Federal Court  Cour fédérale

Date: 20210702

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

Citation: 2021 FC 700

Ottawa, Ontario, July 2, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

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

Applicants

and

THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD

Respondent

and

ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY AND WATERSHED WATCH SALMON SOCIETY

Interveners

ORDER AND REASONS

[1] On January 18, 2021, each of Cermaq Canada Ltd. [Cermaq] (T-129-21), Mowi Canada West Inc. [Mowi] (T-127-21), Grieg Seafood B.C. Ltd [Grieg] (T-128-21) and 622335 British Columbia Ltd. [Saltstream] (T-132-21) filed applications for judicial review challenging the December 17, 2020 decision of the Minister of Fisheries, Oceans and the Canadian Coast Guard [Minister] to phase out existing salmon farms in the Discovery Islands by June 30, 2022 and to prohibit the transfer of live fish into saltwater sites during the phase out period [Minister's Decision or Decision]. On February 2, 2021, with consent of all parties, the four applications were consolidated and ordered to be heard together.

[2] Cermaq brings this motion for an interlocutory injunction, seeking to restrain the Minister from implementing her decision to phase out existing salmon farming facilities in the Discovery Islands – insofar as that decision prohibits the transfer of fish into two of Cermaq's aquaculture sites during the 18 month phase out period – pending the hearing and determination of Cermaq's underlying application for judicial review of the Minister's Decision. The motion is brought pursuant to ss 18 and 18.2 of the *Federal Courts Act*, RSC 1985, c F-7.

[3] This is not the first injunction motion relating to fish transfers that has been brought in these consolidated matters pending judicial review of the Minister's Decision to phase out salmon farming in the Discovery Islands. On April 5, 2021, Justice Pamel granted the injunctive relief sought by Mowi and Saltstream in *Mowi Canada West Inc v Minister of Fisheries, Oceans*

and the Canadian Coast Guard, 2021 FC 293 [*Mowi*]. Cermaq supported Mowi and Saltstream in that motion (*Mowi* at para 50).

Factual Background

[4] Cermaq and Canada have made detailed written representations as to the factual, procedural and legal backdrop to this motion. Those can be referenced in their respective submissions. What follows is a general background and overview of the legislative framework that governs fisheries licencing and of the events leading up to this injunction motion, the purpose of which is to situate and provide context to the motion before me.

[5] Pursuant to s 7 of the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*], the Minister may, in her absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on. When making such decisions the Minister is required to consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982* (*Fisheries Act* ss 2.3, 2.4). The Minister may also consider the factors set out in s 2.5 of the *Fisheries Act*, which include social, economic and cultural factors in the management of fisheries (s 2.5(g)).

[6] Section 43 of the *Fisheries Act* permits the Governor in Council to make regulations for carrying out the purposes and provisions of the *Fisheries Act*.

[7] These regulations include the *Pacific Aquaculture Regulations*, SOR/2010-270, which govern the issuance of aquaculture licences in British Columbia and pursuant to which DFO has issued marine aquaculture licences to Cermaq (and the other Applicants), authorizing it to carry out aquaculture activities. The *Fishery (General) Regulations*, SOR/93-53, provide a general regulatory framework governing the management of the fisheries. Section 55 of the *Fishery (General) Regulations* prohibits the release of live fish into any fish habitat or the transfer of any live fish to any fish rearing facility unless authorized by licence. These licences are generally referred to as "transfer licences". Section 56 of the *Fishery (General) Regulations* describes the circumstances under which the Minister may issue a transfer licence:

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

[8] The *National Code on Introductions and Transfers of Aquatic Organisms* [ITC Code] was jointly implemented by Canada's federal, provincial and territorial governments in 2003. It is an evergreen document, the most recent version was issued on June 28, 2017. The ITC Code states that it establishes "an objective decision-making framework and consistent national process for assessing and managing the potential ecological, disease and genetic risks associated with intentionally moving live aquatic organisms into, between, or within Canadian watersheds and fish rearing facilities". Further, where the *Fishery (General) Regulations* apply the Regional

Director General of DFO may exercise the power to issue s 56 transfer licences on behalf of the Minister; low-risk movements may be undertaken by an appropriate departmental delegate (ss 6.2.1, 7.2.3). The ITC Code states that the decision making authority, or delegates, should not be a member of the ITC Committee, given that the ITC Code allows for inputs into the decision-making process that are external to the Committee's mandate for transfers requiring formal risk assessments, such as socio-economic criteria and the interests of Indigenous groups (s 6.2.3). The decision-making authority will consider the risk assessment provided by the ITC Committee and the certainty surrounding it. The decision-making authority may take into account socio-economic factors and Indigenous considerations, and will determine whether the risk is acceptable or not (s 6.3.14). Applicants who have been denied a licence may resubmit an application for consideration by the ITC Committee after adding new information directly relating to the risks associated with the licencing decision (s 6.3.15).

[9] Cermaq (and the other Applicants) are subject to the regulatory regime described, in skeletal form, above. Aquaculture operations are also subject to a variety of other regulations and legislation not directly relevant to this injunction motion.

[10] Cermaq has three aquaculture sites in the group of islands between the east coast of Vancouver Island and the mainland of British Columbia, known as the Discovery Islands. Mowi has thirteen such sites, while Grieg, Saltstream and another entity each have one aquaculture site in the Discovery Islands.

[11] Cermaq, or its predecessors, have operated the Brent Island and Venture Point aquaculture sites since 1989.

[12] Cermaq's aquaculture production cycle is comprised of several stages over seven to eight years and requires advanced planning and scheduling. First, the eggs from the broodstock (salmon selected to breed future generations of fish) are collected and transferred to hatcheries where the eggs are incubated until they hatch (fry) and are transferred to freshwater tanks where they continue to grow into small fish (parr). After approximately 14 months in the hatchery, the smoltification process begins, requiring the fish to transition to saltwater within a two to three week period (smolt window). Once this occurs, the fish (now smolts) are transferred from hatcheries to marine net-pens. Some fish are grown out in one marine site until they are ready to be harvested, while other fish are initially grown in one marine site (a nursery site) before being moved to another marine site to finish their growth. In either case, the time required in the marine sites for growing smolts to harvestable fish is approximately 18-22 months.

[13] Brent Island and Venture Point are sites where fish are transferred as juvenile salmon (not smolts) after being raised in a nursery site for a few months. Cermaq's evidence is that its production cycle for fish that were destined for Brent Island and Venture Point in 2021 began in 2017 when the broodstock for this generation of fish were spawned, and that those sites operate on a roughly two-year cycle, in which fish are transferred to the sites at the same time every two years.

[14] Cermaq's evidence is that, since at least 2018, its production plan provided the scheduled transfers of juvenile salmon to its Brent Island and Venture Point farms in May/June 2021, with an originally planned harvest between late 2022 and February 2023. As of June 20, 2021, Cermaq has 1,487,926 fish at its Cecil Island nursery farm. These fish have been at Cecil Island since being transferred there in February and March of this year. Their current average weight is 360 g, and they are approximately 35 cm in length. A condition of the Cecil Island aquaculture licence is that it has a maximum allowable biomass of 650MT. If Cermaq were to continue feeding the fish in the usual course, it would have to stop feeding the fish by July 3, 2021 so as to not exceed its biomass limit. By reducing feed by 25% the biomass limit will be reached by July 9, 2021.

[15] Cermaq states that if it is not granted a transfer licence to move the Cecil Island fish to Brent Island and Venture Point, then it will have to cull all of those fish, as there is no other facility to which they can feasibly be transferred and they cannot be left to grow out at the Cecil Island nursery farm.

[16] Cermaq's evidence is that it has routinely applied for fish transfer licences, approximately 15 each year, and that the transfer licences have been issued by DFO so long as fish health requirements were satisfied. Prior to April 27, 2021, DFO had never denied one of Cermaq's transfer licences applications. Transfer licences were generally issued within approximately 20 business days after the application had been submitted, in accordance with the Service Standards for Routine Movements, Appendix 8 of the ITC Code.

[17] In a September 28, 2020 news release, the Minister announced that starting immediately DFO would be consulting with seven named First Nation communities about the aquaculture sites in the Discovery Islands and "The information exchanged will inform the government's decision on whether or not to renew aquaculture licences in the area, prior to the December-2020 deadline".

[18] The press release also noted that DFO had completed nine peer-reviewed, scientific risk assessments which concluded that the transfer of the pathogens studied posed a minimal risk to abundance and diversity of migrating Fraser River sockeye salmon in the Discovery Island area. It stated that, moving forward, DFO would continue to take a collaborative and area-based approach to aquaculture management and decision-making. An area-based approach would consider Indigenous knowledge, social, economic, geographic, and environmental factors and aim to increase collaboration among parties as government advanced its commitment to develop a responsible plan to transition marine net-pen salmon farming in coastal British Columbia waters. That approach would see DFO working closely with the Province of British Columbia, First Nations, industry, and other stakeholders to develop a comprehensive and pragmatic approach to aquaculture while critical work continued in key areas. The news release included the following quote from the Minister:

> This government is committed to an area-based management approach to aquaculture, and we recognize the concerns raised by partners that these particular farms may not be the best fit for this location nor for the adjacent communities. We will be consulting with each First Nation within the Discovery Islands area, and the information and views they provide will inform my decision on whether or not to renew licences for these farms this December, and in the future.

[19] By letter of November 24, 2020, DFO referenced the Minister's September 28, 2020 announcement and, as a part of the decision making process, invited Cermaq to provide information to inform the decision. Cermaq made its submission on November 30, 2020 attaching four reports, however, Cermaq asserts that its submission was hampered by a lack of information as to the decision making process, the nature or scope of the decision and the concerns raised by First Nations.

[20] On December 8, 2020, the Deputy Minister prepared the "Memorandum for the Minister, Licensing of Marine Finfish Aquaculture in the Discovery Islands (FOR DECISION)" [Memorandum]. The purpose and scope of the Memorandum are captured in its Summary:

Summary

> The purpose of this note is to seek a decision on the issuance of licences for 19 finfish aquaculture sites located within the Discovery Islands (DI) in British Columbia (BC) which are expiring on December 18, 2020. A decision is requested no later than December 15, 2020.
>
> To inform the decision and in response to Recommendation 19 of the Cohen Commission. Fisheries and Oceans Canada (DFO) Science completed nine peer-reviewed, risk assessments to determine the impact of pathogens from salmon farms on Fraser River sockeye. Based on these risk assessments, it was concluded that the potential transfer of these pathogens from farm fish to wild fish would pose a minimal risk to migrating Fraser River sockeye salmon.
>
> Additionally, data collected by DFO's BC Aquaculture Regulatory Program from 2011-2020 indicates that across all metrics, the DI farms are generally well performing, minimizing their impacts on fish and fish habitat. This includes the management of sea lice where the farms in the DI area have been below the threshold for action (e.g. treatment or harvest) required under their conditions of licence with some exceptions in 2015 and 2020.
>
> From October to December 2020, the Department undertook consultations with First Nations whose territories overlap

> aquaculture sites in the DI. The First Nations had a range of views regarding the ongoing licencing of these DI farms, but all expressed concern about potential impact of the farms on wild salmon stocks in their claimed territories. All of the First Nations shared in an interest in extending the consultation period and being engaged in the monitoring and/or management of the sites. Specific accommodation measures were requested to address potential infringements of Aboriginal rights to fish.
>
> It is recommended that licences be issued to facilities in the DI with an expiration date of June 30, 2022. This timeframe will respond to requests from First Nations for an extension of time to allow meaningful consultations to take place while allowing progress to be made towards Area Based Management (ABM). This timing considers the lifecycle of the farmed salmon to allow for the grow out and harvest of fish that are currently in the production plans for the DI area. This timeframe would also support the harmonized licence approach between DFO and BC agreed to in the Memorandum of Understanding (MOU) 2010 by being aligned with the BC tenure decision policy effective date of June 2022. It would also provide for sufficient notice for industry to plan accordingly for the 2022 deadline, and work to establish agreements with First Nations where possible.

[21] The Memorandum includes background information concerning the Discovery Islands aquaculture licences; the Cohen Commission final report (*The Uncertain Future of Fraser River Sockeye*), in particular Recommendation 19 which directed the Minister to determine by September 30, 2020, whether marine finfish aquaculture in the Discovery Islands causes more than a minimal risk of serious harm to Fraser River sockeye salmon; the published results of DFO's nine scientific risk assessments on pathogens found on Discovery Islands salmon farms to determine the risk to Fraser River sockeye salmon; and the data collected by DFO's BC Aquaculture Regulatory Program (BCARP) that analyzed environmental performance and compliance on BC salmon farms in the Discovery Islands from 2011-2020, attaching copies of the referenced documents.

[22] The Memorandum then sets out DFO's analysis and considerations, including the results of DFO's consultations conducted between October and December 2020, attaching a document titled "Record of Consultations: Licence of Aquaculture Sites in the Discovery Islands" [Consultation Record]. The Consultation Record summarizes the consultations between DFO and the seven First Nations whose territories overlap with aquaculture sites in the Discovery Islands, as well as input from First Nations outside the Discovery Islands and consultations with the aquaculture industry in British Columbia, including Cermaq and the other Applicants.

[23] The Memorandum's analysis, among other things, notes that the seven First Nations had different views regarding the reissuance of licences and ongoing operation of farms in their territories. This ranged from the tabling of a decommissioning plan for all farms and specific requests for detailed accommodation measures, to interest in co-management opportunities for aquaculture operations. With respect to industry, the analysis notes that a decision to not re-licence these farms would have a significant financial impact on the existing licence holders. The Memorandum noted that the farms in the Discovery Islands area have a combined annual revenue of $105-130 million (2017-2019 data), and significant capital investments in each of the sites. The indirect economic contribution loss to the area was estimated to be greater than $150 million. This would also result in an estimated loss of over 900 jobs in coastal and rural BC, with over 200 of those being directly employed by farms. And, due to production planning, juvenile fish currently in hatcheries that were destined for the farms in the Discovery Islands would need to be culled should the farms not be re-licenced.

[24] The Memorandum presented the options available to the Minister and the Deputy Minister's recommendations and next steps. It recommended that the licences be issued to existing licenced facilities in the Discovery Islands with an expiration date of June 30, 2022, together with the taking of additional complementary measures that were set out.

[25] On December 16, 2020, the Minister indicated on the Memorandum that she did not concur with the recommendations. Rather, she indicated her decision as follows:

> Instead, I affirm the direction as discussed in the December 11, 2020 bilateral meeting with the DM:
>
> My decision is for a temporary (18 month) renewal of aquaculture licenses for facilities operating in the Discovery Islands. All farms in this area must no longer have fish in pens by June 30th, 2022.
>
> - During the period between licence renewal and June 30th, 2022, no hatchery smolts will be introduced.
>
> - The intent of allowing time to grow out and harvest fish already in pens is to avoid culling in order to meet timelines.

[26] On December 17, 2020, a press release was issued regarding the Minister's Decision which states:

> …. Today, the Honourable Bernadette Jordan, Minister of Fisheries, Oceans, and the Canadian Coast Guard, announced her intention:
>
> - To phase out existing salmon farming facilities in the Discovery Islands, with the upcoming 18-month period being the last time this area is licenced;

> - To stipulate that no new fish of any size may be introduced into the Discovery Islands facilities during this time; and
>
> - To mandate that all farms be free of fish by June 30, 2022 but that existing fish at the sites can complete their growth-cycle and be harvested.
>
> These facilities are some of the oldest sites on the West Coast and are located on the traditional territory of the Homalco, Klahoose, K'ómoks, Kwaikah, Tla'amin, We Wai Kai and Wei Wai Kum First Nations. Consultations with the seven First Nations in the Discovery Islands area provided important guidance to the Minister and heavily informed the decision. This approach also aligns with the Province of British Columbia's land tenure commitment that all aquaculture licences as of June 2022 require consent from local First Nations.

[27] The "backgrounder" to the December 17, 2020 press release stated the following with respect to the issuance of s 56 *Fishery (General) Regulations* transfer licences:

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

[28] On December 19, 2020, DFO issued three marine finfish aquaculture licences to Cermaq for the Raza Island, Brent Island and Venture Points sites. As in the past, a condition of those

licences is that Cermaq, as the licence holder, apply to the ITC to obtain a licence to transfer live fish.

[29] On or about December 22, 2020, Cermaq received a letter from DFO advising of the Minister's Decision, restating its intent and indicating the DFO would work with Cermaq to plan a fair and orderly transition. And, in response to feedback from First Nations throughout the consultations, DFO stated that it would also ensure that information was shared with the First Nations moving forward.

[30] On January 18, 2021, each of Cermaq (T-129-21), Mowi (T-127-21), Grieg (T-128-21) and 622335 BC Limited (T-132-21) filed applications for judicial review challenging the Minister's Decision to phase out existing salmon farms in the Discovery Islands by the end of June 2022, and to restrict the transfer of live fish between hatcheries and saltwater sites during the phase out period.

[31] In the meantime, on January 6, 2021, Mowi applied for a licence to transfer 100,000 Atlantic salmon smolts from its hatchery to its saltwater site at Sonora Point [Sonora Point Application]. On February 5, 2021, the ITC coordinator responded advising that "[a]s it is the policy of the Government of Canada that no new fish may now be introduced into Discovery Islands facilities, we have to advise that a refusal of your application is being considered. That said, in order to assess your application fairly, all relevant factors associated with your application will be considered, including whether to make an exception to the government's policy" (*Mowi* at para 33).

[32] Mowi made a responding submission. However, on February 26, 2021, the Minister refused the Sonora Point Application. On February 16, 2021, Mowi also submitted two other transfer licence applications. The first to transfer up to 600,000 Atlantic salmon from its nursery site at Port Elizabeth to its saltwater site at Phillips Arm on March 30, 2021 [Phillips Arm Application], and the second to transfer up to 800,000 Atlantic salmon from its nursery site at Larsen Island to its saltwater site at Okisollo on March 30, 2021 [Okisollo Application].

[33] On February 24, 2021, Mowi received letters with respect to its Phillips Arm and Okisollo Applications similar to the February 5, 2021 letter it received with respect to its Sonora Point Application. Mowi ultimately withdrew its Okisollo Application, revised its production plan to the extent that it could and eventually euthanized 920,000 Atlantic salmon smolts that could not be accommodated elsewhere in its facilities (*Mowi* at paras 35-37).

[34] On March 6, 2021, Mowi made further submissions with respect to its Phillips Arm Application. At the time of the hearing of Mowi's injunction motion that application was still pending. Mowi also planned to submit a further transfer licence application for the transfer of up to 582,000 Atlantic salmon from its Shelter Pass nursery site to its Hardwicke saltwater site [Hardwicke Application]. The Phillips Arm and Hardwicke Applications, as well as a transfer licence application made by Saltstream, were the subject of the motion for injunctive relief before Justice Pamel (*Mowi* at paras 38-40).

[35] Justice Pamel stated that the relief sought by Mowi and Saltstream was:

> [49] I should also make clear that neither Mowi nor Saltstream is looking to secure an outcome, as argued by the Minister, and

> seeking mandatory orders in the form of *mandamus* compelling the Minister to issue fish transfer licences required under section 56 of the FGR. Rather, they are only seeking an order suspending the operation of the Minister's Decision in relation to three transfer licence applications, allowing those applications to be processed in accordance with the statutory scheme set out in the FGR and the Code without the fettering, as they claim, of the Minister's discretion under section 56 of the FGR as a result of the Minister's Decision.
>
> [50] In short, Mowi and Saltstream are seeking an order to maintain what they claim to be the *status quo* in relation to the three transfer licence applications.
>
> ……
>
> [72] Neither Mowi nor Saltstream is seeking judicial review of a refusal by the Minister to issue a transfer licence, so the question of how the Minister exercised her discretion under section 56 of the FGR is not in issue.
>
> (see also paras 45, 67, 70, 87, 95, and 98.)

[36] On April 5, 2021, Justice Pamel granted the injunctions, ordering that the component of the Minister's Decision prohibiting the transfer of fish into licenced aquaculture facilities was enjoined with respect to the three transfer applications at issue.

[37] Meanwhile, by letter of February 4, 2021, Cermaq wrote to DFO advising that fish in Cecil Island were scheduled to be moved to Cermaq's Brent Island and Venture Point sites as part of Cermaq's production plan. Because Cermaq would be applying for transfer licences with respect to those transfers, it sought clarification on the criteria that would be applied to the transfer licence applications that Cermaq would be making.

[38] On April 16, 2021, Cermaq submitted its application to transfer juvenile Atlantic salmon from its nursery site on Cecil Island, to its Brent Island and Venture Point sites, for growing to harvest. In its covering letter, Cermaq advised that it had recently entered into an agreement with the Wei Wai Kum First Nation [WWK Agreement] and that the transfer licence application was brought with the consent and support of the Wei Wai Kum, whose core territory includes Venture Point and Brent Island. A letter of support and consent for the joint application from Chief Roberts of the Wei Wai Kum was also included with the submission. Cermaq's covering letter also set out why Cermaq and Wei Wai Kum were of the view that Cermaq should be exempt from the Minister's Decision, thereby permitting Cermaq to stock the Brent Island and Venture Point sites, commencing on July 1, 2021. This included that the WWK Agreement provided a path forward to ease some of the impacts of the transition of salmon farming at those sites and that the WWK Agreement advances reconciliation.

[39] Of note is that the Province of British Columbia licences occupations for aquaculture sites, including Cermaq's. The Brent Island occupation licence expires in 2031 and the Venture Point in 2034. Pursuant to the WWK Agreement (and if the transfer licences are issued by DFO), Cermaq would transfer those licences to Wei Wai Kum. The Province would consider this to be a licence of occupation assignment for purposes of provincial policy that requires aquaculture operators to have agreements in place with First Nations in whose territories they propose to operate for all tenures issued after June 2022. Canada's evidence is the Province views the WWK Agreement as being consistent with that policy, although a decision on approving the occupation licence transfer has not yet been made.

[40] By email of April 27, 2021, DFO stated that it was providing Cermaq (and the other Applicants) with an update on DFO's approach to applications to transfer fish in the Discovery Islands [Revised Process]:

> Dear Cermaq Canada,
>
> In light of the recent court ruling on the injunction related to transfer requests into the Discovery Islands, Fisheries and Oceans Canada (DFO) would like to provide you an update on the department's approach to applications to transfer fish into Discovery Island farms.
>
> It is critical that DFO understand the perspectives of the Discovery Islands First Nations with respect to these potential transfers, including whether such transfers would be supported from a social and/or cultural point of view. Consequently, moving forward, DFO will be engaging with Discovery Island Nations on individual transfer applications. DFO will be providing details of the transfer application to the potentially impacted Nations, including the company name, transfer location(s), dates of proposed transfers (both in and out as applicable), and fish health information. First Nations will be given 15 business days to provide input on individual transfer applications.
>
> If this input indicates that First Nations have concerns with the transfer, including from a social and/or cultural point of view, this will be relevant information to the Minister in her consideration of the transfer request. In this circumstance, the applicant will be informed of the First Nations' input and given an opportunity to provide submissions, within five (5) business days, on why the transfer should be granted in light of the First Nations' perspectives. These submissions will be considered prior to any decision being made on the transfer.
>
> To allow time for the process outlined in this letter, DFO will now be processing transfer applications into the Discovery Islands under a 40 business day service standard.
>
> In order to facilitate the processing of these applications within this new timeline, and to assist in meeting operational requirements of any potential transfer, please respond to DFO indicating whether or not your company intends to apply for any transfer applications into the Discovery Islands prior to June 2022. If available, the intended source, destinations, and timelines would be useful in ensuring these applications are processed efficiently.

> The Minister's policy announcement to phase out fish farms in the Discovery Islands by June 2022 is not affected by the injunction decision, and will be considered in any transfer applications into the area. As such, please indicate the date on which your company intends to have the transfer destination location free of fish should the transfer application be approved.
>
> If you have already applied for a transfer licence, and you have not already done so, please provide the information set out above.
>
> ……

[41] On April 30, 2021, Cermaq wrote to the Minister requesting a one time extension to Cermaq's aquaculture licences for Brent Island and Venture Point to allow for growing and harvest up to February 28, 2023. Cermaq indicated that the requested 7-month extension would represent its normal, historic production schedule for those two sites and supported its stocking this site after the sensitive, out-migration period for wild salmon. This request was accompanied by a letter of support from Chief Roberts of Wei Wai Kum.

[42] By email of May 14, 2021, DFO advised Cermaq that it would consider the transfer application and the extension request at the same time and that DFO was currently consulting with First Nations on the applications. By letter of May 27, 2021, DFO advised Cermaq that it was consulting with Homalco, K'omoks, Kwiakah, Tla'amin, We Wai Kum and Wei Wai Kai First Nations and had received information from them that was relevant to the Minister's consideration of Cermaq's applications. Access to the relevant documents was provided to Cermaq and it was asked to provide any response within five business days. Cermaq provided its response on June 3, 2021.

[43] Following these consultations the Deputy Minister prepared a MEMORANDUM FOR THE MINISTER, Request to Transfer Live Farmed Salmon into the Discovery Islands and Extend Facility Licences for Cermaq Canada (FOR DECISION) dated June 14, 2021 [Transfer Memorandum]. The Summary of that document states as follows:

> **Summary**
>
> The purpose of this note is to seek your decision on applications from Cermaq Canada Ltd. ("Cermaq") to transfer live fish into two sites in the Discovery Islands and to extend the marine finfish licences at these two sites.
>
> On April 16, 2021, the British Columbia Introductions and Transfers Committee received an application from Cermaq to transfer 1,499,000 Atlantic salmon from Cecil Island (Facility 819) to Venture Point (Facility 306) and Brent Island (Facility 1401). On April 30, 2021, Cermaq applied to extend the facility licences for Venture Point (Licence AQFF 122921) and Brent Island (Licence AQFF 12911) until February 28, 2023. The licence extension application was made to allow the full grow-out of the fish to be transferred. Cermaq indicated that the fish would be harvested by February 28, 2023, if their transfer were allowed.
>
> The British Columbia Introductions and Transfers Committee reviewed the transfer application in accordance with section 56 of the *Fishery (General) Regulations* and determined that the request meets each of its three pre-conditions (a, b, and c), and therefore a transfer could be licenced. DFO has considered the request to extend the facility licences and determined that these extensions are not precluded for any reason related to wild or farmed fish health, and therefore extensions could be granted.
>
> DFO consulted with First Nations claiming territory where the transfer sites are located on both the transfer application and the facility licence extension application, and also sought input from Cermaq in response to the First Nations and other external submissions. There is support and opposition to these applications. From the Department's perspective, two options would be available.
>
> Option 1: approve the application to transfer 1,499,000 Atlantic salmon from Cecil Island to the Venture Point and Brent Island facilities, located in the Discovery Islands, and approve the

> application to extend the licences for thee facilities to February 28, 2023.
>
> Option 2: deny both applications.
>
> Option 1 is supported by the department. You are being asked to make a decision on these two applications by June 14, 2021 at the latest.

[44] The Transfer Memorandum is detailed and addresses science, consultations with First Nations as well other stakeholder concerns. Under the summary of Department advice it states:

> DFO Science Branch advises that there is no new or novel information presented in the submissions provided during the review of Cermaq's application that would trigger a change in process. The Introductions and Transfers Committee concurs with the conclusion of Science Branch that there is no new or novel information presented in these submissions that would alter its review process. The committee reviewed the transfer application in accordance with section 56 of the *Fishery (General) Regulations* and determined that the request meets each of its three pre-conditions (a, b, and c) and therefore a transfer could be licenced. DFO has similarly considered the request to extend the facility licences and determined that these extensions are not precluded for any reasons related to wild or farmed fish health.
>
> The communities of the three Laichkwiltach First Nations, including Wei Wai Kum First Nation, are the closest to the Venture Point and Brent Island sites. The Wei Wai Kum and the Wei Wai Kai support the applications and the Kwiakah defer to the other two Nations. The Wei Wai Kum First Nation has entered into an agreement with Cermaq pursuant to which the First Nation would receive benefits if the applications were granted. They further indicate that this agreement would contribute to reconciliation with them. Granting the applications is also expected to generate economic benefits i.e. wages for worker and income for local businesses.

[45] The Minister again rejected the recommendation of the Deputy Minister and DFO and indicated that she denied both applications.

[46] By letter of June 14, 2021, the Minister advised Cermaq that she denied the transfer application [Transfer Decision]. The Minister's letter states:

> Dear Mr. Foulds:
>
> This is further to your application of April 16, 2021 to transfer 1,499,000 Atlantic salmon from Cecil Island to Venture Point and Brent Island, and your subsequent application of April 30, 2021 to extend the Venture Point and Brent Island marine finfish aquaculture licences to February 28, 2023.
>
> In assessing these applications, I have considered a number of factors. These included:
>
> - The assessment by the Introductions and Transfers Committee under section 56 of the *Fishery (General) Regulations*;
>
> - The policy as announced on December 17, 2020 on the intention to phase out aquaculture operations in the Discovery Islands by June 2022, with the exception that I have not considered the component of the policy that related to the intention to cease the transfer of fish into licenced aquaculture facilities in the Discovery Islands until then;
>
> - The submissions provided by Cermaq Canada Ltd. on why a transfer licence and an aquaculture licence extension should be granted; and
>
> - The perspectives of the Wei Wai Kum, Wei Wai Kai, Kwiakah, K'ómoks, Homalco, and Tla'amin First Nations, all of which claim territory in the area where the sites are located.
>
> In your submissions, you provided information on why your proposed transfers and extension applications should be granted. This included your view that your agreement with the Wei Wai Kum First Nation could become a template for reconciliation, and further how this and your other agreements can address conservation concerns with respect to wild salmon interactions, and serve to respect Indigenous rights and title.
>
> I have also noted your perspective that available science indicates that the risk to wild fish from concerns like *Piscine orthoreovirus*, *Tenacibaculum maritimum*, and sea lice is low, and you have

> multiple safeguards in place to ensure that remains the case. You have indicated that there are various social and economic considerations related to these applications, including the social acceptability of salmon farming in certain areas on north Vancouver Island and investments made annually in community and philanthropic initiatives.
>
> I have given due consideration to the information you have provided. While I understand your perspectives, a number of the First Nations consulted continue to strongly oppose salmon aquaculture in this area, and expressed those views during the consultations, notably for reasons related to the conservation and protection of wild salmon stocks and for social and cultural reasons. In my view, social acceptability for commercial finfish aquaculture activities in the Discovery Islands area is therefore lacking. This is a compelling social and cultural factor in the management of fisheries that I have considered to be of particular importance in assessing your applications. As such, in light of these concerns and of the lack of social acceptability, I have denied your applications.
>
> ……

[47] In this motion, Cermaq asserts that DFO retroactively implemented this new approach to Cermaq's transfer application. Further, that the Revised Process is an attempt by DFO to implement the Minister's Decision by changing the previous consistent and fair transfer licence application review process routinely undertaken by the ITC to an ad-hoc process designed to achieve a particular result. In short, that the Revised Process is an attempt to avoid the results of the *Mowi* injunction, while achieving the ends of the Minister's Decision.

Preliminary Observations

[48] Cermaq filed its Notice of Motion and motion record on June 22, 2021. Canada and any other party's Motion Records were required to be filed by Friday, June 25, 2021; and, the

hearing was to be held on Monday, June 28, 2021. Cermaq also indicated that to avoid irreparable harm (the culling of fish) a decision from this Court was needed by June 30, 2021. A direction issued on June 18, 2021 required any intervener motion to be served and filed by Friday, June 25, 2021, with responding Motion Records to be served and filed by 2:00 pm (Eastern) on Sunday, June 27, 2021. The direction also stated that oral arguments on any motion by the Conservation Coalition for leave to intervene on the injunction motion to be made at the injunction motion hearing.

[49] During a case management conference requested by the parties and held on Monday, June 21, 2021, I expressed concern that, based on the submissions made in connection with the *Mowi* injunction and the lengthy decisions rendered by Prothonotary Aylen with respect to intervener motions filed in connection with the injunction motion (decided in advance of that motion) and Justice Pamel's injunction decision (heard on March 24 and 25 and issued on April 5, 2021), that expecting a decision in this injunction motion to be issued in one day jeopardized the interests of justice.

[50] Ultimately, Cermaq advised that it was able to adjust the feed and thereby slow the growth of the fish, although such rationing was required to be balanced in order to not overly stress the fish. Utilizing this technique the fish at the nursery would reach the maximum sustainable biomass on or about July 9, 2021, meaning that a decision of this Court would then be needed by July 5, 2021 at the latest.

[51] Given the limited time within which this decision must be rendered, I will not be referring to each submission and each affidavit and related materials contained within the many volumes that comprise the motion records of the parties. However, I have reviewed all of the written submissions and affidavits and I have considered the parties oral arguments made when appearing before me.

Intervener Motion – Conservation Coalition

[52] The issue of interveners has also been previously addressed by this Court in these consolidated applications. Case Management Judge Aylen had before her three motions brought by entities seeking to be added as interveners or respondents in the consolidated applications and in the *Mowi* injunction motions. Alexandra Morton, David Suzuki Foundation, Georgia Strait Alliance, Living Oceans Society and Watershed Watch Salmon Society [collectively, the Conservation Coalition], brought a motion for leave to intervene in the consolidated applications and in the *Mowi* injunction motions. Homalco First Nation and Tla'amin Nation [collectively, Sister Nations] brought a motion to be added as respondents in the consolidated applications or alternatively, for leave to intervene in the consolidated applications and the injunction motions. And, Wei Wai Kai Nation, Wei Wai Kum First Nation and Kwiakah First Nation [collectively, Laichkwiltach Nation] brought a motion for leave to intervene in the consolidated applications and in the *Mowi* injunction motions.

[53] In her decision (*Mowi Canada West Inc. v Minister of Fisheries, Oceans and the Canadian Coast Guard* (March 25, 2021) [*Mowi Intervener*] the Case Management Judge set out

the requirements of Rule 109(2)(b) and noted that the Rule requires not just an assertion that a proposed intervener's participation will assist, but a demonstration of how it will assist (*Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 at para 36). She noted that the Court then assesses and weighs these submissions against the listed flexible factors as articulated in *Rothmans, Benson & Hedges Inc v Canada (AG)*, [1990] 1 FC 84, aff'd [1990] 1 FC 90 (CA). She also referenced *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44; *Gordillo v. Canada (Attorney General)*, 2020 FCA 198; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102; *Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34 at para 19 as well as the restatement of the test for intervener status as set out in *Canada* (*Minister of Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13 (*Mowi Intervener* at paras 46-53).

[54] Applying that framework to the matters before her, the Case Management Judge found that the interests of justice weighed in favour of granting the Conservation Coalition's motion to intervene on both the consolidated applications and the *Mowi* injunction motions (*Mowi Intervener* at para 66-67). She dismissed the motions of the Sister Nations and the Laichkwiltach Nation for leave to intervene. On appeal by the Sister Nations, the Case Management Judge's decision was upheld (*Mowi Canada West Inc v Minister of Fisheries, Oceans and the Canadian Coast Guard*, 2021 FC 548).

[55] In this matter, the Conservation Coalition again seeks to intervene in the Cermaq injunction motion. Specifically, it seeks an order that the Conservation Coalition be permitted to file a responding motion record in the form attached as Schedule A to its Notice of Motion; be

permitted to make oral submissions of no more than 30 minutes at the hearing of the Injunction motion; and, that no costs be awarded to or against it regardless of the outcome of either the motion seeking leave to intervene or the injunction motion (a request to rely on the affidavit of Kilian Stehfest was abandoned).

[56] Prior to the hearing of this matter, Cermaq advised, in response to a Direction from this Court, it would take no position on the Conservation Coalition's motion seeking leave to intervene if the motion was, as anticipated, made on the same basis the Conservation Coalition's motion in the *Mowi* injunction. When appearing before me, Cermaq confirmed that it was satisfied that the Conservation Coalition's current motion was made on the same basis as its intervener motion in *Mowi*. Therefore, Cermaq took no position on the motion.

[57] Canada advised that it intended to take no position regarding the Conservation Coalition's motion for leave to intervene in Cermaq's injunction motion.

[58] Grieg submitted a motion record indicating that it also took no position on the Conservation Coalition's motion for leave to intervene in Cermaq's injunction motion.

[59] In its motion the Conservation Coalition submits that, if granted leave to intervene, its submission will assist the Court in evaluating the balance of convenience branch of the test for an injunction. The Conservation Coalition will provide a perspective on what it views as important conservation components of the governing legal regime, and the impact of granting the relief sought on wild salmon and ecosystems as an aspect of the public interest.

[60] Having reviewed the Conservation Coalition's submissions, and in light of the *Mowi Intervenor* reasons and decision, including that the Conservation Coalition has been granted intervener status with respect to the consolidated applications, and being satisfied that the interests of justice weigh in favour of granting the Conservation Coalition's motion, I will grant the Conservation Coalition intervener status to make submissions on the public interest aspect of the balance of convenience.

Test for Injunctive Relief

[61] The test for injunctive relief is well established and the parties agree that it is as set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*], reconfirmed in *R v Canadian Broadcasting Corp*., 2018 SCC 5 at para 12 [*Canadian Broadcasting*].

[62] That test is:

i. whether there is a serious issue;

ii. whether irreparable harm will result if the injunction is not granted; and

iii. whether the balance of convenience favours granting the relief sought.

[63] The test is conjunctive and all three criteria must be satisfied to obtain interlocutory relief. The onus is on the party bringing the motion to establish that the test has been met (*RJR MacDonald* at pp 314–315). And, in all cases, the fundamental question is whether the granting

of an injunction is just and equitable in all of the circumstances of the matter (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25).

[64] An interlocutory injunction is extraordinary and equitable relief (*Canadian Broadcasting* at para 27). Accordingly, compelling circumstances are required to justify the intervention of the courts and the exercise of their discretion to grant the relief sought (*Ahousaht First Nation v Minister of Fisheries and Oceans*, 2019 FC 1116 at para 49 [*Ahousaht 2019*]).

Preliminary Issue – is this motion properly brought?

[65] Canada's main argument in this motion is that Cermaq is not entitled to the relief it seeks given that it is has not sought judicial review of the Transfer Decision. In the event that the Court did not agree, Canada conceded, as it did in *Mowi*, that the serious issue branch of the test has been met. Canada also did not take issue with Cermaq's claim of irreparable harm. Both Canada and the Conservation Coalition challenged Cermaq on the third branch of the test, the balance of convenience.

Cermaq's position

[66] Cermaq submits that it is not challenging the Transfer Decision and is not seeking an injunction with respect to that decision.

[67] Rather, Cermaq is seeking to restrain the implementation of the Minister's Decision, to the extent that it prohibits the transfer of fish into the Brent Island and Venture Point sites during

the 18-month period ending June 30, 2022, either directly or by the implementation of the Revised Process, pending its underlying application for judicial review.

[68] Cermaq states that it is seeking this injunction to ensure that its transfer application is fairly considered in a manner consistent with how aquaculture licence applications were decided in the Discovery Islands prior to the Minister's Decision and how they continue to be decided elsewhere in the British Columbia. Cermaq submits that if it is successful in this injunction motion, then it will resubmit its transfer application to the ITC. This resubmitted application will reflect a changed circumstance, the de-coupling of the transfer application from the extension application. Cermaq would commit to removing the fish transferred to the Brent Island and Venture Point sites by June 30, 2022, unless that deadline was changed by the a successful result in the judicial review or by the Minster.

[69] Cermaq submits that it seeks the injunction to preserve the "true *status quo*" and avoid the destruction of its property until a decision on the merits with respect to its application for judicial review of the Minister's Decision can be heard. Cermaq notes the distinction between a mandatory injunction and *mandamus*, and states that it is not seeking an order in the nature of *mandamus*, as it is not attempting to force the Minister to adopt a new course of conduct nor is it asking the Court to force the Minister to issue a transfer licence. Rather it asks only that the Court maintain the *status quo* regarding the routine low-risk transfers of healthy fish, pursuant to the ITC Code, which DFO has routinely applied.

[70] Cermaq also submits that if, because of the Revised Process, it is prevented from transferring the juvenile salmon, it will be left without any real remedy when its underlying judicial review is heard. The 1.5 million fish will have been culled and the Minister will have achieved the objective of her decision while having dodged procedural fairness, reasonableness and the reviewing powers of this Court. The Minister will effectively have cancelled Cermaq's aquaculture licences in the Discovery Islands in violation of s 9(2) of the *Fisheries Act*.

Canada's position

[71] Canada points out that Cermaq was aware of Canada's view that, to challenge the Transfer Decision, it was necessary for Cermaq to first file an application for judicial review challenging that decision and to then base its injunction motion on that underlying application. This would also have permitted the filing of a related certified tribunal record [CTR]. However, that Cermaq made a deliberate choice not to proceed in that manner.

[72] Canada submits that to grant the relief sought by Cermaq regarding the Transfer Decision would go beyond and would differ from what is sought by Cermaq in its underlying judicial review, because the relief sought in that application concerns only the Minister's Decision. Further, that the relief sought is a remedy in the nature of an order of *mandamus*, as opposed to interlocutory injunctive relief. Canada cites *Ahousaht 2019* at paras 55-56, and 58-60 in support of this view.

[73] Canada also submits that Cermaq is improperly seeking orders for *mandamus* and mandatory injunctive relief. Canada refers to *Ahousaht 2019* where, at paragraph 71, Justice

Gascon stated that the applicants "are not asking for a restorative, mandatory injunctive relief. They are instead asking for an order compelling the Minister to do something he has not yet done, and to adopt a new course of conduct. This is not an interlocutory injunctive relief. This is the very essence of an order of mandamus". Canada submits that the *status quo* is that no fish transfers are permitted unless a s 56 transfer licence is issued and that Cermaq has been denied a transfer licence. The Transfer Decision is not the subject of a judicial review application. Unless quashed by a Court, it remains valid and legally binding. Therefore, Cermaq cannot now seek an order directing the Minister to make another decision on a s 56 transfer licence. That is a request for an order of *mandamus*, not relief by way of a mandatory injunction.

[74] Canada submits that the Transfer Decision is an individualized administrative decision between Canada and Cermaq. Had Cermaq filed a separate judicial review application then Canada could properly focus on and defend that decision instead of defending against both the Minister's Decision and the Transfer Decision in one motion. In that regard, Canada also submits that pursuant to Rule 302, Cermaq is limited to relief against the Minister's Decision. Cermaq should not be permitted to seek orders in the nature of a collateral attack against the Transfer Decision, a valid decision that is not the subject of the underlying judicial review application.

Analysis

i. The Nature of the relief sought

[75] Canada asserts that because the Transfer Decision has not been challenged, the relief that Cermaq seeks is not available to it. Canada and Cermaq fundamentally disagree on the scope and intent of Justice Pamel's decision in *Mowi* and, in particular, what the *status quo* is.

[76] Canada submits that the relief that Cermaq seeks goes beyond and is different from what Cermaq seeks in its underlying application for judicial review. Thus, the starting point is to review that relief.

[77] In its Notice of Motion, Cermaq describes the order it seeks as follows:

> THE MOTION IS FOR:
>
> 1. An interlocutory order:
>
> (a) restraining the Minister from implementing the Decision, directly or through the application of the New Process or any other process, pending the hearing and determination of Cermaq's application for judicial review in these proceedings, insofar as the Decision prohibits transfer of fish into the Brent Island and Venture Point sites during the 18-month period ending June 30, 2022;
>
> (b) requiring the Minister or her delegate to issue a decision regarding the Re Submitted Transfer Application, taking into account only the standard considerations routinely applied to Transfer Licences prior to December 2020;
>
> (c) requiring the Minister or her delegate to issue a decision on the Re-Submitted Transfer Application within two days of receipt of the Re-Submitted Transfer Application; and
>
> (d) relieving Cermaq of its obligation to provide an undertaking for damages in the event the injunction is granted.
>
> 2. ……

[78] In its Notice of Application, filed on January 18, 2021, Cermaq identified its application and the relief sought as follows:

> **APPLICATION**
>
> **This is an application for judicial review in respect of:**

1. On December 17, 2020, the Minister of Fisheries, Oceans and the Canadian Coast Guard's (the "Minister") announced her decision that:

    (a) The Discovery Islands aquaculture licences, which would be reissued the following day for a period of 18 months, would be "the last time" aquaculture licences would be issued in the Discovery Islands;

    (b) No new fish of any size may be introduced into Discovery Islands facilities, despite these renewed aquaculture licences; and

    (c) Mandated that all farms be free of fish by June 30th, 2022 (the "Constraining Decision")

2. On December 18, 2020, the Minister or her delegate issued three aquaculture licences to Cermaq Canada Ltd. ("Cermaq") for its three fish farm sites in the Discovery Islands (the "Licences") which have terms ending on June 30, 2022 (the "Licence Decision").

3. The Constraining Decision acts to limit Cermaq Canada Ltd.'s ("Cermaq") ability to use its Licences, to prevent it from engaging in its regular operations at its Discovery Islands sites by preventing the transfer of fish into those sites and to frustrate Cermaq's planned and scheduled production at those sites set for 2023 which has been planned and in development since 2017 and 2018.

RELIEF SOUGHT

The Applicant makes application for:

1. A declaration that the Constraining Decision was unreasonable, or both unreasonable and unlawful.

2. In the alternative, if the Licence Decision and the Constraining Decision are considered a single decision, then a declaration that the Constraining Decision aspect of the single licencing decision was unreasonable, or both unreasonable and unlawful.

3. A declaration that the Constraining Decision was made in a manner contrary to the principles of natural justice and procedural fairness.

> 4. In the alternative, if the Licence Decision and the Constraining Decision are considered a single decision, then a declaration that the decision was made in a manner contrary to the principles of natural justice and procedural fairness.
>
> 5. An order quashing or setting aside the Constraining Decision.
>
> 6. An interim and interlocutory injunction prohibiting the applicability of the Constraining Decision until a decision in this judicial review is rendered.
>
> 7. Costs
>
> ……

[79] Justice Gascon in *Ahousaht 2019* addressed the nature of the relief sought in the injunction motion before him in that matter. There, the applicant First Nation bought an interlocutory injunction motion seeking an order enjoining the Minister from opening or continuing the opening of the commercial and/or the recreational fisheries for AABM Chinook without allowing the First Nation to continue fishing commercially for an additional 5,000 salmon. Justice Gascon found that the relief sought had a dual dimension – being a prohibitive injunction linked to a request mandating a specific course of action by the Minister (para 55). He found that:

> [56] As formulated, the Five Nations' injunction motion raises two fundamental problems which, in light of the overarching exceptional nature of interlocutory injunctive reliefs, are sufficient reasons to refrain from exercising my discretion in favour of the Five Nations and to dismiss the motion. First, the injunction motion goes beyond and differs from what is sought by the Five Nations in their underlying judicial review, in terms of the remedy itself and of the "established aboriginal right" invoked. Second, the main relief sought is a remedy in the nature of an order of *mandamus*, as opposed to an interlocutory injunctive relief.
>
> ……

[58] One should not lose sight of the fundamental nature of an injunction and its relation to a cause of action or an application. The right to obtain an interlocutory injunction is merely ancillary and incidental to a pre-existing cause of action or application. An injunction does not have an independent life of its own but is instead a remedy attached to an underlying action or application. As the SCC reminded in *CBC*, an injunction is generally "a remedy ancillary to a cause of action" [emphasis in original] (*CBC* at para 24, citing Amchem Products Inc v British Columbia (Workers' Compensation Board), [1993] 1 SCR 897 at p 930). Mr. Justice Sharpe (writing extrajudicially) echoed this principle when he noted that "[i]nterlocutory injunctions are 'a prophylactic measure associated directly with the ongoing case' whereas 'permanent injunctions are of a different order and amount to a final adjudication of rights'" (Robert Sharpe J., *Injunctions and Specific Performance*, 4th ed (Toronto: Canada Law Book, 2012) [*Sharpe*] at paras 1.40 and 1.60). That is, an interlocutory injunction is a preservative and precautionary remedy intimately linked to an on-going matter, be it an action or an application.

[59] Given the accessory nature of interlocutory injunctions, and the direct connection they must have with an underlying action or application, the courts will be hesitant to use their discretion to grant such an exceptional relief when a moving party, by way of an interlocutory injunction, asks for more relief and remedy than what it is seeking in the underlying action or application. Put differently, it will hardly be just and equitable for a court to issue an interlocutory injunction if the moving party is in fact claiming more, as interlocutory relief, than what it is asking the court in its underlying action or application.

[60] This is what the Five Nations are attempting to obtain through this injunction motion. The main mandatory relief they are seeking (i.e., the allocation of 5,000 additional AABM Chinook) is not contemplated in their underlying judicial review. In addition, in support of such expanded relief, they are invoking a right which, in view of its terms, differs from and expands beyond the Aboriginal Rights referred to in their underlying application.

[61] The Five Nations do not have any mandatory conclusions in their underlying application of judicial review. They are not seeking conclusions compelling the Minister to allow them to continue fishing commercially for at least a certain additional amount of AABM Chinook, or in fact for any particular species of fish. Nor are they asking the Court to modify the Fishery Management Plan or to amend it in order to be granted specific allocations or quantities of fish. I further observe that the Five

> Nations are not seeking a judicial review of DFO's late July 2019 decision which refused their specific request for a new allocation of 5,000 AABM Chinook in the middle of the season.
>
> [62] Pursuant to their judicial review application, the Five Nations are only asking the Court to declare that the Fishery Management Plan or portions of it fail to offer them the opportunity to exercise their Aboriginal Rights in a manner that remedies some or all of the Unjustified Infringements or that is otherwise consistent with the Humphries Judgment. They are also asking for an injunction enjoining the Minister from enforcing some or all of the Fishery Management Plan against them or from authorizing or opening other fisheries (recreational, general commercial or both) that are inconsistent with or given priority over the Five Nations' Aboriginal Rights. But nowhere are they asking the Court to compel the Minister to do what they are seeking to obtain at an interlocutory stage.

[80] In my view, assessing whether the relief sought by Cermaq in this motion goes beyond, and is different from, what it seeks in the underlying application for judicial review in this matter is not as clear cut as the tagging on of an additional request for relief, like permission to catch an additional 5000 salmon, as was the case *in Ahousaht*.

[81] In its application for judicial review of the Minister's Decision, which decision includes a total prohibition of the transfer of fish between the time of licence renewal (December 18, 2020) and June 30, 2022, Cermaq asserts that the decision limits its ability to use its licences and prevents it from engaging in its regular operations at its Discovery Islands sites "by preventing the transfer of fish into those sites". It also sought relief by way of an interim and interlocutory injunction "prohibiting the applicability of the Constraining Decision" until a decision in this judicial review is rendered.

[82] In its injunction motion, Cermaq states that it seeks to restrain the Minister from implementing the Minister's Decision, directly or through the application of the Revised Process or any other process, pending the hearing and determination of Cermaq's application for judicial review in these proceedings – insofar as the Minister's Decision prohibits transfer of fish into the Brent Island and Venture Point sites during the 18-month period ending June 30, 2022.

[83] It is not disputed by Canada that the transfer of fish is a normal, necessary and regular aspect of salmon farming (see also *Mowi* at paras 14 and 45). It is obvious that if transfer licences are not granted, then the holders of aquaculture licences, such as Cermaq, are, in effect, precluded from conducting their licenced aquaculture operations. That is the circumstance that Cermaq now faces with respect to the transfer of fish from Cecil Island nursery site to is Brent Island and Venture Point grow out sites.

[84] It is also of note that when Cermaq filed its application for judicial review, it had not made its transfer application and the Minister had not made her Transfer Decision. However, such transfers were clearly anticipated and were contemplated by the Minister's Decision which is the subject of the underlying application for judicial review. Thus, on a general level, the relief sought under the application for judicial review and this motion have commonality in that they are concerned with transfer licences.

[85] However, to assess the nature of the relief sought in this motion and whether it is captured by the underlying application or is otherwise available, requires consideration of two points. First, whether, as Cermaq submits, that in spirit and intent *Mowi* restored the *status quo*

with respect to the process for assessing transfer licences to the process in place prior to the Minister's Decision and restricted any revision to that process. And, second, whether the new process, and therefore the Transfer Decision, was a direct or indirect application of the Minister's Decision, contrary to Justice Pamel's finding in that regard.

ii. The scope of Justice Pamel's decision in **Mowi**

[86] Cermaq submits that, in essence, it is only seeking the same relief that Mowi sought and was granted by Justice Pamel. Canada strongly disagrees.

[87] The *Mowi* injunction involved a circumstance where the three transfer licence applications at issue were pending or proposed. When discussing the relief sought, Justice Pamel found that the objective of the motions in that case was to restrain the implementation of the Minister's Decision (no new fish of any size to be introduced into the Discovery Islands facilities during the phase out period) only to the extent that it interfered with the issuance of those licences (at para 45). Further:

> [49] I should also make clear that neither Mowi nor Saltstream is looking to secure an outcome, as argued by the Minister, and seeking mandatory orders in the form of *mandamus* compelling the Minister to issue fish transfer licences required under section 56 of the FGR. **Rather, they are only seeking an order suspending the operation of the Minister's Decision in relation to three transfer licence applications, allowing those applications to be processed in accordance with the statutory scheme set out in the FGR and the Code without the fettering, as they claim, of the Minister's discretion under section 56 of the FGR as a result of the Minister's Decision.**
>
> ……
>
> [69] Nor am I convinced that the relief sought in the present motions by Mowi and Saltstream go beyond what is being sought

> by way of judicial review. To the contrary, the relief aligns very well with the conclusions sought in their underlying application.
>
> [70] Moreover, I cannot agree with the Minister that Mowi and Saltstream are seeking a mandatory injunction. On the contrary, they are not looking to impose any conditions upon the regulatory process inherent in the issuance of transfer licences as provided for in section 56 of the FGR other than to remove the application of the Minister's Decision. **In essence, they are seeking to turn back the clock to just prior to the Minister's Decision as regards the regulatory process and determination criteria relevant to the issuance of such licences, and this only as regards the three identified transfer licence applications.**
>
> **…..**
>
> [87] I appreciate that the issuance of transfer licences involves a separate regulatory process under the PAR, but the argument of Mowi and Saltstream was that the component of the Minister's Decision of no longer issuing transfer licences was an exercise of statutory power, and was made although no transfer licence application was before her; **the Minister's Decision purported to decide not only the applications for replacement aquaculture licences – a matter that was before her for a decision – but also any future applications which might be made for transfer licences. In doing so, Mowi and Saltstream argue that the Minister thereby fettered her discretion otherwise available under section 56 of the FGR in respect of future transfer licence applications.**
>
> (emphasis added)

[88] Mowi and Saltstream sought an order suspending the operation of the Minister's Decision, specifically the ban on fish transfers, in relation to their pending transfer applications. Mowi and Saltstream wanted their transfer licence applications to be processed in accordance with the statutory scheme set out in the *Fisheries (General) Regulations* and the ITC Code – without the Minister's s 56 discretion being fettered by the total ban on transfers pursuant to the Minister's Decision. In that regard, Justice Pamel found that Mowi and Saltstream sought an order to maintain the *status quo* (para 50).

[89] Justice Pamel found that the evidence established that Mowi and Saltstream would suffer irreparable harm if the applied for transfer licences were not available to them. He also noted that those losses could still occur, regardless of the granting of the injunction, if the Minister nonetheless decided under her statutory authority to refuse issuance of the transfer licences without reference to the Minister's Decision. Significantly, in my view, Justice Pamel stated that the injunction would serve only to remove the impact of the Minister's Decision on the s 56 decision-making process (para 114).

[90] Thus, the effect of Justice Pamel's order in *Mowi* was that the Minister was required to consider the three subject s 56 transfer licence applications without considering the transfer ban aspect of the Minister's Decision.

[91] However, Cermaq asserts that *Mowi* goes further, at least in spirit and intent. Specifically, Cermaq asserts that it restored the *status quo* as regards to the review process for transfer licence approvals to what the process utilized prior to the Minister's Decision and that this precluded the Minister from implementing a new or changed transfer licence review process.

[92] In this regard Cermaq focuses on Justice Pamel's finding that, in essence, Mowi and Saltstream sought in their injunction motion to "turn back the clock" to just prior to the Minister's Decision, as regards the regulatory process and determination of the criteria relevant to the issuance of transfer licences. Cermaq submits that, in spirit and intent, Justice Pamel was instructing that the usual process for transfer licence application assessment and approval*, as it existed before the Minister's Decision*, was to be applied with respect to future assessments.

[93] Cermaq asserts that, contrary to the intent of *Mowi*, the Minister subsequently changed the manner in which transfer licences would be reviewed – but only for the Discovery Islands – and retroactively applied this Revised Process to Cermaq's application. Cermaq asserts that the Revised Process is an attempt by DFO to avoid the results of the *Mowi* injunction while still achieving the ends of the Minister's Decision.

[94] That is, rather than assessing transfer licence applications utilising DFO's normal and established methodology, which Cermaq sees as the *status quo* as restored by *Mowi*, DFO changed the methodology by adding a whole new step. The Minister then utilized the Revised Process to ground her refusal to approve and issue Cermaq's fish transfer applications, the Transfer Decision.

[95] Canada, however, asserts that these circumstances critically differ from *Mowi* in that here Cermaq applied for a transfer application and, by way of the Transfer Decision, its application was refused by the Minister. Therefore, that is the *status quo*. Further, that this Court cannot interfere with the Minister's licencing discretion.

[96] In my view, it is significant to recall that Mowi and Saltstream were arguing before Justice Pamel that the Minister fettered her discretion. They were of the view that by effecting a total ban on transfer licences she was fettering her s 56 discretion to issue transfer licences. Thus, it was in that context, that Justice Pamel spoke of turning back the clock. On a go forward basis, the Minister was to disregard the transfer ban when assessing transfer applications and instead follow the usual application approval process.

[97] I do not understand Justice Pamel to have made a determination that the Minister was bound by the transfer licence approval process as it existed at that time (which would have entailed review of the application by the ITC Committee, applying the ITC Code and, upon acceptance of their recommendation by the Regional Director, issuance of the transfer licence) and that he was implicitly restraining the Minister from making changes to that process if, in her view, further consultation or other measures were required to assess social, economic, cultural or other factors in respect of the transfer applications. Justice Pamel's order does not reflect this, stating only that the component of the Minister's Decision comprising a total ban on the transfer of fish was enjoined with respect to the three applications at issue before him. Nor would he have had reason to put his mind to this based on the circumstances before him. He could not have anticipated that in response to his decision in *Mowi* the Minister would effect the Revised Process.

[98] In my view, implementing the Revised Process does not contravene *Mowi*'s determination that the Minister, when considering s 56 transfer licence applications, could not consider that aspect of the Minister's Decision that transfers would not be permitted – the transfer ban – with respect the three subject transfer applications.

[99] Further, the Minister has absolute discretion to issue licences, and neither the pre-existing process, nor the ITC Code itself, is binding on the Minister (*Canada (Attorney General) v Robinson*, 2021 FCA 39 at para 27; *Campbell v. Canada (Attorney General)*, 2006 FC 510 at paras 18-19). And, as noted above, ss 2.2 and 2.3 of the *Fisheries Act* require the Minister, when making decisions, to consider any adverse effects the decision may have on Indigenous people's

rights. Pursuant to s 2.5(g), the Minister may consider social, economic and cultural factors in the management of fisheries. Additionally, the ITC Code recognizes that the s 56 decision maker can take into consideration socio-economic factors and Indigenous considerations when considering whether the risk is acceptable or not.

[100] The Minister's discretion was implicitly acknowledged by Justice Pamel when he stated that Mowi's losses (the irreparable harm) could still occur, regardless of the granting of the injunction, if the Minister nonetheless decided under her statutory authority to refuse issuance of the transfer licences without reference to the Minister's Decision. Justice Pamel also set the parameters of the effect of his decision when he stated that the injunction would serve only to remove the impact of the Minister's Decision – the transfer ban – on the s 56 decision-making process (para 114).

[101] As to remedy, what Cermaq seeks in this motion is that the Minister be ordered to issue a decision about the re-submitted transfer application "taking into account only the standard considerations routinely applied to Transfer Licences prior to December 2020". This, as I understand it, is intended to reflect that prior to December 2020 transfer licence applications had not been subject to consultation and, therefore, to preclude such consultation as part of the post Minister's Decision approval process. Further, the Transfer Decision found that "social acceptability" of commercial finfish aquaculture activity in the Discovery Islands was lacking and that this was a compelling social and cultural factor in the management of the fisheries. The Minster denied the transfer licence based on this finding of lack of social acceptability. Cermaq submits that this is a novel finding. Thus, the order Cermaq seeks would, in broad strokes, also

serve to preclude the Minister from considering "social acceptability" as this, in Cermaq's view, was not a "standard consideration" prior to December 2020.

[102] Thus, in effect, what Cermaq is requesting is that this Court direct the Minister to limit the scope of her review of the resubmitted transfer licence application and not take into consideration the existing or any other transfer application consultations. While Cermaq views this as permissible restorative relief, this is based on its view that the *Mowi* decision precluded the Revised Process. For the reasons above I do not agree. There was nothing in the *Mowi* decision precluding the Minister from implementing the Revised Process.

[103] In this regard, the relief that Cermaq seeks also differs from that sought in *Mowi*. In *Mowi*, Justice Pamel found that the relief Mowi and Saltstream sought was an order suspending the operation of the Minister's Decision in relation to three subject transfer licence applications, which was in keeping with the underlying application for judicial review, and that they were not seeking mandatory injunctions. Here, the relief sought by Cermaq goes beyond their underlying application for judicial review which, with respect to the general reference to an interlocutory injunction, was concerned with the applicability of the Minister's Decision. In *Mowi*, Justice Pamel found that Mowi and Saltstream were not looking "to impose any conditions upon the regulatory process inherent in the issue of transfer licence" (at para 70). However, if Cermaq's "spirit and intent" argument were accepted, its interpretation of Justice Pamel's decision would impose conditions on the Minister that would limit her discretion when assessing whether or not to grant the resubmitted transfer licences. In effect, the relief that Cermaq seeks exceeds what is sought in the underlying application for judicial review and the relief granted in *Mowi*.

[104] I also note that unlike *Mowi*, in this matter the Minister has actually made a decision on the subject transfer licence applications. As Canada points out, the Transfer Decision has not been challenged and remains valid and binding.

[105] While *Mowi* applied only to the applications there at issue, it is apparent from the record before me that the Minister's understanding of the impact of *Mowi* is that, in making any future transfer licence decisions, she may not consider the transfer ban aspect of the Minister's Decision. As noted above, in the Transfer Decision she explicitly stated that she had not done so when assessing Cermaq's application.

[106] Thus, in the context of the specific relief that Cermaq seeks in this motion, while I could order that the transfer ban aspect of the Minister's Decision is enjoined with respect to Cermaq's proposed re-submission of its application, there is no practical utility in doing so.

[107] Further, Cermaq says that it is not seeking to compel the Minister to issue it transfer licences. Rather, that it wishes to re-submit its transfer application to the ITC de-coupled from the extension application. This, it submits, represents a change of fact as Cermaq now acknowledges that the fish will have to be removed on June 30, 2022, unless they are successful in their underlying application for judicial review or the Minster changes the removal deadline. Cermaq submits that this impacts the risk assessment because the fish will then be in the pens only until the Minister's existing deadline, not the additional 7 months that Cermaq had sought.

[108] Canada acknowledges that Cermaq could seek to resubmit its application pursuant to the ITC Code, but points out that it does not need a Court order to do so. This is true. But Cermaq is also faced with a very tight time constraint before it will have to begin culling its fish. Cermaq states that it is for this reason that it also seeks an order requiring the Minister to issue a decision in the re-submitted application within two days.

[109] The Transfer Memorandum establishes that the ITC has reviewed Cermaq's transfer licence application in accordance with the s 56 of the *Fishery (General) Regulations* and determined that the request meets the s 56 (a), (b), and (c) preconditions and that a transfer licence could therefore be issued. Further, that DFO had considered the request to extend Cermaq's aquaculture licences for the Brent Island and Venture Point sites and determined that the extensions were not precluded for any reason related to wild or farmed salmon health and that the extensions could be granted. Given this, a re-submission to the ITC would be unlikely to accomplish anything more than achieving the very same result. And DFO has already recommended acceptance of the extension requested by Cermaq.

[110] But, ultimately, even if Cermaq resubmits its transfer application, the remedy that Cermaq seeks is that the Minister be ordered to issue a decision about the re-submitted transfer applications "taking into account only the standard considerations routinely applied to Transfer Licences prior to December 2020". As discussed above, the relief sought seeks to impose limitations on the Minister's discretion. This is different than the relief granted in *Mowi* and is different from and beyond the relief sought in the underlying application for judicial review.

iii. Is the Transfer Decision a direct or indirect application of the transfer ban?

[111] Cermaq also asserts that the Revised Process was a direct, or indirect, attempt to implement the Minister's Decision. That is, that the new fish transfer licence approval process allowed the Minister to do indirectly what she could not do directly – apply the transfer ban.

[112] Cermaq points to a number of facts that it says support this assertion. These include that the result of Cermaq's transfer application mirrors the February 26, 2021 denial of Mowi's Sonora Point application, made before the Revised Process, where the Minister's Decision was expressly taken into account. The Minister decided both Mowi's and Cermaq's application on what Cermaq views as the novel basis of "social acceptability". Further, that the Revised Process was implemented as a response to the *Mowi* injunction and only applies to the Discovery Islands. And, because the Revised Process included consultation with First Nations, who the Minister knew did not support aquaculture, the change in the process was result oriented, designed to effect the Minister's Decision.

[113] In this injunction motion, Mowi made submissions in support of Cermaq. Mowi shares the concern that the Revised Process is designed to thwart the spirit of the *Mowi* injunction. Mowi submits that this concern is not without foundation. It states that after the hearing before Justice Pamel, in which Canada participated, but before Justice Pamel issued his decision, the Minister denied Mowi's transfer licence application on the basis that "social acceptability…is lacking". Once the *Mowi* injunction decision was issued, the Revised Process was retroactively applied to Mowi's resubmission for the same transfer. Mowi states that the Revised Process delayed the decision on that transfer, requiring Mowi to modify its operations, redirect saltwater fish, and cull the 600,000 otherwise healthy freshwater fish the *Mowi* injunction was intended to

save. Mowi remains concerned that the Revised Process will be applied to its most recent application to transfer 525,000 fish, and has created an outcome that was designed to be consistent with the Minister's Decision.

[114] In terms of a direct application, the Minister purports to have complied with Justice Pamel's decision when determining Cermaq's transfer application. In the Transfer Decision, the Minister explicitly states that she had considered her decision (Minister's Decision) to phase out aquaculture operations in the Discovery Islands "with the exception that I have not considered the component of the policy that related to the intention to cease the transfer of fish into licenced aquaculture facilities in the Discovery Islands until then".

[115] There is no evidence before me that directly contradicts this statement. And, to the extent that Cermaq (and Mowi) are asserting that the Minister, in effect, acted in bad faith by implementing the Revised Process, that issue is one that is properly addressed by challenging the Transfer Decision directly, on that basis. To challenge it in this format amounts to a collateral attack on the Transfer Decision.

[116] With respect to the Cermaq's assertion that the Minister indirectly applied the transfer ban aspect of the Minister's Decision, Cermaq questions the Minister's timing and motivation in implementing the Revised Process.

[117] Canada acknowledges that, subsequent to the Minister's Decision, DFO implemented "two adjustments" to its process for approving transfer licence applications for the Discovery Islands.

[118] In that regard, Canada has filed the affidavit of Ms. Tracey Sandgathe, Director of the Aquaculture Management Division, DFO, affirmed on June 24, 2021[Sandgathe Affidavit], together with exhibits. The Sandgathe Affidavit describes the "adjustments" to the process for issuing fish transfer licences. Attached as an exhibit to her affidavit is a partially redacted *Memorandum for the Minister, Consultation Approach for Requests to Transfer Marine Finfish into Discovery Islands (FOR INFORMATION)*, dated April 23, 2021. The summary of this memorandum states that its purpose is to advise the Minister on the consultation approach for requests to transfer fish to marine finfish sites in the Discovery Islands. The summary then describes the impact of the *Mowi* injunction on the Minister's Decision (preventing the application of the component of the Minister's Decision prohibiting the transfer of new fish). Although authored by the Deputy Minister and Associate Deputy Minister, the summary contains a redacted section marked as "Solicitor-Client Privilege". This is followed by the statement:

> Therefore, due to the received and expected transfer applications, a plan for managing applications and consulting with Discovery Island First Nations has been developed, together with a timeline that includes departmental approval and record keeping protocols.

[119] The memorandum discusses upcoming transfer requests, noting that DFO could expect up to 10 transfer requests in the upcoming months. Three of these had already been submitted, one of which was from Cermaq. The remainder of this section is again redacted purportedly on

the basis of solicitor-client privilege. The next segment discusses the approach to transfer requests:

> In light of the Court's decision on the injunction REDACTED and current and expected transfer applications, the Department is modifying its approach to reviewing transfer requests which will include consultation with the seven First Nations with overlapping claimed territory in the Discovery Islands. *In its decision, the Federal Court stressed that there was no evidence of meaningful consultations with First Nations on the component of your decision regarding the prohibited transfers* REDACTED.
>
> (italic emphasis added)

[120] The memorandum next discusses consultation, noting that it is a new component in the process for assessing species introduction and transfer licences. Further, that a plan for managing applications and consulting with First Nations is attached, that the approach only applies to transfers into the Discovery Islands, and that based on these new steps the adjusted service standard is 40 business days from the time of application to decisions rather than the standard timeline of 20 business days. Following a further redaction, the memorandum also states that two First Nations had already asserted a lack of consultation on the basis of a novel adverse impact of a pathogen (the attached plan refers to letters dated April 1, 6 and 8, 2021 received from counsel for these two First Nations), followed by another redaction.

[121] As to the reason for the Revised Process, the Sandgathe Affidavit states that immediately after the Minister's Decision, DFO adjusted the process so that the final decision on transfer licence applications was made directly by the Minister, rather than the Regional Director of Fisheries Management (this followed the Minister's rejection the Deputy Minister's Memorandum recommendation described above, instead making the Minister's Decision). And,

in April 2020, DFO added consultation with First Nations and further consultation with transfer licence applicants for s 56 transfer licence applications to move fish into the Discovery Islands (referencing the above consultation memorandum). Ms. Sandgathe states that this second "adjustment" was prompted by two events. First, the three letters (April 1, 6 and 8, 2021) from legal counsel for Homalco and Tla'mins's First Nations asserting that a disease agent (*Tenacibaculum*, a bacteria causing mouth rot) constituted a novel adverse impact on wild salmon requiring consultation with those First Nations on any applications for transfer licences in the Discovery Island. Ms. Sandgathe states that the second reason for the adjustment was that "on April 5, 2021, the Federal Court released its decision on Mowi's and Saltstream's injunction application. In its decision, the Federal Court stressed that there was no evidence of meaningful consultations with First Nations on the component of your decision regarding the prohibited transfers in the Discovery Islands".

[122] Neither the memorandum nor Ms. Sandgathe point out where in the *Mowi* decision Justice Pamel stressed the lack of meaningful consultation that apparently provoked a change to the longstanding s 56 transfer licence application assessment process.

[123] However, I note that in his discussion of the serious issue branch of the test for an injunction, when discussing an assertion by Mowi and Saltstream that nothing in the record before Minister could have informed her decision to ban transfer licences, Justice Pamel found that there had been consultation with stakeholders, including First Nations, concerning the greater policy imperative regarding the future of salmon aquaculture in the Discovery Islands. However, the evidence regarding concerns over the continued issuance of fish transfers was

limited to a single statement (*Mowi* at para 82). Justice Pamel then quoted from an affidavit filed by Canada, based on which Canada argued that it could be inferred that the consulted First Nations did not want further transfers. Justice Pamel stated that "another reading of the evidence would suggest that the concern regarding the continued issuance of transfer licences during the phase-out period was not first raised by the First Nations communities, but rather emanated from a suggestion from the Minister" (*Mowi* at paras 81-84).

[124] And, when discussing the balance of convenience aspect of the tripartite test, Justice Pamel noted that Canada had argued that a stay of the component of the Minister's Decision dealing with transfer licences would harm reconciliation efforts with First Nations. Justice Pamel acknowledged the importance of reconciliation efforts and stated that although they were a factor weighing against the issuance of an injunction, based on the evidence before him, it was difficult to find any meaningful consultation with First Nations regarding the possible prohibition of the issuance of transfer licences (at para 122).

[125] In her affidavit, Ms. Sandgathe states that the purpose of the consultations conducted pursuant to the Revised Process "was to allow DFO to meet any consultation obligations with First Nations that may arise in the context of s 56 transfer licence applications, and to provide the Minister with information relevant to s. 56 transfer licence decisions into the Discovery Islands" (para 44).

[126] In my view, Justice Pamel did not make a finding that there had been a failure of the duty to consult with respect to granting or denying transfer licences. That issue was not before him.

Rather, he found that Canada's suggestion that First Nations were in support of the Minister's Decision totally banning further transfer licences during the phase out period was not supported by the record that was before the Minister when she made her decision.

[127] Cermaq expresses skepticism as to the motivation for the Revised Process. I agree that, based on his comments above, the consultation memorandum's statement that Justice Pamel "stressed" that there was no evidence of meaningful consultations is a questionable interpretation of his reasoning and an equally questionable spring board for the implementation of an entirely new consultation component. As Cermaq points out, transfer licence application consultation has never been previously utilized and the Revised Process only applies in the Discovery Islands. Cermaq submits, and Canada does not dispute, that in the normal course, the s 56 analysis is conducted by the ITC and, so long as fish health is not a concern, transfer licence applications are issued as a matter of course.

[128] As to the letters from Homalco and Tla'amin's counsel asserting that a disease agent constituted a novel adverse impact on wild salmon in the Discovery Islands requiring DFO to consult with them on transfer applications, and that DFO had not done so, I note in passing that the duty to consult when there is an assertion of a novel adverse impact has previously been litigated (*Morton v Canada (Fisheries and Oceans)*, 2019 FC 143; *Namgis First Nations v Canada (Fisheries, Oceans and the Canadian Coast Guard)*, 2020 FCA 122). In my view, if DFO was of the opinion that this concern warranted discrete consultation, then it was open to DFO to do so. The consultation memorandum, however, makes only a passing reference to this issue and it would not seem to have been the primary motivating factor for the Revised Process.

[129] Based on the above, in my view, Cermaq is not wrong in its submission that the Revised Process was implemented in response to the *Mowi* injunction. However, this does not assist Cermaq in this motion. As I have found above, *Mowi* did not preclude the Minister from implementing the Revised Process.

[130] Cermaq also asserts that the Revised Process as applied with respect to its transfer licence application indirectly implemented the transfer ban.

[131] The background to this begins on April 27, 2021 when DFO wrote to the seven First Nations. This letter refers to an April 16, 2020 letter from Ms. Sandgathe concerning the Mowi injunction and DFO's next steps as it received transfer requests It states that as DFO continues to receive fish transfer requests that it is critical that DFO understand the perspectives of the First Nations, including whether transfers would be supported from a social and/or cultural perspective. The letter states that previous consultations, including between September 17 and December 10, 2020, included a fish health component, "which is the underlying factor associated with transfer requests". In the new consultation, DFO would provide notice of the proposed transfer along with information from the applicant and information from DFO on whether the proposed transfer poses a risk. First Nations would have 15 days to inform DFO of any concerns with the proposal that were not addressed in the previous consultation which DFO would consider when making a decision on the fish transfer.

[132] On April 29, 2021, DFO sent letters to the seven First Nations concerning Cermaq's transfer application. These letters again noted that previous consultations, including those

between September 17 and December 10, 2020 regarding the aquaculture licence decision on the Discovery Islands fish farms, included a fish health component "which is the underlying factor associated with the transfer requests". The letter states that during the relicensing consultations DFO shared information, including science and fish health information, which DFO again provided, along with information concerning Cermaq's transfer application. The letter states that the First Nations were invited to inform DFO of any concerns with the proposed transfer of fish that were not addressed in the previous consultations. The letters to Hamalco and Tla'min First Nations added that DFO would be considering the April 1, 6 and 8, 2021 letters from their counsel. A separate letter was sent to these First Nations concerning Cermaq's aquaculture licence extension request. The responses and notes of a meeting between the Minister and DFO representatives and the First Nations are attached as exhibits to the Sandgathe Affidavit and are described in the Transfer Memorandum.

[133] Cermaq was given an opportunity to review the First Nations' submissions and to provide response submissions.

[134] Based on the record before me, I agree with Cermaq that the consultation responses and the notes of the consultations attended by the Minister and DFO are not particularly focused on the transfer of these particular fish to which Cermaq's application applied. That is, how these particular fish that Cermaq sought to transfer under the application at issue constituted an unacceptable risk. The Transfer Decision itself also states that in the course of the transfer licence consultations a number of First Nations continued to strongly oppose salmon aquaculture in the Discovery Islands. Again, this is a reference to aquaculture generally, and is not specific to

Cermaq's transfer licence application, which was the subject of the new consultation conducted under the Revised Process.

[135] The consultations, the ITC assessment, and other materials were assessed by DFO and summarized in the Transfer Memorandum. As noted above, the Transfer Memorandum recommended that the Minister approve Cermaq's transfer application and request to extend the aquaculture licence for seven months.

[136] The Minister rejected that recommendation. She indicated in the Transfer Decision that, because some First Nations consulted continued to strongly oppose salmon aquaculture in the Discovery Islands, she had determined that "social acceptability" for commercial finfish aquaculture in that area was lacking and accordingly denied the transfer licence and the extension request.

[137] However, the Transfer Memorandum demonstrates that the consultations conducted pursuant to the Revised Process were considered by DFO and that DFO still recommended that the transfer and extension applications should be approved. Therefore, the Revised Process itself did not ensure a certain result. In this way it was not an indirect application of the Minister's Decision. Rather, it was the Minister's rejection of DFO's recommendation and her assessment of the further consultations that founded the Transfer Decision.

[138] While there may be room to question the reasonableness of the Minister's assessment based on the record before her and while Cermaq takes issue with what it views as her novel

finding of “social acceptability” and the retroactive application of the Revised Policy to its transfer licence application, these are all issues on the merits of the Transfer Decision, which has not been challenged and is not the subject of the underlying judicial review in this motion.

Conclusion

[139] In conclusion, the premise of Cermaq’s motion seeking injunctive relief is that *Mowi* established that the transfer licence application review process which was routinely utilized prior to the Minister’s Decision was the *status quo* and, in spirit and intent, that this precluded the Minister from making changes to that process. However, as I have indicated above, I do not agree that *Mowi* served to constrain the Minister from effecting the Revised Process.

[140] Therefore, the remedy that Cermaq seeks, that the Minister be constrained from implementing the Minister’s Decision, directly or through the application of the Revised Process or any other process, is not available to it. Similarly, nor is the relief that the Minister issue a decision regarding the resubmitted application “taking into account only the standard considerations routinely applied to transfer licence prior to December 2020”. Based on the record before me, I am also not persuaded that the Revised Process served to ensure a certain result, thereby indirectly implementing the transfer ban aspect of the Minister’s Decision.

[141] The relief that Cermaq seeks, constraining the Minister with respect to the transfer licence application review process, also differs from and exceeds the relief sought in the underlying application for judicial review which seeks to prohibit the application of the

Minister's Decision until the judicial review is heard. The relief sought in the application for judicial review concerns only the Minister's Decision while the relief sought in this motion is concerned with the manner in which Cermaq's transfer licence application was, and on re-submission, will be assessed.

[142] This finding is determinative of the motion.

ORDER IN T-129-21, T-127-21, T-128-21, AND T-132-21

INTERVENER MOTION

THIS COURT ORDERS that

1. The motion of Alexandra Morton, David Suzuki Foundation, Georgia Strait Alliance, Living Oceans Society and, Watershed Watch Salmon Society [collectively, the Conservation Coalition] seeking leave to intervene in Cermaq Canada Ltd's interlocution injunction motion is granted;

2. The Conservation Coalition is granted leave to file a responding Motion Record in the form attached as Schedule A to its Notice of Motion and to make oral submissions of no more than 30 minutes at the hearing of the injunction motion; and

3. No costs are awarded to or against the Conservation Coalition.

INJUNCTION MOTION

THIS COURT ORDERS that

1. Cermaq Canada's Ltd. motion seeking an interlocutory injunction is dismissed; and

2. Costs shall be in the cause of the underlying consolidated applications for judicial review.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-129-21, T-127-21, T-128-21, AND T-132-21
STYLE OF CAUSE:	MOWI CANADA WEST INC., CERMAQ CANADA LTD.,, GRIEG SEAFOOD B.C. LTD. AND 622335 BRITISH COLUMBIA LTD. v THE MINISTER OF FISHERIES, OCEANS, AND THE CANADIAN COAST GUARD and ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY AND WATERSHED WATCH SALMON SOCIETY
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	JUNE 28, 2021
ORDER AND REASONS:	STRICKLAND J.
DATED:	JULY 2, 2021

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