includes adult forms, seed, eggs, larvae, young or juvenile stages or any parts thereof;
- 1.4 "extension program" means the provision and promotion of technical, marketing, production and business management information, procedures and technologies to and for the benefit of the aquaculture industry; and
- 1.5 "technology transfer" means transmittal and adoption of scientific and production information, procedures and technologies to and for the benefit of the aquaculture industry.

2. Scope

- 2.1 This Agreement extends to the aquatic plants and animals currently, or which may be, husbanded or cultured in British Columbia.
- 2.2 Nothing in the Agreement affects or extends to the terms and conditions of valid Provincial tenure or to applications, policy, procedures, guidelines or legal duties and obligations concerning that tenure. "Provincial Tenure" means the right to occupy Provincial Crown Lands, however conferred, and includes permission conferred by a licence issued under authority of the Land Act.

3. Research and Development

- 3.1 British Columbia and Canada shall facilitate research, development and technology transfer as it relates to aquaculture, in a co-operative manner to ensure that programs are complementary, cost effective and meet the needs of industry. The Management Committee (Schedule A) shall be the forum for co-ordination, co-operation and the identification of priorities.

3.2 Canada shall undertake research and development related to the aquaculture industry in British Columbia including conducting research at aquaculture facilities where appropriate. Canada will conduct basic and applied mission-oriented research related to the aquaculture industry. Canada shall communicate research and development results to the aquaculture industry and British Columbia, and shall encourage rapid communication of key results to those parties.

3.3 British Columbia will facilitate and encourage the development, provision and delivery of extension programs to the aquaculture industry, and Canada shall co-operate with British Columbia in the provision of those services, and in facilitating technology transfer to the industry.

3.4 British Columbia and Canada agree to promote and encourage the aquaculture industry, universities and other agencies to undertake, or focus, activities related to the development, acquisition, application and dissemination of knowledge or technology to maximize the benefit of such activities to the aquaculture industry.

4. Education and Training

4.1 British Columbia will facilitate and encourage the development, provision and delivery of educational and on-the-job programs that will provide academic, technical and safety training for the aquaculture industry.

4.2 Canada will encourage the training of graduate students, post-doctoral fellows, technical or industry personnel in its research facilities and in other institutions.

5. Administration of Aquaculture

5.1 Licensing and Regulations: Provincial

5.1.1 British Columbia may issue licences to carry out aquaculture operations in the Province of British Columbia.

5.1.2 The Ministry of Agriculture and Fisheries will act as Provincial lead agency in dealing with Canada. However, any ministry of the Provincial Government may be responsible for exercising its powers and regulations herein referred to, and may deal directly with Canada.

5.1.3 British Columbia, in establishing regulations and policies for the aquaculture industry, may address, among others, the following concerns:

- (a) development and management of the aquaculture industry in the Province;
- (b) establishment of categories of aquaculture licences and the terms and conditions of each;
- (c) exemption of persons, classes of persons, types of aquaculture or activities from provincial regulations;

- (d) fees or royalties in regard to licensing aquaculture operations;
- (e) prescription of forms or applications for aquaculture licences and for approvals to transport and transfer aquatic plants and animals within British Columbia;
- (f) size, spacing, density and location of aquaculture facilities and the use, content and enforcement of site-development plans;
- (g) number of aquaculture licences that may be held by one person;
- (h) marking and identification of aquaculture sites and structures for purposes other than the protection of navigation;
- (i) reporting requirements, records and documents, and fees in respect thereof;
- (j) performance standards for aquaculture facilities;
- (k) qualifications or financial standards for aquaculture facilities;
- (l) protection of the confidentiality of information required from licencees and applicants;
- (m) methods of handling, buying, selling, holding and possession, offering or advertising for sale or maintaining the quality of aquatic plants or animals within the province;
- (n) approved methods of harvesting in an aquaculture facility and prohibitions of such harvesting without the consent of the licencee;
- (o) standards relative to the design, layout, construction materials and equipment of aquaculture facilities.

5.1.4 In undertaking the above, British Columbia recognizes the need for orderly and responsible growth and development of aquaculture and agrees to consult with Canada to develop criteria and standards that recognize the possible impacts of aquaculture and to minimize adverse affects of aquaculture on fish health, fish stocks, fish habitat and fishing activities.

5.1.5 All aquaculture licence applications in British Columbia shall be referred to Canada for comment prior to establishing the conditions of licences.

5.2. Regulation: Federal

5.2.1 The Department of Fisheries and Oceans will act as lead federal agency for aquaculture in British Columbia. However, any federal department of the Government of Canada may be responsible for exercising its powers and regulations herein referred to, and may deal directly with British Columbia in that regard.

- 5.2.2 Leases issued by Canada over Federal properties shall continue to be administered by Canada.
- 5.2.3 The Fish Health Protection Regulations and related instruments under the Fisheries Act shall apply to all stocks in aquaculture facilities.
- 5.2.4 Canada may enact regulations for conservation and protection of wildstocks and fish habitat with respect to aquaculture.
- 5.2.5 Canada will continue to facilitate the provision of approvals under the Navigable Waters Protection Act of aquaculture facilities to ensure that other waterway users have equitable access and that marine navigational rights of passage are respected.
- 5.2.6 For federally regulated species, Canada is responsible for issuing permits for collecting wild broodstock for aquaculture including eggs, milt, spawn, larvae, juveniles and adults.
- 5.2.7 Canada undertakes to carry out or cause to be carried out sanitary shellfish water quality surveys, paralytic shellfish poison surveys, and product and other certification programs in accordance with all shellfish export requirements.

5.3 Co-ordination

- 5.3.1 Upon execution of this Agreement, Canada shall advise holders of existing licences, issued by Canada, to apply for a licence issued by British Columbia. In replacing the licences formerly issued by Canada, British Columbia will undertake to honour the general purposes and conditions of those licences.
- 5.3.2 Canada and British Columbia will develop mutually acceptable aquaculture referral processes that consider fish health, fish habitat and fish harvesting concerns.
- 5.3.3 British Columbia and Canada will consult in exercising existing and in establishing new regulations and policies for the aquaculture industry and may address, among others, the following concerns:
 - a) the introduction into the province and transfer and transport within the province between aquaculture facilities and to processing plants within the province, of aquatic plants and animals including conducting environmental assessment relative to such activities;
 - b) isolation and quarantining of aquatic plants and animals, and where diseased or infested with harmful lifeforms, disposal or destruction of such plants and animals, and disinfection or disposition of equipment related to such plants and animals;
 - c) standards relative to construction and operation of aquaculture facilities, and methods of handling, storage and use of chemicals, fertilizers, vaccines, feeds and other substances used in the conduct of aquaculture; and

d) in conjunction with the aquaculture industry, development of product quality standards.

- 5.3.4 Canada agrees to provide, where possible, both general and site-specific information necessary to identify critical fish habitats, stocks and related matters to enable British Columbia to develop policies and programs that minimize the possibility of adverse impacts from aquaculture.
- 5.3.5 Canada and British Columbia will consult on the development of policy regarding international and interprovincial importations of aquatic plants or animals or intra-provincial movements which would expose a watershed or marine area, all or part of which, is included in British Columbia, to the introduction of exotic species, diseases and pests.
- 5.3.6 Canada and British Columbia will, through the Federal-Provincial Transplant Committee, review, approve or reject applications for the introduction, transport and transfer of aquatic plants and animals into and within British Columbia.
- 5.3.7 Canada and British Columbia will establish mechanisms for on-going dialogue with the aquaculture industry, in a form and with terms of reference as agreed to by the Management Committee.

5.4 Dispute Resolution

- 5.4.1 In the event of a dispute between Canada and British Columbia over a substantive question affecting matters referred to in this agreement it shall be referred to the Management Committee. Where the Management Committee is unable to resolve the dispute, it shall be referred to the Deputy Minister of Fisheries and Oceans for Canada and the Deputy Minister of Agriculture and Fisheries for British Columbia who shall diligently attempt to resolve the dispute as quickly as possible and in accordance with the intent of this Agreement.
- 5.4.2 Where a court of competent jurisdiction finds a particular regulation to be ultra vires the powers of Canada or British Columbia and neither government intends to appeal the decision or the appeal process has been exhausted, the government that has jurisdiction for the matter shall consider forthwith the passing of substantially similar regulations to replace the ones declared ultra vires by the Court.
- 5.4.3 Notwithstanding anything in this Agreement, Canada or British Columbia may take measures deemed necessary to protect matters within its jurisdiction.

5.5 Compliance and Inspection

- 5.5.1 Canada and British Columbia shall conduct periodic inspections of aquaculture facilities to determine compliance with their respective Acts, regulations and guidelines and will provide the other with results relevant to their mandate of those inspections. Nothing in this Agreement shall affect

the duties of the parties with regard to fish plant inspections.

- 5.5.2 Canada will consult with British Columbia concerning appointment, as agents for fish health protection purposes, of qualified persons recommended by British Columbia. British Columbia shall have a role in the detection, prevention, control and eradication of fish diseases in British Columbia.
- 5.5.3 Canada and British Columbia in accordance with their respective environmental and fish habitat protection mandates, shall from time to time, monitor waste accumulations from aquaculture operations and the effects thereof, and share this information with each other.
- 5.5.4 (a) Canada will exercise its responsibilities to monitor aquaculture products destined for human consumption for antibiotic residues, toxic materials and other additives or contaminants likely to pose a hazard to human health;
(b) Canada will exercise its responsibilities to specify quality or grade standards for interprovincial and international trade and inspect for compliance; and
(c) British Columbia will exercise its responsibilities to license and inspect facilities buying, vending and processing aquaculture products for intraprovincial trade.
- 5.5.5 Nothing in the above shall affect the existing arrangements regarding the enforcement of the international agreement on molluscs, and Canada will continue to exercise control over exportation of molluscs.
- 5.5.6 Canada and British Columbia shall consult to establish effective procedures for inspection and enforcement.

6. Feed for Aquaculture

- 6.1. In developing and implementing policies to optimize the allocation, harvest and utilization of fish stocks and fish offal, Canada agrees to take into consideration fish feed requirements of the British Columbia aquaculture industry.

7. Egg Supply

- 7.1 Canada and British Columbia will negotiate annually the quantity of salmon eggs to be made available to the aquaculture industry.
- 7.2 Within the constraints of salmon conservation and stock rebuilding, Canada will make available small quantities of genetic material from wild salmon stocks to facilitate aquaculture broodstock development.

8. Therapeutants and Vaccines

- 8.1 Therapeutic drugs used in aquaculture shall be regulated by Health and Welfare Canada. Vaccines used in aquaculture shall be regulated by

Agriculture Canada. Canada agrees to facilitate research, development and testing in these areas.

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9. Statistics

- 9.1 Aquaculture products statistics shall be collected as specified in the existing Canada-British Columbia Letter of Agreement on Co-operative Collection and Analysis of Processed Fish Statistics.
- 9.2 British Columbia shall collect annually, in a mutually agreed form, data from aquaculture facilities relevant to production, distribution and sales. It shall provide the data to Canada.
- 9.3 Canada shall collect annually, in a mutually agreed form, data on aquaculture imports and exports.
- 9.4 Canada shall compile provincial statistics on aquaculture and publish them annually in a national report together with its own statistics.
- 9.5 To facilitate the exchange and supply of cultivated stock, Canada shall develop and maintain a National Registry of important aquaculture stocks. Canada shall make available to British Columbia information concerning those stocks, whether or not indigenous to British Columbia, including information about each stock's performance characteristics, ancestry and related facts.
- 9.6 Canada shall maintain Pacific and National Registries of fish diseases and a data centre for the documentation and dissemination of information pertaining to fish diseases in Canada.

10. Management and Implementation

- 10.1 There shall be a Management Committee whose structure and functions are as set out in Schedule A.
- 10.2 The Director General, Pacific Region, Department of Fisheries and Oceans, shall represent Canada for the implementation of this Agreement on behalf of Canada, and shall be Co-Chairman of the Management Committee.
- 10.3 The Deputy Minister, Ministry of Agriculture and Fisheries, or designate, shall represent British Columbia for the implementation of this Agreement on behalf of British Columbia and shall be Co-Chairman of the Management Committee.
- 10.4 Implementation of this Agreement will be coordinated with other Canada-British Columbia agreements administered by the Department of Fisheries and Oceans.
- 10.5 The parties agree that they shall use their best efforts to achieve expeditious alteration of legislation or administrative policies that may impede the implementation of this Agreement.
- 10.6 The Management Committee will meet semi-annually to review implementation of this Agreement and will consult as necessary to ensure its effective operation.

10.7 The parties will use their best efforts to ensure implementation of the intent of this Agreement in fostering growth and development of aquaculture in British Columbia.

11. National Co-ordination

11.1 The parties will co-operate with other provinces, if possible, through national meetings or other arrangements, for the putting in place of plans and projects aimed at developing aquaculture and at promoting a co-ordinated and joint approach to the development of aquaculture and the marketing of its products.

12. Amendments to Agreement

12.1 This Agreement may be amended at any time on mutual accord.

12.2 A notice of proposal to amend the Agreement by one party shall be submitted in writing to the other party, which shall respond within three (3) months. Failure to respond within three (3) months shall be deemed to be rejection of the amendment proposal.

13. Coming into Force

13.1 This Agreement shall come into force on signing.

14. Termination

14.1 The present Agreement may be terminated on one year's written notice by either party.

14.2 Licences issued during this Agreement remain valid for one year, or until their date of expiry, whichever comes first, notwithstanding that the Agreement may be terminated during this period.

SIGNED IN THE PRESENCE OF:

GOVERNMENT OF CANADA

"Original signed by the Honourable Tom Siddon"

Witness

Minister of Fisheries and Oceans

GOVERNMENT OF BRITISH COLUMBIA

"Original signed by the Honourable John Savage"

Witness

Minister of Agriculture and Fisheries

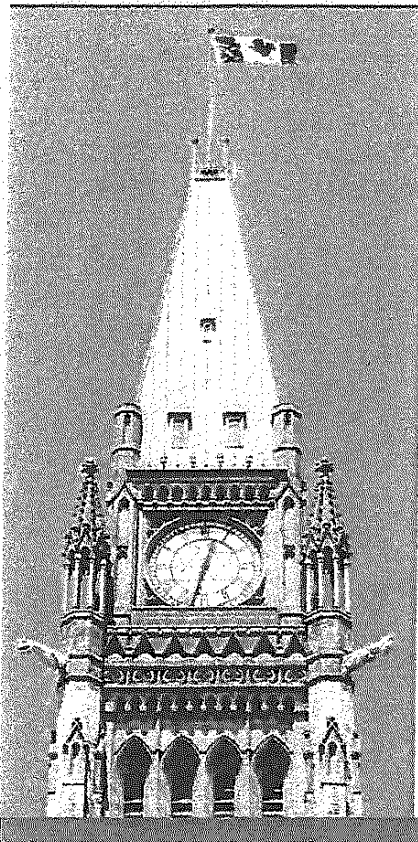
MANAGEMENT COMMITTEE

The Management Committee shall be comprised of equal numbers of federal and provincial members. It shall have a least 4 members. It shall meet not less than semi-annually.

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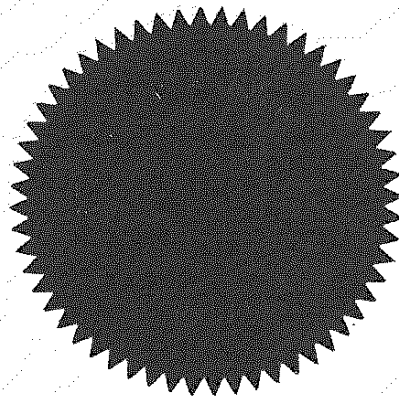
The Management Committee shall

- function as a co-ordination and liaison mechanism to implement this Agreement;
- identify priorities, timing, sequence and funding for activities of joint interest;
- co-ordinate and consult with industry and other interested groups including non-government or international organizations;
- strike and co-ordinate subordinate committees or task groups as necessary to perform its duties;
- identify research priorities and encourage timely communication of key research results to the industry;
- develop terms of reference to establish and maintain a direct communications link with industry; and
- function in resolving disputes arising between Canada and British Columbia.



CABINET DIRECTIVE ON STREAMLINING REGULATION

This is Exhibit "H" referred to in the Affidavit of TREVOR SWERDFAGER sworn before me at the City of Ottawa in the Province of Ontario this 17th day of NOVEMBER, A.D. 2009
Rita Mauer Adamske
A Commissioner for taking Affidavits within the Province of Ontario



Canada

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Our Commitment to Canadians

The Government of Canada is committed to protecting and advancing the public interest by working with Canadians and other governments to ensure that its regulatory activities result in the *greatest overall benefit to current and future generations of Canadians*.

When regulating, the federal government will:

- **protect and advance the public interest** in health, safety and security, the quality of the environment, and the social and economic well-being of Canadians, as expressed by Parliament in legislation;
- **promote a fair and competitive market economy** that encourages entrepreneurship, investment, and innovation;
- **make decisions based on evidence** and the best available knowledge and science in Canada and worldwide, while recognizing that the application of precaution may be necessary when there is an absence of full scientific certainty and a risk of serious or irreversible harm;
- **create accessible, understandable, and responsive** regulation through inclusiveness, transparency, accountability, and public scrutiny;
- **advance the efficiency and effectiveness** of regulation by ascertaining that the benefits of regulation justify the costs, by focussing human and financial resources where they can do the most good, and by demonstrating tangible results for Canadians; and
- **require timeliness, policy coherence, and minimal duplication** throughout the regulatory process by consulting, coordinating, and cooperating across the federal government, with other governments in Canada and abroad, and with businesses and Canadians.

1.0 Introduction

Regulation is an important tool for protecting the health and safety of Canadians, preserving the environment, and securing the conditions for an innovative and prosperous economy. Regulations are a form of law—they have binding legal effect and usually set out rules that apply generally, rather than to specific persons or situations.

Often referred to as “delegated” or “subordinate legislation,” regulations are made by persons to whom or bodies to which Parliament has delegated authority, such as Cabinet (the Governor in Council), a minister, or an administrative agency. Authority to make regulations must be expressly delegated through enabling legislation.

When drafting enabling legislation, departments and agencies are to ensure that subordinate legislative instruments, including regulations, are subject to the requirements of the *Statutory Instruments Act*. Regulations and other such instruments should not be exempted from these requirements except in exceptional circumstances, when approved by Cabinet.

For more information on the requirements governing legislative instruments, see the *Cabinet Directive on Law-making*.

2.0 Scope of Application

The *Cabinet Directive on Streamlining Regulation* applies to all departments and agencies involved in the federal regulatory process. Government officials are responsible for abiding by the Directive at all stages of the regulatory lifecycle—development, implementation, evaluation, and review.

3.0 Implementing the *Cabinet Directive on Streamlining Regulation*

This directive is supported by a series of frameworks and documents that provide detailed guidance for government officials on the regulatory process. These frameworks can be found at <http://www.regulation.gc.ca>.

When regulating, departments and agencies are responsible for ensuring that relevant legislation and directions from Cabinet and the Treasury Board are followed, including the following:

- *Statutory Instruments Act*;
- *User Fees Act*;
- *Financial Administration Act*;
- *Cabinet Directive on Law-making*;
- *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*;

- *A Framework for the Application of Precaution in Science-based Decision Making about Risk*; and
- *A Framework for Science and Technology Advice: Principles and Guidelines for the Effective Use of Science and Technology Advice in Government Decision Making*.

A review of the Directive will be conducted within five years of its coming into force. Accordingly, the Regulatory Affairs Sector of the Treasury Board of Canada Secretariat (Regulatory Affairs) will work with departments and agencies to develop a performance measurement and evaluation strategy and to monitor the implementation of the Directive. In addition, departments and agencies are expected to submit a report to their senior management and Regulatory Affairs on how they have met the commitments and directions set out here. It is expected that the review of the Directive will include the involvement of interested Canadians.

3.1 Regulatory Process Requirements

In consultation with Regulatory Affairs, departments and agencies will assess regulatory proposals at an early stage to determine where approval processes can be streamlined and where resources should be focussed. The following factors will be considered in this assessment:

- potential impact of the regulation on health and safety, security, the environment, and the social and economic well-being of Canadians;
- cost or savings to government, business, or Canadians and the potential impact on the Canadian economy and its international competitiveness;
- potential impact on other federal departments or agencies, other governments in Canada, or on Canada's foreign affairs; and
- degree of interest, contention, and support among affected parties and Canadians.

Emergency situations—when there is an immediate and serious risk to the health and safety of Canadians, their security, the economy, or the environment—may require an expedited process. In these cases, departments and agencies will work with Regulatory Affairs to proceed in a manner that most effectively protects the public interest.

4.0 Regulatory Analysis

4.1 Regulatory consultation

Departments and agencies are responsible for identifying interested and affected parties, and for providing them with opportunities to take part in open, meaningful, and balanced consultations at all stages of the regulatory process.

When undertaking consultations, departments and agencies are to:

- inform and engage Canadians on the nature and implications of the public policy issue based on available evidence, science, or knowledge;
- include Canadians in developing policy objectives;
- set out the process and timelines in a clear manner so that affected parties can organize and provide input; and
- provide timely feedback to Canadians and affected parties on the outcome of the consultations and on the priorities considered in decision making.

Departments and agencies are also to work with First Nations, Inuit, and Métis communities and peoples; national, regional, and local Aboriginal organizations; and Aboriginal governments and ensure that they meet all obligations that may exist in relation to rights protected by section 35 of the *Constitution Act, 1982*.

Departments and agencies are to publish proposals in the *Canada Gazette*, Part I, to allow for a public comment period and to then take the comments received into consideration. The standard comment period is 30 days, but it can vary based on legislative requirements, international obligations, and other considerations. A minimum comment period of 75 days is required for proposals for new and changed technical regulations that may affect international trade.

Departments and agencies should note that publishing proposed regulations in the *Canada Gazette* is not a substitute for meaningful consultations on the development of regulatory proposals. Cabinet may exempt proposals from publication in Part I of the *Canada Gazette*.

4.2 Identifying and assessing public policy issues

Departments and agencies are responsible for assessing public policy issues, including potential risks, and demonstrating through the best available evidence and knowledge that government intervention is needed.

When assessing and documenting public policy issues, departments and agencies are to:

- analyze the public policy issue, its causes, and context, including its urgency and immediate and long-term impacts;
- review wherever possible relevant evidence-based assessments, analyses, standards, and classification systems of provincial and territorial governments, other countries, or international organizations;
- explain fully to decision makers and Canadians the nature of the issue and how its impacts change over time; and
- describe the scientific and empirical evidence, uncertainties, ethical considerations, and public views of the public policy issue.

Best Practice: For significant proposals, departments and agencies are encouraged to seek independent review of risk assessments. Departments and agencies can use science advisory boards or other existing mechanisms for this review.

When there is a risk of serious or irreversible harm, the government recognizes that the absence of full scientific certainty shall not be used as a reason for postponing decisions to protect the health and safety of Canadians, the environment, or the conservation of natural resources. For guidance on the application of precaution, departments and agencies should consult *A Framework for the Application of Precaution in Science-based Decision Making about Risk*.

4.3 Setting public policy objectives

Once policy issues have been assessed and it is determined that government intervention is required, departments and agencies are responsible for setting public policy objectives that outline tangible outcomes for Canadians. Departments and agencies are to:

- set measurable objectives that address the public policy issue and its causes;
- establish linkages to enabling legislation and government priorities to ensure relevance and consistency; and
- develop and use performance indicators on an ongoing basis to monitor and report on progress against performance expectations.

4.4 Selecting, designing, and assessing regulatory responses

Selecting the appropriate mix of government instruments

Departments and agencies are responsible for assessing the effectiveness and appropriateness of regulatory and non-regulatory instruments for achieving policy objectives.

Departments and agencies are to:

- identify potential points for effective intervention;
- identify the institutions and parties that should be involved in addressing the public policy issue;
- identify the appropriate instrument or mix of instruments, including regulatory and non-regulatory measures, and justify their application before submitting a regulatory proposal;
- demonstrate that the regulatory response is designed to address policy objectives;
- demonstrate that the regulatory response is proportional to the degree and type of risk;
- demonstrate that the regulatory response will not unduly affect areas that it was not designed to address;

Best Practice: Departments and agencies are encouraged to use standardization tools and approaches offered by Canada's National Standards System (NSS). This network provides internationally accepted best practices and test methods, improves market entry and acceptance, and reduces the need for multiple testing or repetitive certification. For more information, please see <http://www.scc.ca/en/nss/index.shtml>.

Regulators may also wish to check *RegWatch*, a search tool that identifies Canadian and international standards referenced in Canadian laws and regulations. Please visit https://alert.scc.ca/rwh/basic_e.jsp.

- specify, particularly for technical regulations, regulatory requirements in terms of their performance rather than their design or descriptive characteristics; and
- make use of all or parts of relevant national or international standards, guidelines, and recommendations as a basis for technical regulations and for conformity assessment procedures when they fulfil intended policy objectives.

Assessing legal implications

When designing regulations, departments and agencies are responsible, with assistance from the Department of Justice Canada, for assessing the legal implications of the proposal and for ensuring that it is legally sound.

Departments and agencies are therefore expected to take measures to ensure that regulations are:

- authorized by enabling legislation or other law;
- consistent with the *Constitution Act, 1867* and the *Constitution Act, 1982* (including the *Canadian Charter of Rights and Freedoms* and with particular note of any obligation relating to Aboriginal and Treaty Rights arising out of s. 35), and the *Canadian Bill of Rights, 1960*; and
- well drafted and able to operate effectively with other related laws, particularly legislation of general application such as that referred to in this document under the heading “Implementing the *Cabinet Directive on Streamlining Regulation*.”

Compliance with international obligations

Departments and agencies are to respect Canada’s international obligations in such areas as human rights, health, safety, security, international trade, and the environment. They must also implement provisions related to these obligations in all stages of regulatory activity.

To ensure the compliance of regulatory proposals, departments and agencies should seek the advice and assistance of:

- the Legal Bureau of Foreign Affairs and International Trade Canada—the Legal Bureau is responsible for the negotiation, creation, and interpretation of Canada’s international legal obligations and provides advice concerning the interpretation and application of such obligations for regulation;

For more information on requirements related to Canada’s international trade obligations for the design and implementation of technical regulations, conformity assessment procedures, and sanitary and phytosanitary measures, departments and agencies should refer to Appendix B of this document.

- Foreign Affairs and International Trade Canada, which is responsible for coordinating the implementation of Canada's international trade obligations, including the implementation of the World Trade Organization (WTO) Agreement and the North American Free Trade Agreement (NAFTA);
- the Department of Justice Canada, with its specialized sections, and its departmental legal services units that are responsible for advising departments and agencies on legal matters, including consistency of regulatory proposals with Canada's international obligations; and
- the Trade Law Bureau of Foreign Affairs and International Trade Canada and the Department of Justice Canada, which provides advice on Canada's international trade obligations.

Coordination and cooperation

Coordinating across the Government of Canada

Federal departments and agencies are responsible for working together to develop and implement regulations to maximize effectiveness and minimize the cumulative and unintended impacts on Canadians and the economy. To do so, departments and agencies are to:

- identify and consult with other federal departments and agencies that have a specific interest in the proposed regulation;
- identify similar or related regulatory requirements—either existing or proposed—in the area being regulated;
- assess these requirements to minimize cumulative impacts and develop complementary and cooperative approaches whenever possible; and
- coordinate the implementation and management of regulation to minimize complexity and duplication.

Best practice: Departments and agencies are encouraged to apply service-oriented approaches to the administration of regulatory programs. Coordinated approaches, such as single-window service delivery, can reduce the administrative burden and improve compliance. For more information, please see the Institute for Citizen-Centred Service website at <http://www.iccs-isac.org>.

Cooperating with provincial and territorial governments

Departments and agencies are responsible for cooperating with provincial and territorial governments in the development and implementation of regulation. Departments and agencies are to:

- involve provincial and territorial counterparts in federal regulatory initiatives;
- identify and assess similar or related provincial and territorial requirements, and work with relevant jurisdictions to manage any cumulative impacts and minimize duplication and conflicting requirements;
- comply with the Government of Canada's intergovernmental agreements, such as the Canadian Agreement on Internal Trade;

- develop cooperative arrangements such as the mutual recognition of requirements, the adoption of consensus-based standards, and consistency in reporting requirements whenever possible; and
- establish national standards or common conformity assessment procedures to support and facilitate internal trade whenever possible.

International cooperation

Departments and agencies are to take advantage of opportunities for cooperation, either bilaterally or through multilateral fora, by:

- reviewing and influencing international best practices, sharing knowledge, adopting or contributing to the development and updating of international standards and conformity assessment procedures, and developing and pursuing compatible approaches with international counterparts;
- limiting the number of specific Canadian regulatory requirements or approaches to instances when they are warranted by specific Canadian circumstances and when they result over time in the greatest overall benefit to Canadians; and
- identifying the rationale for their approach, particularly when specific Canadian requirements are proposed.

Analyzing the benefits and costs of regulation

When determining whether and how to regulate, departments and agencies are responsible for assessing the costs and benefits of regulatory and non-regulatory measures, including government inaction. This analysis should include quantitative measures and, when costs and benefits are difficult to quantify, qualitative measures. The analysis of these impacts provides useful information to decision makers, even when economic efficiency is not the only or the overriding public policy objective.

When assessing options to maximize net benefits, departments and agencies are to:

- identify and assess the potential positive and negative economic, environmental, and social impacts on Canadians, business, and government of the proposed regulation and its feasible alternatives; and
- identify how the positive and negative impacts may be distributed across various affected parties, sectors of the economy, and regions of Canada.

Best Practice: To improve accountability and transparency, departments and agencies should prepare an accounting statement to report on the quantifiable and non-quantifiable costs and benefits of significant proposals.

Recommending an option

When developing the option that maximizes net benefits, departments and agencies are to:

- limit the cumulative administrative burden and impose the least possible cost on Canadians and business that is necessary to achieve the intended policy objectives;
- consider the specific needs of small business and identify the least burdensome but most effective approach to addressing these needs;
- ensure that regulatory restriction on competition is fair, limited, and proportionate to what is necessary to achieve the intended policy objectives;
- prevent or mitigate adverse impacts and enhance the positive impacts of regulation on the environment, the health and safety of Canadians, and competitiveness, trade, and investment;
- identify the scope and nature of residual adverse environmental effects after mitigation and enhancement strategies have been considered; and
- identify necessary follow-up measures to track environmental effects over time.

Departments and agencies should consult the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* for further guidance on conducting environmental impact assessments.

4.5 Planning for implementation, compliance, and enforcement

Planning for implementation

Departments and agencies are responsible for putting in place the processes to implement regulatory programs and to manage human and financial resources effectively, including:

- publishing service standards, including timelines for approval processes set out in regulations, setting transparent program objectives, and identifying requirements for approval processes;
- taking advantage of opportunities for implementation and delivery coordination with other departments and agencies, and with other governments in Canada that are regulating in the same sector;
- planning for the necessary human and financial resources that the recommended option would require, including compliance and enforcement activities; and
- ensuring that those charged with carrying out regulatory responsibilities have the necessary resources, skills, and abilities.

Departments and agencies should consult the relevant Treasury Board policies for further guidance on the development and evaluation of service standards.

Planning for compliance and enforcement

Departments and agencies are responsible for promoting regulatory effectiveness by developing and implementing compliance and enforcement strategies. These strategies are to:

- be developed in consultation with affected parties, including those that must administer the regulation or comply with it as appropriate;

- use an appropriate range of compliance tools; and
- provide timelines and processes for assessing and reviewing compliance activities.

4.6 Measuring, evaluating, and reviewing regulation

Departments and agencies are responsible for ensuring that regulation continually meets its initial policy objectives and for renewing regulatory frameworks on an ongoing basis.

Measuring and reporting on performance

Departments and agencies are to:

- identify the intended results of regulation in managing a public policy issue and, before submitting a regulatory proposal, develop time-based performance indicators for significant regulatory activities;
- take measures to ensure that monitoring and reporting activities are effective while imposing the least possible burden on government, business, and Canadians;
- integrate performance measures that can be used to adjust compliance plans as needed; and
- collect performance information on the results of existing regulation and provide Canadians with this information in a timely manner.

Evaluating regulatory programs

Departments and agencies are to evaluate their regulatory programs according to the time frames and cycle established in the Treasury Board *Policy on Evaluation* to demonstrate results for Canadians. Subject to the impacts and complexity of the regulatory programs, departments and agencies are to assess the following areas, when appropriate:

- inputs (e.g., resources, mandate, and enabling authorities), activities, effectiveness, ultimate outcomes of the regulatory program, and the extent to which the program contributed to the achievement of reported results;
- value for money (e.g., relevance, efficiency, and cost-effectiveness); and
- governance, decision-making and accountability processes, service standards, and service delivery mechanisms.

Reviewing regulatory frameworks

Departments and agencies are to regularly assess the results of performance measurement and evaluation to identify regulatory frameworks in need of renewal. Once identified, departments and agencies are to examine the regulation with a focus on:

- the effectiveness of the current regulation in meeting the policy objective;
- the current instrument selection, level of intervention, and degree of prescriptiveness;
- clarity and accessibility of the regulation to users; and
- the overall impact on competitiveness, including trade, investment, and innovation.

Planning, priority- and timeline-setting, and the measuring and reporting of outcomes of regulatory review should be determined by departments and agencies in collaboration with affected parties.

5.0 Responsibilities for Planning and Reporting to Canadians

Departments and agencies are to:

- develop regulatory plans and priorities for the coming year(s); and
- report publicly on plans, priorities, performance, and regulatory review in accordance with Treasury Board guidelines.

6.0 Enquiries and Further Information

Treasury Board of Canada Secretariat—Public Enquiries

Telephone: 1-877-636-0656

Email: info@tbs-sct.gc.ca

Website: <http://www.regulation.gc.ca>

Appendix A: Key Departments and Agencies Involved in the Regulatory Process

The Treasury Board of Canada Secretariat

The Regulatory Affairs Sector (Regulatory Affairs) of the Treasury Board of Canada Secretariat (TBS) is responsible for ensuring that the analysis that departments and agencies provide on policy and regulatory proposals is consistent with the commitments and directions set out in the *Cabinet Directive on Streamlining Regulation* and that the analysis effectively supports ministerial decision making. Regulatory Affairs is also responsible for promoting policy coherence among new proposals, existing policies, and the government's policy agenda.

Regulatory Affairs is expected to:

- provide advice and support to departments and agencies concerning the development of regulatory proposals and the implementation of the Directive;
- work closely with departments and agencies to provide ministers and the Cabinet committee responsible for Governor-in-Council decisions with the necessary information to make decisions on the issues before them;
- review regulatory proposals, challenge departments and agencies on the quality of regulatory analyses, and advise them when the directions set out in the Directive have not been met;
- promote regulatory reform and be a centre of expertise on regulatory governance; and
- assess the effectiveness of the Directive and its implementation.

Regulatory Affairs will work with other sectors in TBS to:

- confirm that regulatory proposals appropriately address resource management; and
- formulate advice and guidance to departments and agencies on other government management policies relevant to their regulatory activities.

The Department of Justice Canada

The Department of Justice Canada provides legal advice to departments and agencies on the legality of proposals for enabling and subordinate legislation, and the legal requirements of the regulatory process.

In doing so, the Department of Justice Canada provides drafting services to departments and agencies and, under the *Statutory Instruments Act*, examines all proposed regulations to ensure that they:

- have the necessary legal authorization to be made;
- are consistent with the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights, 1960*;
- are not an unusual or unexpected use of the enabling authority; and
- are drafted in accordance with established standards.

The Department of Justice Canada also provides departments and agencies with legal tools and advice on the appropriate use of government instruments, regulatory techniques, international standards, and compliance and enforcement techniques.

The Department of Justice Canada and the Legal Bureau of Foreign Affairs and International Trade Canada are responsible for advising on the effect of Canada's international legal obligations, including their implementation in domestic law. The Trade Law Bureau of the Department of Justice Canada and Foreign Affairs and International Trade Canada is responsible for advising departments and agencies on Canada's trade law obligations.

The Privy Council Office

The role of the Privy Council Office is to assess memoranda to Cabinet and legislative proposals with regard to instrument selection, regulatory implications, and consistency with this directive and the *Cabinet Directive on Law-making*. It is also responsible for informing and involving Regulatory Affairs when policy proposals may have a regulatory aspect.

Appendix B: International Trade Obligations Regarding Specific Requirements for the Design and Implementation of Technical Regulations, Conformity Assessment Procedures, and Sanitary and Phytosanitary Measures

The *Cabinet Directive on Streamlining Regulation* establishes the responsibility of departments and agencies to seek advice and comply with Canada's international trade obligations. This appendix draws attention to certain specific requirements applicable to technical regulations, conformity assessment procedures, and sanitary and phytosanitary measures contained in the World Trade Organization (WTO) Agreement on Technical Barriers to Trade, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, and Chapter Seven ("Sanitary and Phytosanitary Measures") and Chapter Nine ("Technical Barriers to Trade") of the North American Free Trade Agreement.

In particular, with respect to technical regulations, conformity assessment procedures, and sanitary and phytosanitary measures that affect trade, departments and agencies are to:

- specify, where possible, technical regulatory requirements in terms of performance rather than design or descriptive characteristics;
- consider accepting as equivalent the technical regulations and conformity assessment procedures of other countries, even if different, provided they achieve the intended regulatory objective and offer an equivalent level of assurance of conformity with domestic technical regulations and standards;
- ensure that technical regulations and conformity assessment procedures treat products from one jurisdiction no less favourably than like products from other jurisdictions;
- ensure that sanitary and phytosanitary measures are based on scientific principles and evidence, that they do not arbitrarily or unjustifiably discriminate against other jurisdictions where identical or similar conditions prevail, and that they are based on international standards, guidelines, or recommendations where they exist;
- accept the sanitary and phytosanitary measures of other countries as equivalent, even if different, provided they achieve Canada's appropriate level of sanitary or phytosanitary protection;
- use available international standards, guidelines, and recommendations as a basis for technical regulations and for conformity assessment procedures where they achieve the intended regulatory objective;
- treat regulatees and products from one jurisdiction no less favourably than those from other jurisdictions when assessing conformity to technical regulatory requirements, providing they are in comparable situations;
- have in place a process to review complaints concerning conformity assessment procedures and must take corrective action when justified; and
- publish proposals for new or changed technical regulations, conformity assessment procedures, and sanitary and phytosanitary measures that may affect international trade for a comment period of at least 75 days and take into account the comments received.