Federal Court Cour fédérale

Date: 20240607

Dockets: T-554-23
T-556-23
T-552-23
T-555-23

Citation: 2024 FC 876

Ottawa, Ontario, June 7, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

WE WAI KAI NATION AND WEI WAI KUM FIRST NATION, MOWI CANADA WEST INC., CERMAQ CANADA LTD., AND GRIEG SEAFOOD B.C. LTD.

Applicants

and

THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD

Respondent

and

KWIKWASUT'INUXW HAXWA'MIS FIRST NATION, 'NAMGIS FIRST NATION, ST'ÁT'IMC CHIEFS COUNCIL, STÓ:LŌ TRIBAL COUNCIL, MUSQUEAM INDIAN BAND, THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS, ALEXANDRA MORTON, DAVID SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY, AND WATERSHED WATCH SALMON SOCIETY

Interveners

JUDGMENT AND REASONS

I. Overview

[1] This application for judicial review involves a consideration of competing interests and issues related to the licensing of open-net pen Atlantic salmon fish farms in the Discovery Islands in British Columbia.

[2] The applicants in this matter are We Wai Kai Nation and We Wai Kum First Nation [together, the Nations], Mowi Canada West Inc. [Mowi], Cermaq Canada Ltd. [Cermaq], and Grieg Seafood B.C. Ltd. [Grieg] [all collectively referred to as Applicants]. Mowi, Cermaq, and Grieg [collectively, Operators] operate Atlantic salmon fish farms in British Columbia.

[3] The Applicants seek judicial review of the February 17, 2023 decision [Decision] of the Minister of Fisheries, Oceans and the Canadian Coastguard [Minister] declining to renew 15 aquaculture licences for Atlantic salmon fish farms in the Discovery Islands in British Columbia. The Minister is the sole Respondent in this matter.

[4] Each of the Applicants filed separate applications for judicial review of the Decision in court files T-554-23, T-556-23, T-555-23, and T-552-23. On April 14, 2023, Associate Judge Milczynski ordered the consolidation of the proceedings.

[5] Seven aquaculture licences situated in the following locations are located within the traditional territories of the Nations: Hardwicke Island, Lees Bay, Chancellor Channel, Sonora

Point, Venture Point, Brent Island, and Barnes Bay. The Decision affected 11 Mowi aquaculture sites, 3 Cermaq aquaculture sites, and 1 Grieg aquaculture site in the Discovery Islands.

[6] Two coalitions were granted intervener status. The first coalition consists of Kwikwasut'inuxw Haxwa'mis First Nation, 'Namgis First Nation, St'át'imc Chiefs Council, Stó:lō Tribal Council, Musqueam Indian Band, and the Union of British Columbia Indian Chiefs [collectively, the First Nations Coalition]. The second coalition consists of Alexandra Morton, David Suzuki Foundation, Georgia Strait Alliance, Living Oceans Society, and the Watershed Watch Salmon Society [collectively, the Conservation Coalition].

[7] The Nations assert that the Minister did not meet her heightened duty to consult with them in arriving at the Decision. The Operators assert that the Minister breached their rights to procedural fairness in arriving at the Decision. All Applicants assert that the Decision is unreasonable. The Minister disputes all of these assertions. The specific submissions of the parties will be summarized in more detail later in this Judgment and Reasons.

[8] The applications for judicial review are dismissed.

II. Regulatory Backdrop

[9] The Minister is responsible for regulating aquaculture operations through the *Fisheries Act*, RSC, 1985, c F-14 [*Fisheries Act*]. The Department of Fisheries and Oceans [DFO] is responsible for issuing all aquaculture licences for marine finfish, shellfish, and freshwater operations in British Columbia.

[10] The operation of aquaculture sites requires multiple federal and provincial authorizations. First, operators require a marine finfish aquaculture licence issued under section 7 of the *Fisheries Act*:

> **Fishery leases and licences**
>
> 7 (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

[11] Second, operators require introduction and transfer licences to transfer fish into or between aquaculture sites. The Minister or her delegate issues transfer licences pursuant to section 56 of the *Fisheries (General) Regulation*, SOR/93-53:

> **Licence to Release or Transfer Fish**
>
> 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.

[12] Third, operators require a licence of occupation authorizing the tenure for the site issued by the Province of British Columbia pursuant to the *Land Act*, RSBC 1996, c 245:

> **Licence of occupation**
>
> 39 The minister may issue a licence to occupy and use Crown land, called a "licence of occupation", subject to the terms and reservations the minister considers advisable.

[13] Furthermore, the *Fisheries Act* specifies the following considerations for the Minister:

> **Duty of Minister**
>
> 2.4 When making a decision under this Act, the Minister shall 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*.
>
> **Considerations for decision making**
>
> 2.5 Except as otherwise provided in this Act, when making a decision under this Act, the Minister may consider, among other things,
>
> (a) the application of a precautionary approach and an ecosystem approach;
>
> (b) the sustainability of fisheries;
>
> (c) scientific information;
>
> (d) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister;
>
> (e) community knowledge;
>
> (f) cooperation with any government of a province, any Indigenous governing body and any body — including a co-management body — established under a land claims agreement;
>
> (g) social, economic and cultural factors in the management of fisheries;
>
> (h) the preservation or promotion of the independence of licence holders in commercial inshore fisheries; and
>
> (i) the intersection of sex and gender with other identity factors.

[14] The *Fisheries Act* makes clear that licensing decisions require a consideration of public interest factors that extend beyond the private interests of license holders and which are assessed on polycentric criteria (*Shelburne Elver Limited v Canada (Fisheries, Oceans and Coast Guard)*,

2023 FC 1166 at para 76; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras 28-29).

III. Background

[15] In 2012, the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River [Cohen Commission] released its final report "The Uncertain Future of Fraser River Sockeye" [Final Report]. The Final Report made several recommendations, including:

> 19. On September 30, 2020, the minister of fisheries and oceans should prohibit net-pen salmon farming in the Discovery Islands (fish health sub-zone 3-2) unless he or she is satisfied that such farms pose at most a minimal risk of serious harm to the health of migrating Fraser River sockeye salmon. The minister's decision should summarize the information relied on and include detailed reasons. The decision should be published on the Department of Fisheries and Oceans' website.
>
> 20. To inform the decision under Recommendation 19, the minister and the Department of Fisheries and Oceans should take the following steps:
>
> - Conduct the research and analysis recommended in Recommendation 68 and publish the results of this research.
> - Assess any relationships between salmon farming variables compiled in the fish health database and Fraser River sockeye health or productivity.
> - Invite from the salmon-farming industry and from other interested parties written submissions respecting the risk that net-pen salmon farms pose to the health of migrating Fraser River sockeye salmon.
> - Publish on the DFO website the full text of all submissions received.
> - Provide to submitters a reasonable opportunity to respond in writing to other submissions and publish such responses on the DFO website.

[16] In 2019, the Prime Minister mandated then-Minister Jordan to work with the Province of British Columbia and Indigenous communities to create a plan to transition away from open-net pen aquaculture in British Columbia by 2025 [Transition Plan].

[17] On September 28, 2020, the Canadian Science Advisory Secretariat [CSAS] announced that it completed nine scientific peer-reviewed risk assessments in accordance with the Final Report [CSAS Risk Assessments]. The CSAS determined that "[a]ll of the assessments concluded that the pathogens on Atlantic salmon farms in the Discovery Islands area **pose no more than a minimal risk** to Fraser River Sockeye salmon abundance and diversity under the current fish health management practices" [emphasis in original].

A. *Previous Decision*

[18] Four salmon farming fishing companies, including the Operators, filed for a judicial review of then-Minister Jordan's December 17, 2020 decision to phase out salmon farms in the Discovery Islands [2020 Decision]. In *Mowi Canada West Inc v Canada (Fisheries, Oceans and Coast Guard)*, 2022 FC 588 [*Mowi*], the Court allowed the applications for judicial review finding that Minister Jordan breached procedural fairness obligations by not providing the applicants with notice of the 2020 Decision, a meaningful opportunity to provide submissions or respond to concerns, and reasons for the 2020 Decision (at paras 194, 211, 228). The Court also found that the 2020 Decision was unreasonable as it was not justified, intelligible, or transparent due to the lack of reasons provided (at para 254).

[19] The Operators submit that *Mowi* applies directly to this matter and that the Court should similarly allow these applications for judicial review.

B. *Events Leading to the Decision*

[20] On June 22, 2022, then-Minister Murray announced that she would not reissue the aquaculture licences in the Discovery Islands. Instead, the Minister would conduct further consultations regarding aquaculture in the Discovery Islands between June and December 2022 and announce a decision on reissuing expiring licences in January 2023.

[21] During the consultation period, DFO held four aggregate meetings with the Operators. Mowi held four bilateral meetings with DFO or the Minister, Cermaq met with DFO six times and had a bilateral meeting with the Deputy Minister, and Grieg had two bilateral meetings consisting of one with DFO and one with the Minister. Each of the Operators also submitted reports, presentations, and other information to DFO throughout the process.

[22] The Nations met three times with DFO or the Minister during the consultation period. The Nations also submitted documents and letters to DFO and the Minister. Most notably, the Nations submitted a proposal to the Minister on November 30, 2022, which the Nations created after discussions with the Operators [Proposal]. The Nations viewed the Proposal as an alternative path forward that would respect their sovereignty, protect wild salmon, develop Indigenous science and governance capacity, and explore innovative techniques and technology for minimizing interactions between farmed and wild salmon.

IV. Decision

[23] On January 24, 2023, DFO submitted a memorandum to the Minister concerning the "Reissuance or Non-Reissuance of Salmon Aquaculture Licences in the Discovery Islands" [Memorandum]. The Memorandum is comprehensive and begins with a high-level summary of

the consultation process then discusses relevant considerations, the precautionary principle, and science, including the Final Report, CSAS Risk Assessments, DFO research on pathogen risk assessments and stressors or threats to Pacific salmon. DFO also recommended that the precautionary approach should be applied in the Discovery Islands consistent with its application across British Columbia.

[24] DFO then discussed the varying First Nations perspectives who assert claims to the Discovery Islands, including the Nations and the Klahoose, Kwiakah, Homalco, K'ómoks and Tla'amin First Nations. DFO stated, "the Department recommends placing strong emphasis on the views of First Nations who support renewal."

[25] The Memorandum identifies industry perspectives on the licences sought and their socio-economic impact, including from the Operators. Specifically, the Memorandum discusses the Nations' engagement with and support for the Operators' licences, as well as the local and provincial impact of these aquaculture sites. The Memorandum cautioned that industry would view the Minister's decision as an indicator of the future direction of the Transition Plan.

[26] DFO provided four options on how to proceed: (1) approve all until June 2024; (2) approve nine and defer remainder until the release of the Transition Plan by spring or summer 2023; (3) defer all until the release of the Transition Plan by spring or summer 2023, except for Saltstream Engineering Ltd. [Saltstream]; or (4) deny all. Under each option, DFO outlined a summary of the recommendation, science considerations, First Nations' views, industry views,

public reaction, and a redacted category due to solicitor-privilege. DFO recommended that the Minister proceed with Option 1 and strongly recommended against Option 4.

[27] The Minister decided to proceed with a modification of Option 4 and denied licences to the Operators but approved the licence for Saltstream until June 30, 2024. On February 17, 2023, the Minister informed the Operators individually of the Decision by letters, which were substantially similar aside from details about the sites in issue and details of their respective consultations. The Minister outlined that the following considerations warrant taking a highly precautionary approach concerning the Atlantic salmon farms in the Discovery Islands: the Discovery Islands is a unique area, the decline of wild salmon stocks, the impact of the decline of wild salmon on First Nations, and scientific uncertainty. The Minister considered "all relevant circumstances and information including scientific research, environmental factors, socio-economic factors, Indigenous considerations and representations made by industry", including the financial impact on industry by not reissuing the licences in the Discovery Islands. However, "[t]he considerations outlined above all point in the same direction: a high degree of precaution is warranted with respect to Atlantic salmon aquaculture in the Discovery Islands, which compels me to take strong, concrete measures to protect wild salmon."

[28] On March 10, 2023, the Minister informed the Nations about the Decision by letter. In the letter, the Minister recognized the differing First Nations views, decline of wild salmon stocks, uniqueness of the Discovery Islands area, scientific uncertainty, and the Minister's mandate to develop the Transition Plan, which all led to a need for a high degree of precaution to protect wild salmon.

V. Evidence

A. *The Nations*

[29] The Nations' evidence on this application was in the form of an affidavit from Wei Wai Kum First Nation Chief Christopher Roberts [Chief Roberts], with the consent of We Wai Kai Nation Chief Ronnie Chikite. Generally, the evidence discusses that Wei Wai Kum First Nation, We Wai Kai Nation and Kwiakah First Nations were collectively known as the Laich-kwil-tach Nation and that seven sites in this application are within the core, unceded and exclusive traditional territory of the Laich-kwil-tach Nation over which they hold Aboriginal title. Chief Roberts also states that the Nations' priority is protecting wild salmon that frequent their waters and they are not opposed to plans to transition away from fish farming.

B. *Mowi*

[30] Mowi's evidence on this application was in the form of affidavits from Councillor Isaiah Robinson, from the Kitasoo Xai'Xais Nation; Diane Morrison, Managing Director of Mowi; Richard Opala, Regulatory Affairs Manager for Mowi; Mia Parker, Director of Environmental Performance and Certification for Mowi; and Leanna McInally, Legal Administrative Assistant for Mowi's counsel.

[31] Councillor Isaiah Robinson discusses Kitasoo Xai'xais' historic and modern involvement with commercial fisheries. He focuses on Kitasoo Xai'xais' relationship with Mowi in terms of Mowi's employment of Kitasoo Xai'xais members, partnership with the Kitasoo Xai'xais on a

smoker plant and its community support, as well as the impact of the Decision on the community.

[32] Diane Morrison discusses the business operation of Mowi in terms of its facilities, salmon farming process, the importance of the Discovery Islands, and relationships with local First Nations and communities. Ms. Morrison also discusses the factual context for the judicial review with a focus on the consultation process.

[33] Richard Opala discusses the regulatory background in terms of the requirements for licencing of aquaculture in British Columbia, conditions of licencing, licenses to transfer smolts from a hatchery to a fish farm and fish between fish farms, the regulation of the Hardwicke site, and area-based aquaculture management. Mr. Opala also discusses his involvement during the consultation process.

[34] Mia Parker discusses the factual context for the judicial review, including the 2020 Decision, federal engagement on aquaculture regulation and policy, the Minister's mandate and engagement on the 2025 Transition Plan, the engagement process leading to the Decision, Mowi's submissions, and the CSAS process.

[35] Leanna McInally provides a chart outlining the Applicants' requests to revise the Certified Tribunal Record to include certain documents and the corresponding responses from the Respondent's counsel.

C. *Cermaq*

[36] Cermaq's evidence was in the form of affidavits from David Kiemele, Managing Director for Cermaq; Peter McKenzie, Fish Health Director and Senior Veterinarian for Cermaq; and Chantelle deMontmorency, temporary articled student for Cermaq's counsel.

[37] David Kiemele discusses information related to Cermaq's sites in the Discovery Islands, the regulatory framework for aquaculture and licences, the production cycle for fish farming, and Cermaq's agreements with First Nations. Mr. Kiemele also discusses the factual context for events leading to the Decision and afterwards, including the consultation process and the impact of the Decision.

[38] Peter McKenzie discusses the CSAS Risk Assessments completed in response to the Cohen Commission recommendations, the CSAS scientific review process generally, CSAS science responses, and other relevant DFO policies and procedures. Mr. McKenzie discusses Cermaq's efforts to further research in response to requests from DFO, its proposals with respect to the Decision, and the Minister's engagement with scientists.

[39] Chantelle deMontmorency provided hyperlinks to pages on publically accessible websites for the Pacific Salmon Foundation, Wild First and EcoJustice, as well as an article that includes an interview with Tony Allard and his biography page for the Rivers Capital Group.

D. *Grieg*

[40] Grieg's evidence on this application was in the form of an affidavit from Jennifer Woodland, Managing Director of Grieg, who discusses the business operations, such as the regulation of aquaculture operations, the Barnes Bay site licencing, the salmon farming process, and Grieg's relationships with local First Nations, including a memorandum of understanding with the Nations for the Barnes Bay site. Ms. Woodland also discusses the factual context for events leading to the Decision and afterwards, including the consultation process and the impact of the Decision.

E. *Cross-examinations*

[41] Diane Morrison, Jennifer Woodland, David Kiemele, Chief Roberts, Peter McKenzie, Mia Parker, and Richard Opala, were cross-examined on their affidavits.

VI. Preliminary Issues

A. *Should the Applicants' affidavit evidence be struck?*

[42] The Respondent takes issue with certain evidence contained in the Applicants' affidavits, as set forth below.

(1) Mowi's Evidence

[43] In Mia Parker's affidavit, the Respondent seeks to strike portions of paragraphs 20, 39, 46, 46(b), 54, 55, 61, 62, 66, 69, 70, 72, 76, 77, 79, 81, 83, 84(a), 84(c), 94 and the entirety of paragraphs 60, 63-64, 78, 85, 87-89, 102-103, and 106-111. After considering the Respondent's

submissions and after reviewing the paragraphs in question, I agree that the portions or paragraphs identified by the Respondent are argumentative or opinion evidence. Generally, much of the identified portions of the affidavit of Mia Parker go towards her views on the consultation and opinion on how CSAS functions.

[44] In Dianne Morrison's affidavit, the Respondent seeks to strike portions of paragraphs 10, 46, 53, 55, 62(a), 64, 68, 99 and 107 and the entirety of paragraph 95. I agree that paragraph 95 contains hearsay and should be struck. I also agree that the identified portions of paragraphs 10, 46, 53, 55, 62(a), 64, 68, 99 and 107 should be struck as they contain either opinion or argument. Most of the impugned content contain Ms. Morrison's opinion on the consultation or the Minister's state of mind.

[45] In Richard Opala's affidavit, the Respondent wishes to strike portions of paragraphs 40, 56, 63, 64, 69, 70, and 88. I agree that the impugned portions of these paragraphs should be struck as they are argumentative.

(2) Cermaq's Evidence

[46] In David Kiemele's affidavit, the Respondent seeks to strike the entirety of paragraph 103 and portions of paragraphs 94 and 99(a). I agree with the Respondent that the identified portions of paragraphs 94 and 99(a) and the entirety of paragraph 103 are opinion or argumentative about the Minister's engagement.

[47] In Peter McKenzie's affidavit, the Respondent seeks to strike portions of paragraphs 11-14, 19, 21-22, 24, 33 and 35-36 and the entirety of paragraphs 31 and 35. I agree that portions of paragraphs 11, 13-14, 19, 21-22 and 35-36 and the entirety of paragraphs 31 and 35 contain either Mr. McKenzie's opinion or calls for expert evidence. Most of the impugned content concerns his views on the CSAS process.

[48] However, the Respondent takes issue with the sentence "[t]his research document provides a review of the efforts made to maintain optimal fish health on farms" in paragraph 12 but the document referred to in Exhibit N states under Purpose of This Document that "[t]his document provides a summary of the legislative and regulatory requirements related to fish health management and describes the additional practices used by the Atlantic Salmon farming industry in the Discovery Islands." I do not agree that the sentence in the affidavit is opinion evidence. Furthermore, I do not agree that paragraph 33 contains opinion evidence as Mr. McKenzie repeats comments that he heard from DFO representatives.

(3) Grieg's Evidence

[49] In Jennifer Woodland's affidavit, the Respondent seeks to strike all of paragraphs 79, 102 and 106, and portions of paragraphs 73, 93 and 105. I agree that paragraphs 73, 79, 93, and 102 should be struck as it contains opinion and argument. I also agree that paragraphs 105 and 106 contain hearsay and should be struck. I note that paragraph 106 also contains opinion and the remainder of the paragraph should be struck for that reason.

(4) Nations' Evidence

[50] In Chief Christopher Roberts' affidavit, the Respondent seeks to strike paragraph 36 and portions of paragraphs 30 and 73. I agree that the paragraphs are opinion or argumentative.

[51] Overall, while the affidavit evidence was extensive, the matter has been determined with limited assistance of this evidence.

B. *Should the Nations' standing in these proceedings be limited to making submissions on the duty to consult?*

[52] The Respondent submits that the Nations do not have standing to argue administrative law issues identified in the Nations' amended notice of application since the Nations were not directly affected by the Decision as required under the *Federal Courts Act*, RSC 1985, c F-7 (s 18.1). After considering these submissions, the Nations' written and oral submissions, and the Nations' Amended Notice of Application, I note that the Nations abandoned the arguments on these issues.

VII. Issues and Standard of Review

[53] After considering the submissions of the parties, this matter raises the following issues:

1. Did the Minister meet the duty to consult?
2. Was the Decision procedurally fair?
3. Was the Decision reasonable?

[54] Only the Nations and the Respondent made submissions concerning the Minister's duty to consult, while only the Operators and the Minister made submissions on procedural fairness. All parties made submissions on the reasonableness of the Decision.

[55] On the first issue, the Nations submit that the existence, extent, and content of the duty to consult are legal questions reviewable on the standard of correctness while the question of whether the Minister met the duty to consult is reviewable on a standard of reasonableness (*Ehattesaht First Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849 at para 45, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 61-63 [*Haida*]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 27 [*Coldwater*], citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 55 [*Vavilov*]). The Respondent submits that the adequacy of consultation is reviewable on the reasonableness standard (*Haida* at para 61). I agree that the correctness standard applies to the scope of the duty to consult and that the adequacy of the consultation is reviewable on a reasonableness standard (*Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2023 FCA 191 at paras 16-17; *Vavilov* at para 55; *Coldwater* at para 27).

[56] On the second issue, the Applicants agree that procedural fairness is reviewable on a correctness standard. The Respondent submits that the standard of review is either correctness or no standard applies at all; the question is whether the procedure was fair having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at para 46 [*CP Railway*]). I agree that the second issue attracts a standard of review akin

to correctness (*CP Railway* at para 46; *Mission Institution v Khela*, 2014 SCC 24 at para 79). On a correctness review, no deference is owed to the decision-maker (*Blois v Onion Lake Cree Nation*, 2020 FC 953 at para 26). Rather, when evaluating whether there has been a breach of procedural fairness, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at paras 46-47; *Vavilov* at para 77; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at paras 21-28 [*Baker*]).

[57] On the third issue, the Applicants and the Respondent agree that the merits of the Decision is reviewable on a standard of review of reasonableness. I agree. This case does not engage one of the exceptions set out by the Supreme Court of Canada in *Vavilov*. Therefore, the presumption of reasonableness is not rebutted (at paras 16-17).

[58] A reasonableness review is a robust form of review that requires the Court to consider both the administrator's decision-making process and the outcome of the decision (*Vavilov* at paras 83, 87; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 58 [*Mason*]). A reviewing court must take a "reasons first" approach to assess whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justifiable in relation to the relevant factual and legal constraints (*Vavilov* at paras 15, 99; *Mason* at paras 59-61). The onus is on the applicant to demonstrate the unreasonableness of the decision (*Vavilov* at para 100). A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine

whether the decision falls within a range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86).

VIII. Analysis

A. *Did the Minister meet the duty to consult?*

(1) Nations' Position

[59] The duty to consult exists to safeguard against infringements of Aboriginal rights, whether or not they have been proven in Court (*Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 at para 61). The central purpose of the duty is rooted in reconciliation (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1). It is not in dispute that the Minister owed a duty to consult the Nations, as the Crown had express knowledge of the Nations' claim and contemplated a decision, which impacted the management of the Nations' asserted territories and the future of the aquaculture industry in the region. (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31 [*Rio Tinto*]). The Minister was also aware of the economic impact of the Decision on the Nations. The Minister had a heightened duty to consult the Nations and failed to do so.

[60] The scope of the duty to consult is at the high end of the spectrum because of the strength of the Nations' asserted claim and because the potential infringement is of high significance due to the Decision's impact on the Nations' economic interests (*Haida* at paras 42-44; *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 at para 105 [*Ermineskin*]) and jurisdiction. There is also a high risk of non-compensable damage, including

harm to the Nations' right to self-determination, loss of opportunity to build governance and scientific capacity, and loss of economic opportunities promised under the agreements with the Operators (*Haida* at para 44). The Minister also failed to conduct a strength of claim assessment, which is required unless the Minister concedes that deep consultation is owed (*Sipekne'katik v Alton Natural Gas Storage LP*, 2020 NSSC 111 at paras 119-121 [*Sipekne'katik*]). Accordingly, the parties must proceed as if the Minister had to engage in deep consultation.

[61] The bundle of rights encompassed by Aboriginal title includes not only the right to the physical integrity of lands but also a range of economical and governance rights (*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 73). The Proposal was grounded in these jurisdictional and economic rights.

[62] The Minister had an obligation to listen to the Nations' concerns and meaningfully account for the impact of the Decision on the Nations' rights (*Coldwater* at para 41). Specifically, the Proposal was more than an impact benefit agreement, as it was designed to facilitate the exercise of the Nations' rights by bringing the seven sites at issue under the Nations' supervision and control. The Proposal illustrates what meaningful reconciliation can look like.

[63] The duty to consult also finds harmony with the analysis of substantive reasonableness set out in *Vavilov*. These conceptual frameworks are intertwined (*Coldwater* at para 41). Accordingly, the Minister failed to fulfill the duty to consult and the Minister failed to meet the standard of responsive justification, therefore, the Decision is unreasonable.

[64] First, the Minister failed to demonstrate that she took the Nations' asserted rights meaningfully into account or that she grappled with the consequences of the Decision on those rights. Instead, the reasons are exclusively concerned with the environmental considerations of the unique conservation value of the Discovery Islands area, scientific uncertainty about the impacts of fish farming on wild salmon populations, and government efforts to protect wild salmon. Second, the Minister failed to grapple with or address the specific submissions made by the Nations, including engaging substantively with the Proposal. This is similar to *Sipekne'katik* where the respondent failed to address the "proverbial elephant in the room", which is the Proposal in this case (*Sipekne'katik* at para 122). Third, the Minister failed to justify her departure from the clear advice of DFO. Although the Minister is not required to follow the advice of DFO, the Minister had a heightened onus to justify her departure from the clear recommendation of her own department, which is presumed to have expertise in this area.

[65] Consultation incorporates both procedural and substantive elements (*White River First Nation v Yukon Government*, 2013 YKSC 66). The controlling question to determine what is reasonable and meaningful in a particular circumstance is "what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake?" (*Haida* at para 45; *Coldwater* at paras 42-43). The Minister did not meaningfully and substantively engage with the Nations' submissions in making the Decision.

(2) Respondent's Position

[66] The Respondent agrees with the Nations' overview of the applicable principles related to the duty to consult and that there was a duty to consult in this case. However, Canada met its duty. The Nations' right at issue is the right to manage and benefit from their asserted traditional territories, flowing from their territorial claims, which is not a standalone right.

[67] The level of consultation owed was at the middle to low end of the spectrum rather than the high end as submitted by the Nations. The Nations' asserted rights do not have the strength of established rights or title nor asserted title as there are overlapping claims of other First Nations. The Nations submit that the duty to consult must be at the high end because no strength of claim analysis was done. However, it is a misinterpretation of the case law cited in *Sipekne'katik*, which simply stands for the proposition that a strength of claim analysis is not required when the Crown concedes that the depth of consultation is deep. Furthermore, it is not clear that the Decision had any adverse effect on the Nations' ability to exercise their Aboriginal right but if there were any impact, it was temporary and/or minor. The Decision concerned whether to issue a one-year aquaculture licence pursuant to the Minister's authority, which does not impact the Nation's ability to assert control over other industries or future agreements in which the Nations could assert control over aquaculture. Similarly, the right claimed is not actively diminished or negatively impacted by the Decision, so the right is preserved and the status quo is maintained.

[68] The Nations conflate the principles related to the duty to consult with the reasonableness review of the Decision under administrative law. In the context of the duty to consult, the focus is on the process of consultation and whether reasonable efforts were made, and not on the substantive outcome (*Roseau River First Nation v Canada (Attorney General)*, 2023 FCA 163 at

para 34). The major project cases cited by the Nations are distinguishable by virtue of this matter not involving a major project. However, it is possible for a decision-maker not to issue reasons in duty to consult cases, even when the duty to consult is at the high end of the spectrum (*Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 47; *Coldwater* at paras 41-42).

[69] In this matter, the Minister met the mid-level standard of the duty to consult. First, the process was reasonable. On June 22, 2022, the Minister notified the Nations by letter that there would be a six-month consultation period before she decides whether to relicense the Discovery Island sites and provided the Stated Considerations outlining the proposed Crown action, the Minister's concerns, and the scope of consultation. During the six-month consultation period, and as outlined in the Background section of this Judgment and Reasons, the Nations had several engagements: a meeting with DFO on October 6, 2022 (along with Cermaq and the Coalition of First Nations for Finfish Stewardship); a visit from the Minister on the Nations' claimed territory and touring some of the aquaculture facilities between October 11 and 14, 2022, including a meeting with the Minister on October 12, 2022; and a meeting with the Minister on January 9, 2023 (along with the Operators and Coalition of First Nations for Finfish Stewardship). The Nations also raised their views on the Decision during meetings with DFO on the Transition Plan. Furthermore, the Nations submitted the following documents to DFO and the Minister in support of their position: a November 15, 2022 letter indicating their consent for the Grieg licences; a November 29, 2022 letter reiterating their desire to control decision-making concerning the fish farms; and the November 30, 2022 Proposal. The Nations were supported by

the Coalition of First Nations for Finfish Stewardship, which submitted letters to the Minister as well.

[70] Second, Canada considered the Proposal to the extent it was necessary. The Proposal fell into two categories: recurring issues that were already consulted on or new issues that were outside the scope of consultation. The recurring issues already consulted on were the potential economic benefit for the Nations stemming from relicensing, concern for wild salmon and the need for further research, and the desire to have the Decision rolled into the Transition Plan from fish farming in the Nations' asserted territories. The new issues that went outside the scope of consultation were federal funding for the aquaculture companies to compensate for the 2020 Decision, and shift of decision-making power from the Minister to the Nations, to be informed by Nations-led scientific investigation. The Minister was not required to consider the new issues raised by the Proposal because it would have derailed DFO's consultations and "the duty to consult is about the consideration of asserted rights and the potential adverse impacts on such rights as a result of the contemplated decision, not about the recognition or determination of rights on the merits."

[71] Third, the Minister's reasons listed submissions from the Nations, took into account all relevant facts and circumstances raised by the Nations, other First Nations and industry during the consultation period (including the Proposal), and provided an explanation that the Decision was based on the precautionary principle and efforts to protect wild salmon.

(3) Intervener First Nations Coalition's Position

[72] The Minister's reliance on Indigenous peoples' concerns about the ongoing detrimental impact of fish farms on vulnerable wild Fraser River salmon is reasonable, appropriate, and consistent with Canada's obligations toward Indigenous peoples.

[73] The Decision had the potential to adversely affect the Aboriginal right to fish for many Indigenous peoples, both inside and outside the Discovery Islands. Similarly, the Decision had the potential to affect adversely Aboriginal title. The Minister was required to consider, weigh, and balance the impacts of the exercise of her discretion on the asserted Aboriginal title of Indigenous people along the entire migratory route of the Fraser River salmon.

[74] Furthermore, the Minister owed a deep level of consultation to Indigenous peoples outside the Discovery Islands since the right and potential infringement is of high significance to the Aboriginal peoples and the risk of non-compensable damage is high (*Haida* at para 44). Fraser River salmon play a significant role in the exercise of Aboriginal rights by many Indigenous peoples and the risk to the health of the Fraser River salmon posed by the fish farms in the Discovery Islands is unacceptably high. In contrast, the risk of non-compensable damage to the Laich-kwil-tach and Klahoose is low because the impact of a decision not to reissue licences is the loss of economic benefits from their territories, which is quantifiable and compensable.

[75] As part of the duty to consult, the Minister was required to consider Indigenous perspectives on the science, the risks, and the management of fish, fish habitat and fisheries. The honour of the Crown and the duty to consult also require the protection of Aboriginal rights by

preserving the resources upon which those rights depend (*Rio Tinto*; *Haida*). As such, the First Nations Coalition asserts that, the Minister was required to weigh the adverse impact on the Laich-kwil-tach and Klahoose of denying them economic benefits from the fish farms they supported with the adverse impact caused by increased risks to vulnerable Fraser River salmon on the rights to fish of Indigenous peoples that rely on Fraser River salmon for their food security, culture and spiritual well-being.

(4) Conclusion

[76] I agree with the parties that the Minister owed a duty to consult to the Nations. I find that the Minister met this duty, which was in the middle of the spectrum rather than the high end.

[77] While the Nations do not have a weak claim to title, there is insufficient evidence to say that the claim arises to the level of a strong *prima facie* claim, given the disputed territorial claims by other First Nations in the area. The Nations submit that this fact is irrelevant to the analysis because each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it (*Gitxaala Nation v Canada*, 2016 FCA 187 at para 236). I agree that the existence of multiple claims cannot negate the duty to consult to the Nations but it can serve to particularize or contextualize the duty. The record establishes that a contextualized approach of the impact of the Decision was made by the Minister and DFO in consulting with the Nations.

[78] The Nations have not persuaded me that the level of consultation required was at the high end of the spectrum. At the time of the Decision, the Nations were not managing or benefiting from the management of the aquaculture sites making this situation different from much of the

case law which contemplates a decision by the Crown which actively impacts or will impact a standalone right that is being practiced already (such as the right to fish). This Decision does, on its face, impact the ability of the Nations to assert this right in the sites at issue in the future, however it must be remembered that the licences were not permanent, thus not creating a significant impact on the asserted title claims. Though the Nations' economic interests are adversely impacted by the Decision (*Ermineskin* at paras 109-110), these impacts do not appear to be a non-compensable loss as required for the high end of the spectrum by *Haida* (at para 44). Recent case law also suggests that *Haida* does not contemplate adverse impacts on the Nations' ability to decide how the land will be used, or manage the land. Those rights flow from Aboriginal title, so the Crown must not impede the Nations' ability to govern their land in the future when Aboriginal title is established in order for the duty to consult to be triggered (*Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 at paras 305-306, 316, 318). As a result, in my view the depth of consultation owed is not at the high end of the spectrum as the Nations assert.

[79] The Nations also take issue with the lack of a formal preliminary assessment of their strength of claim. The Nations had provided the Minister with a detailed strength of claim report authored by Dr. Deidre Cullon, but did not receive a strength of claim assessment from the Minister. However, as noted by the Respondent, DFO informed the Nations that this matter was not the proper forum to determine the Nations' title claim but that DFO would assume for the purposes of the consultation that the Nations have a strong claim to title and rights in the area of the applicable Discovery Island sites. Given the nature of the Decision and DFO's concession on the Nations' strength of claim for the purpose of the Decision, I find the remaining question is

only whether the Crown fulfilled its obligation to consult adequately (*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 81; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at paras 61-64).

[80] I am also unconvinced that the Minister was required to address every submission of the Nations to maintain the honour of the Crown and to effect reconciliation in this case. However after a consideration of the record, the following conduct is sufficient to show that the Minister reasonably met the duty to consult: the adequate notice of consultation with the Stated Considerations, length of consultation period, direct engagement with the Nations through meetings and letters, and notice of the Decision with reasons that recognize the Nations' position and submissions and explain how the Minister came to a different course of action. The Nations have not taken issue with these aspects of the Minister's exercise of the duty to consult.

B. *Was the Decision procedurally fair?*

(1) Operators' Positions

[81] The Operators generally all assert that the Minister owed a high level of procedural fairness to the Operators, particularly in light of the procedural fairness requirements identified by the Court in *Mowi*. In *Mowi*, the Court found that the applicants were owed an opportunity to know the case to meet and to respond, as well as reasons for the decision (at paras 182, 228). Here, the Minister breached procedural fairness by not providing the Operators with an opportunity to know the case to meet and respond and by relying on scientific uncertainty, without notice, instead of the actual Stated Considerations and despite claims to emphasize

"social, economic, and cultural factors". The Operators had legitimate expectations that the Minister would rely on the established process for seeking science advice in decision-making. Given that the Minister placed significant weight on "scientific uncertainty" from non-CSAS science, which was largely sought out after the consultation period, the Minister was required to provide notice of and an opportunity to respond to the role of non-CSAS science. Grieg in particular noted that it had requested copies of any new research that was referenced broadly in the Stated Considerations. As submitted by Cermaq, the Minister engaged in pro-forma consultations with the Operations.

[82] The Operators also submit that the Minister was biased and pre-judged the outcome. The test of bias is whether the decision-maker has pre-judged the matter to such an extent that any representations to the contrary would be futile (*Newfoundland Telephone Co v Newfoundland (Board of Commissioners)*, 1992 CanLII 84 (SCC) at 638 [*Newfoundland Telephone*]).

[83] Grieg, on behalf of the Operators, identifies the following as evidence that the Minister pre-judged the outcome:

- the statement that "it is my view at this time that no salmon aquaculture activities should be carried out in the [Discovery Islands] area, including at the sites mentioned above" in the consultation notice letter dated June 22, 2022;

- the reference in the Stated Considerations that the social, economic and cultural factors could necessitate the Minister using her discretionary authority and provides a rationale for the non-issuance of licences;

- the Minister's failure to engage with the Operators' questions and concerns in a meeting between the Operators and Ministers on October 13, 2022;

- an email exchange from December 8-9, 2022 with the Minister's aunt that confirmed her views on aquaculture in the Discovery Islands;

- the existence of the January 16, 2023 pre-decision memorandum since it arose as a result of the Minister's direction to DFO following the end of the consultation period to "further develop… [the Stated Considerations] as the basis for decisions in the Discovery Islands area" as the Minister did not like the outcome of the consultations on the Stated Considerations; and

- the Minister sought non-DFO scientist advice after the end of the consultation period to find science that could support the outcome that she wanted.

[84] Furthermore, Mowi asserts that the Minister appears to have made the Decision to "quiet the criticism of others" who were opposed to aquaculture in the Discovery Islands and submissions otherwise would have been futile, despite the Minister being tasked with a statutory exercise of power and not a political or policy decision (*Newfoundland Telephone* at 642; *Keating v Canada (Attorney General)*, 2002 FCT 1174 at para 68). The evidence in the record runs contrary to the Decision since the Minister justified the Decision "based on science" but the Minister was aware that there was no scientific basis to deny renewal. The Minister also rejected the advice of DFO, ignored the individual circumstances of the sites at issue including the Hardwicke site, ignored the Proposal, and refused to extend the engagement process.

[85] Mowi also asserts that the Operators also repeatedly raised concerns regarding the engagement process but the Minister refused to modify the engagement. The Minister misconstrued the concern to be about insufficient time to raise concerns, rather than insufficient time to identify a socially acceptable path forward with the Nations.

(2) Respondent's Position

[86] The Respondent disagrees on the level of procedural fairness owed to the Operators and submits that the Operators were provided with a level of procedural fairness that exceeded what they were owed. In applying the *Baker* factors, the Operators were owed a moderate duty of procedural fairness at best. Specifically, the nature of the process was a standard administrative process in which interested parties make submissions which are collated for a decision; the statutory scheme provides absolute discretion to the Minister under section 7 of the *Fisheries Act* and specifies considerations for the Minister under sections 2.4 and 2.5; the Decision would reduce business for the Operators but not cease their operations, so it does not arise to the level of importance of cases involving individual freedoms or physical harm; the statute is silent on process so deference is owed to the decision-maker's selected process; and the Operators did not have any legitimate expectations of a particular process that should heighten the level of fairness owed.

[87] The Operators did not have legitimate expectations that the Minister would follow the CSAS process when considering scientific information. First, there has been no history of invoking the CSAS process for aquaculture decisions because historically these decisions were made through submissions to an online portal with no consultation. Second, the Minister's letters

to the Operators on June 22, 2022 notifying the Operators of consultation did not include any comment on a process for assessing scientific information.

[88] The Minister met the procedural fairness requirements because the Operators knew the case to meet through the provision of the Stated Considerations and clarification on the Stated Considerations and the Operators and had a meaningful opportunity to respond.

[89] The Operators also knew that there was public opposition to aquaculture, scientific debate about the risks of aquaculture, and concerns from the Minister about the risks to wild salmon from pathogens. The Operators, to varying extents, all provided their input on the risks to wild salmon during consultation, yet take issue that they were not provided the specific submissions from other stakeholders on the risk to wild salmon. However, information provided to a decision-maker must only be given to another party if it is prejudicial to the absent party's position *and* it is new or different from what was previously known to the absent party (*Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 at paras 11, 52-54, 64 [*Taseko Mines*]). The Operators have not shown that the studies that the Minister referred to in her reasons created a real possibility of prejudice based on their awareness of the public opposition and the scientific debate. While Grieg is correct that it requested studies, Grieg has not demonstrated that it was prejudiced, such as by showing that it did not receive clarification or that it was unable to have accessed or discovered the studies. Furthermore, there is no right to review or reply to all submissions because procedural fairness requires disclosure of sufficient information to permit meaningful participation, not disclosure of all information (*Quebec (Attorney General) v Canada (National Energy Board)*, 1994 CanLII 113 (SCC) at 181-182).

[90] All submissions that the Minister received from other stakeholders concerned considerations that the Minister identified in the Stated Considerations, including the importance of the Discovery Islands to wild salmon migration routes, the vulnerability of wild salmon, the level of uncertainty and risk caused by aquaculture operations, and the cultural importance of wild salmon to First Nations. The studies that the Minister referred to in the reasons for the Decision did not change or affect the Operators' case to meet. The Operators have failed to show any prejudice arising from the studies, as the Operators have not explained how they would have responded differently.

[91] Furthermore, the Operators had a meaningful opportunity to put their best case forward during the six-month consultation period. The Operators have not shown that they did not have time to meet or respond to the concerns identified by the Minister. Rather, the Minister had 11 meetings with Mowi, 14 meetings with Cermaq, and 9 meetings with Grieg. The Operators also submitted 25 letters and emails with their position and submissions to DFO and the Minister.

[92] The Operators also have not demonstrated that the Minister pre-judged the Decision. Statements that could "give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged" (*Old St Boniface Residents Assn Inc v Winnipeg (City)*, 1990 CanLII 31 (SCC) at 1197). However, the statement identified by the Operators from the Minister that she was "not waffling on the open-net pen transition" shows that the Minister understood the stakes of the Decision, rather than demonstrating she had a closed mind. Furthermore, an open mind is different than an empty one as impartiality does not mean not having prior conceptions (*Yukon*

Francophone School Board, Education Area #23 v Yukon (Attorney General), 2015 SCC 25 at para 33). The January 16, 2023 pre-decision memorandum is not evidence of a closed mind, since DFO regularly provides information to the Minister and the Operators have not identified any information that was new to them. The assertion that the Minister sought out submissions after the consultation period to align with her alleged predetermined conclusion is speculative and not grounded in evidence.

[93] Alternatively, if there was a breach of procedural fairness the Respondent submits that the interests of justice warrant this Court to exercise its discretion to refuse relief because any alleged errors were inconsequential, trivial or technical (*Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KG*, 2006 FCA 398 at paras 13, 22, 24; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). If a breach occurred, it was inconsequential because the Operators' submissions would have contained the same disagreements on the scientific issues that they put before the Minister.

(3) Conclusion

[94] The Decision was procedurally fair.

[95] In *Mowi*, the Court applied the *Baker* factors to determine that the Minister owed the applicants notice about the pending decision, the opportunity to make submissions and know the case to meet, and reasons for the decision (at paras 182-183, 228). I agree that the same procedural fairness requirements apply here. I also find that the procedural fairness requirements were met in the present case.

[96] The main concern of the Operators is the Minister's reliance on non-CSAS science in making the Decision, which breached their legitimate expectations or resulted in the Operators not knowing the case to meet. First, I agree with the Respondent that the Operators did not have a legitimate expectation that the Minister would rely only on the CSAS process when considering scientific information. The Operators have not shown that the Minister made clear, unambiguous, and unqualified representations to the Operators about the process that she would follow in considering science, nor have the Operators shown that the Minister has consistently followed a certain practice in the past when considering aquaculture licences (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68; *Agraira v Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36 at para 94).

[97] Second, based on the record, the Minister did not breach the *audi alteram partem* rule. The Federal Court of Appeal in *Taseko Mines* stated that "[t]he central question is thus whether the information at issue was prejudicial to the appellant and, by extension, whether it was new or different from what was presented at the hearing" (at para 53). The information from the non-CSAS science is new in that while representatives from the Operators knew generally of the existence of adverse scientific opinions on the aquaculture sites or some of the scientists, the Operators did not know the exact opinions expressed nor were they familiar with all of the studies. However, I agree with the Respondent that the information was not prejudicial to the Operators in that it did not change the case that the Operators had to meet, as they were aware of the existence of conflicting science. The non-CSAS science goes to considerations that the Minister identified in the Stated Considerations: the depletion of wild salmon, concerns about risks to migrating juvenile salmon in the Discovery Islands, emerging scientific studies, and

uncertainty about cumulative effects to wild salmon. The Operators also had opportunities to make submissions concerning the scientific uncertainty and risks, and the Operators did make their positions known to the Minister and DFO. The Operators have not identified how they were specifically prejudiced and not given a fair opportunity to respond.

[98] As for bias, the parties agree that the test is whether the decision-maker has pre-judged the matter to such an extent that any representations to the contrary would be futile (*Newfoundland Telephone* at 638). The onus is on the party alleging pre-judgment. The Operators have not met the burden of showing that the Minister pre-judged the Decision with clear and convincing evidence. Mowi's submissions concerning the argument that the Minister made findings unsupported by the record and ignored other evidence in the record, rejected the recommendations and science advice of DFO, refused to extend the engagement period, and did not allow the Operators to respond to science she relied on for her Decision. I do not agree that a refusal to extend the engagement period shows that the Minister had a closed mind. For reasons described elsewhere, I also do not agree with the basis of Mowi's other assertions on this issue.

[99] Grieg also has not demonstrated that submissions would have been futile, as none of the examples presented to the Court seem like expressions of a final opinion. The statements, even taken together, do not seem to indicate that the Minister would not change her position regardless of evidence or information disclosed during the consultation period. Some of Grieg's submissions speculate what was in the Minister's mind, including the impression of Grieg's Managing Director at the Operator-Minister meeting, the Minister's reasons for requiring the pre-decision memorandum from DFO, and the Minister's intention for seeking science advice

after the consultation period dates. Grieg points to only two sources of statements for its position that the Minister had a closed mind: the consultation notice letter and accompanying Stated Considerations, as well as an email to the Minister's aunt. I view the statement in the consultation notice letter as indicating the Minister's initial position at the start of consultation as she states it was "[her] view at this time" but does not rise to the level of having a closed mind throughout the consultation. The Operators had an opportunity to make submissions that may have changed the Minister's mind. Similarly, the other identified statements show that the Minister recognized the high stakes of making a decision, rather than showing that submissions contradicting the Minister's initial stance would be futile.

C. *Was the Decision reasonable?*

(1) Applicants' Positions

[100] As previously stated, the Nations' submissions on the duty to consult also drew from substantive reasonableness in assessing the adequacy of consultation. Bearing in mind the Respondent's position set out in the Preliminary Issues section, these submissions are taken into account in the duty to consult portion of the Judgment and Reasons.

[101] The Operators have identified three overarching issues with the Decision that render it unreasonable. First, the Minister relied on erroneous findings of fact that the Discovery Islands is a unique area and that there is scientific uncertainty, but these conclusions lack a factual foundation in the record and were rejected by DFO.

[102] Second, the Minister failed to justify her departure from DFO's advice and the practice of relying on science advice from CSAS. The Court has repeatedly recognized a heightened duty that requires administrative decision-makers who depart from the recommendations of their department to provide an explanation for doing so (*Mowi* at paras 249-252). The Minister provided no justification for departing from the longstanding practice of relying on peer-reviewed advice of CSAS. A departure from longstanding practices, internal authority or guidelines requires justification and a decision will be unreasonable where the decision-maker does not do so (*Vavilov* at paras 108, 131; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 58-60).

[103] Third, the Minister failed to grapple with the unique circumstances presented to her concerning the Operators and the sites, which call into question whether the Minister was alert and sensitive to the matter before her. The Minister's reasons to each of the Operators of the Decision were substantially the same and did not grapple with the unique submissions of each Operator. Mowi and Grieg both identify that the Minister did not even acknowledge the Proposal, despite that the Nations' support for relicensing of certain sites was a significant shift in circumstances compared to the 2020 Decision. The Proposal was an essential part of the factual matrix but the Minister did not mention whether she considered it or justify why she would not reissue the licences despite the Proposal.

[104] For Cermaq, the Minister did not grapple in refusing Cermaq's two licences with the facts that it was the only Operator with immediate plans to restock its sites and with clear First Nations' consent for the transfer licence applications that would permit stocking its sites.

[105] Similarly, Mowi asserts that the Minister did not undertake an independent analysis of the continued inclusion of Hardwicke in the Discovery Islands, despite Mowi's submissions that the site was not historically treated as part of the Discovery Islands, and the Court's guidance on the unreasonableness of including Hardwicke in the 2020 Decision in *Mowi*.

[106] For Grieg, the Decision failed to articulate why the Barnes Bay licence was denied apart from the other licences at issue, despite the Decision being an individual licencing decision. The Minister's letter to Grieg did not acknowledge any specific evidence put forward by Grieg in support of relicensing nor did it address the Proposal. Although the Minister acknowledged Grieg's position that the Discovery Islands aquaculture licences should be dealt with as part of the Transition Plan process, the Minister similarly did not provide a rationale for excluding the Discovery Islands sites from the Transition Plan process.

(2) Respondent's Position

[107] The Minister's Decision was reasonable in light of the statutory context and based on relevant statutory considerations. The Supreme Court of Canada has interpreted the federal fisheries power concerning the protection and preservation of fisheries as a public resource (*Ward v Canada (Attorney General)*, 2002 SCC 17 at para 36). The *Fisheries Act* is the tool that allows the Minister to achieve this objective and imposes a duty on the Minister to manage, conserve and develop fisheries on behalf of Canadians in the public interest (*Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 at para 52 [*Malcolm*]). Section 7 of the *Fisheries Act* in particular confers absolute discretion on the Minister and so the Minister has broad authority (*Fisheries Act*, s 7; *Morton v Canada*, 2015 FC 575 at para 29 [*Morton 2015*]). Section 2.4 of the

Fisheries Act also specifies that when making a decision under the *Fisheries Act*, the Minister shall consider any adverse effects that a decision may have on the constitutional rights of the Indigenous peoples of Canada. Section 2.5 further lists non-exhaustive factors that the Minister may consider, including the precautionary approach and scientific information.

[108] In exercising her discretion to make a section 7 decision, the Minister must make determinations based on policy and public interest considerations, including how to protect wild fish and the rights of Indigenous people. The reasons show that the Decision was grounded in the legislative framework as the Minister considered the importance of protecting and conserving fish under section 2.1 of the *Fisheries Act*, scientific information regarding risks to wild salmon from the aquaculture facilities, the views of Indigenous peoples on whether the aquaculture facilities continue and whether there are potential adverse impacts, and the need to take a precautionary approach.

[109] Furthermore, the Decision was reasonable in light of the facts before the Minister. First, the record included extensive information on the risks and uncertainties associated with aquaculture in the Discovery Islands, including the potential for pathogen transfer to wild salmon. The Operators submitted that the risk was minimal and that the Minister should defer to the CSAS Risk Assessments, but First Nations, non-government organizations and external scientists communicated flaws about the CSAS Risk Assessments and alternative research suggesting the risk may be higher. In light of the Minister's concerns about uncertain risks to wild salmon and adverse impacts to First Nations, it was reasonable for the Minister to apply a precautionary approach. The focus of the precautionary approach is "to exercise more caution

when information is uncertain and, where appropriate, to ensure that steps are taken to prevent irreversible harm, even when the potential risk of causing that harm is uncertain" (*Morton 2019* at paras 167-168). Furthermore, the Minister's finding of the uniqueness of the Discovery Islands is consistent with the findings of the Final Report by the Cohen Commission.

[110] Lastly, the Minister's reasons were intelligible and transparent. The Minister provided justification from the departure from DFO's recommendation and preference in light of the statutory and factual constraints before her. *Mowi* stands for the proposition that a Minister needs to provide reasons but not that there is a heightened duty to explain a departure from departmental advice (at para 248). The cases cited in *Mowi* at paragraphs 249-251 are also distinguishable and arise in a very different context, as they concern a criminal case for fraud and labour grievance processes. The reasons may be imperfect or not provide a detailed analysis of every issue, but the Court can still "connect the dots" to understand the basis for the decision, which is all that is required for a reasoned explanation (*Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 32). The Decision is a polycentric decision that the Minister must make in light of the legal constraints of the *Fisheries Act* and she is allowed to depart from the advice of DFO, as the department ultimately does not make the decision.

(3) Intervener Conservation Coalition's Position

[111] The Conservation Coalition makes two submissions: (1) how the Minister's duty to conserve wild salmon and ability to consider the precautionary principle informs the reasonableness of the Decision; and (2) the potential impact of this Court's decision on the

consolidated applications on the ability of the Minister to conserve wild salmon when making aquaculture licensing decisions in the Discovery Islands.

[112] On the first point, the Supreme Court of Canada and the Federal Court have recognized a hierarchy of considerations within the *Fisheries Act* scheme that shape the Minister's discretion: 1) conservation and protection of fish, including wild salmon; 2) protection and fulfillment of constitutionally-protected Indigenous rights to harvest fish; and 3) other management considerations, including fishing interests that are not constitutionally-protected (*R v Sparrow*, 1990 CanLII 104 (SCC) at 1115-16; *R v Marshall*, 1999 CanLII 666 (SCC) at para 40; *Morton 2015*; *Morton v Canada (Fisheries and Oceans)*, 2019 FC 143 at para 35 [*Morton 2019*]. The conservation priority is further supported by the purposes of the *Fisheries Act* and the regulatory scheme for aquaculture licences and fish transfer licences.

[113] The Minister is also explicitly empowered to take a precautionary approach in decision-making through paragraph 2.5(a) of the *Fisheries Act*. *Morton 2015* confirms that the precautionary approach "recognizes, that as a matter of sound public policy[,] the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to protect the environment, as there are inherent limits in being able to predict environmental harm" (at para 43).

[114] The factual record supports the Decision, given the Minister's overarching obligation to conserve and protect wild salmon and her discretion to act in accordance with the precautionary principle. The Minister was presented with evidence concerning the decline of wild salmon stocks and the threat of fish farming to wild salmon populations, including the report by the

Cohen Commission and that the Committee on the Status of Endangered Wildlife in Canada has designated many Fraser River salmon populations as threatened or endangered. Furthermore, the evidentiary record highlighted that the decline of wild salmon stocks is largely due to human-caused threats to their survival, including the transfer of pathogens and parasites to migrating juvenile salmon and that the threat of harm to wild salmon from fish farms is amplified in the Discovery Islands. As a result, the Minister was within the scope of her discretion to conclude that the state of salmon stocks was a concern and use her authority to act in a "heightened precautionary manner".

[115] Furthermore, the evidentiary record demonstrates sufficient scientific uncertainty to ground a highly precautionary approach to decision-making in the Discovery Islands. The record contains evidence of continuing uncertainty with CSAS assessment processes, as well as that the CSAS assessments are outdated and scientifically refuted. However, the Minister is permitted to consider all relevant scientific developments from both internal and external sources (*Morton 2019* at para 164). In light of the information before the Minister, the Minister made a precautionary decision that responded to scientific uncertainty in order to fulfil her obligation to protect and conserve wild salmon.

[116] Similarly, the evidentiary record contains evidence on the unique nature of the Discovery Islands that justifies a precautionary approach. For example, it is a significant migratory corridor for wild salmon populations and the nature of the waters creates a challenging environment that juvenile salmon must navigate, which is exacerbated by the potential for pathogen transfer from fish farms or cumulative effects of other stressors like climate change.

[117] On the second point, there is a risk that granting the Operators the relief sought will restrict the Minister's ability to fulfill statutory obligations, act in accordance with the precautionary principle, and effectively respond to existing and emerging threats to wild salmon in future decisions. The Minister's discretion is part of the Minister's "arsenal of powers" to advance her primary conservation obligation when making highly complex and potentially fraught licensing decisions (*Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 399 (SCC) at para 37; *Malcolm* at para 40). The Minister can only fulfill her duty to conserve wild fisheries if she can consider all sources of information of risk and respond with precaution.

(4) Conclusion

[118] The Decision was reasonable in light of the Minister's discretion over fisheries management as set out in the *Fisheries Act*.

[119] Two of the Operators' main arguments center around the idea that the Minister made findings of fact that ran contrary to the record before her or that ignored facts before her. First, I agree with the Respondent that there was a reasonable factual foundation in the record to support the Minister's statements that the Discovery Islands is a unique area and that there is scientific uncertainty. DFO concluded that it "[does] not have a science basis to apply a higher level of precaution in the Discovery Islands area compared to elsewhere in BC" and further explained that this means that the precautionary approach in the Discovery Islands should be consistent with how it is applied across British Columbia. In the Memorandum, DFO outlined the findings of the CSAS Risk Assessments responding to Recommendation 19 of the Final Report by the

Cohen Commission, ongoing research, and cumulative effects to wild salmon before stating that "the Department's conclusion is that there is minimal risk to the population abundance and diversity of wild Fraser River sockeye salmon from transfer of the nine assessed pathogens from Atlantic salmon in the Discovery Islands". In this context, DFO continued to state in the Memorandum that:

> ...the Department would be challenged to explain a rationale for a different management approach related to licences in the Discovery Islands, in the absence of expert assessment indicating that it is likely that there is something environmentally or hydrologically unique about the area that would require a unique salmon aquaculture management approach to be applied.

[120] In her reasons, the Minister identified the CSAS Risk Assessments as part of the broader body of literature related to the impact of salmon aquaculture. The Minister then discussed gaps in the CSAS Risk Assessments since it does not consider the cumulative effects and other parties identified more recent scientific research during the consultation process that raises the possibility of harmful impacts from Atlantic farmed salmon on wild salmon. In the context of this disagreement with DFO's advice in the Memorandum, the Minister identified the need for a more precautionary approach than recommended by DFO. In light of this disagreement about the risk or uncertainties, it is reasonable that the Minister would disagree with DFO about the uniqueness of the Discovery Islands area. Due to the Minister's position on the still outstanding scientific uncertainty, she aligns herself in the reasons with the Cohen Commission by citing passages from the Final Report that support the unique characteristics and risks of the Discovery Island as it relates to wild and farmed salmon. While the Minister's views on the scientific uncertainty varied from DFO's advice and the CSAS Risk Assessments, there was still a factual basis in the record to make that finding based on the scientific papers before her that discussed

the risks and uncertainties in the area. In summary, it was reasonably open to the Minister to determine that there was a basis for the uniqueness of the Discovery Islands.

[121] Second, the Minister reasonably grappled with the facts before her. In each of the reasons provided to the Operators, the Minister summarized the consultations and identified some of the unique factors raised by the Operators. It must be remembered that assessing the reasonableness of a decision does not involve a treasure-hunt for errors and the Minister was not required to identify every submission as long as she demonstrated that she was alert and sensitive to the evidence before her (*Vavilov* at paras 102, 128). It would be an error for the Minister to fail to meaningfully grapple with key issues or central arguments raised by the parties (*Vavilov* at para 128). In my view, the Decision addresses the key issues raised by all of the parties including the duty to consult, the locations of the licenses, the positions on science, and whether the Discovery Islands were unique.

[122] Similarly, I find that the Decision addressed Mowi's central argument concerning the Hardwicke site. The Minister recognizes Mowi's stance and correspondence on this issue during the consultation period, and then adopts the stance and reasons from the Department of Justice's November 2, 2022 letter to Mowi as to why the Hardwicke site is appropriately assigned within the Discovery Islands for the purpose of the Decision. In that letter, Canada's position was that the inclusion of the Hardwicke site was reasonable because CSAS's science response confirmed Hardwicke's hydrological connectivity to the Discovery Islands, and DFO adopted area-based management based on that CSAS response and hydrological connectivity, confirming Hardwicke is within the Discovery Islands. Mowi takes issue that there was no independent analysis on

Hardwicke's continued inclusion, but provides no authority for a requirement for independent analysis for this site. As a result, the Minister met the requirement of being alive and sensitive to the issue of whether to include Hardwicke as within the Discovery Islands.

[123] In the Memorandum, the Minister indicated that she selected none of the options put forward by DFO but that she would explain her decisions in the letters to Cermaq, Mowi, Grieg, and Saltstream. The Operators cite *Mowi*'s commentary for a heightened duty on a decision-maker to explain their departure from the recommendations of their department. However, in *Mowi*, there were no reasons provided at all. I find the Respondent's submissions on the statutory context of the Decision helpful for identifying it is a highly discretionary decision for the Minister but that she must be guided by certain principles like protection and conservation, as well as that there are other factors that she may consider like the precautionary principle and science. In light of the legal constraints on the Minister, the Minister identifies how these considerations from the *Fisheries Act* play into the Decision, in contrast to how DFO analyzed the considerations in the Memorandum. In particular, the Minister emphasizes how the considerations lead to needing a more precautionary approach. She also explained why she was not relying solely on the CSAS Risk Assessments due to gaps in the assessments. In my view, the Minister provided adequate reasons for her departure from the advice of DFO and the findings of the CSAS Risk Assessments.

IX. Conclusion

[124] For the foregoing reasons, the application for judicial review is dismissed. The Minister met the mid-level requirement of the duty to consult and did not breach the Operators' rights of the procedural fairness. The Decision is also reasonable.

JUDGMENT in T-554-23, T-556-23, T-552-23, T-555-23

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are dismissed.
2. The parties will provide their submissions on costs to the Court within 30 days of this Judgment and Reasons.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-554-23, T-556-23, T-552-23, T-555-23
STYLE OF CAUSE:	WE WAI KAI NATION AND WEI WAI KUM FIRST NATION,, MOWI CANADA WEST INC., CERMAQ CANADA LTD., AND GRIEG SEAFOOD B.C. LTD. v THE MINISTER OF FISHERIES, OCEANS, AND THE CANADIAN COAST GUARD AND KWIKWASUT'INUXW HAXWA'MIS FIRST NATION, 'NAMGIS, FIRST NATION, ST'ÁT'IMC CHIEFS COUNCIL, STÓ:LŌ TRIBAL, COUNCIL, MUSQUEAM INDIAN BAND, THE UNION OF BRITISH, COLUMBIA INDIAN CHIEFS, ALEXANDRA MORTON, DAVID, SUZUKI FOUNDATION, GEORGIA STRAIT ALLIANCE, LIVING OCEANS SOCIETY, AND WATERSHED WATCH SALMON SOCIETY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 11-15, 2023
JUDGMENT AND REASONS:	FAVEL J.
DATED:	JUNE 7, 2024

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