IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al,***
2005 BCSC 283

Date: 20050302
Docket: L043154
Registry: Vancouver

Between:

Darren Blaney, Chief Councillor, Florence Hackett, Bonnie Wilson, Clyde Leo, Bill Blaney, Band Councillors, suing on their own behalf and on behalf of all the members of the Homalco Indian Band, and the Homalco Indian Band

Petitioners

And

The Minister of Agriculture Food and Fisheries and Marine Harvest Canada

Respondents

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the Petitioners	P.R. Grant, N.B. O'Reilly and L. Schmidt
Counsel for the Respondent, The Minister of Agriculture Food and Fisheries	L. Mrozinski and P.E. Yearwood
Counsel for the Respondent, Marine Harvest Canada	S.B. Armstrong, Q.C., J.M. Shore and C.J. Kowbel
Date and Place of Trial/Hearing:	January 24 – 28, January 31, February 1 & 2, February 10 & 11, 2005 Vancouver, B.C.

INTRODUCTION

[1] The petitioners, who I will refer to as “the Homalco”, are the Chief councillor and Band councillors suing on their own behalf, and on behalf of the members of the Homalco Indian Band. The Homalco Band is also known as the Xwèmalhkwu First Nation.

[2] The Minister of Agriculture, Food and Fisheries (“MAFF” or “Ministry”) is the Minister responsible on behalf of the Crown in right of British Columbia for licensing and approval of aquaculture facilities and amendments to aquaculture licenses.

[3] “Marine Harvest Canada” is a trade name for Nutreco Canada Inc. Marine Harvest Canada (“Marine Harvest”) operates an aquaculture facility in British Columbia at a site adjacent to the Church House Indian Reserve at Bute Inlet. The reserve is held in trust by the Crown in right of Canada on behalf of the Homalco.

[4] The Homalco seek judicial review of the decision by the Minister, through its decision maker, to approve an amendment to an existing fish farm licence on Bute Inlet. Marine Harvest has a licence to operate a fish farm and raise Chinook salmon at this facility. They applied to amend that licence in April of 2004 to allow them to raise Atlantic salmon. The amendment was granted effective December 8, 2004.

[5] The Homalco say the approval of the amendment was done without proper consultation and accommodation of their concerns, as required by law.

[6] The Homalco seek the following in their petition:

1. a declaration that the Minister has failed to properly consult and accommodate them with respect to the amendment;

2. an order quashing or setting aside the decision of the Minister;

3. relief in the nature of certiorari quashing the decision of the Minister approving the amendment;

4. a declaration that the decision of the Minister to proceed with the granting of approval of the amendment prior to meaningful consultation with the Homalco in good faith was a breach of the constitutional duty of the Crown to consult in good faith with the Homalco;

7. a permanent injunction prohibiting Marine Harvest from placing Atlantic salmon in the Church House fish farm without proper authorization from the Department of Fisheries and Oceans for the harmful alteration, disruption or destruction [HAAD] of fish habitat pursuant to s. 35(2) of the ***Fisheries Act***, R.S.C. 1985, c. F-14 ("***Fisheries Act***") and without obtaining a licence pursuant to s. 55 of the ***Fishery (General) Regulations***.

[7] They also seek an order that the Atlantic salmon which are presently located in this fish farm be removed.

BACKGROUND

[8] The Homalco Band are Aboriginal people who claim Aboriginal title and rights to an area on the central coast of British Columbia that includes Bute Inlet and the area surrounding the Church House and Barlett Island Indian Reserves.

[9] Marine Harvest operates the aquaculture facility which is at the site adjacent to the Church House Reserve and at the mouth of Bute Inlet. The licence was originally granted in 2002, allowing the raising of Chinook salmon. Marine Harvest applied in April of 2004 to amend the licence to allow them to raise Atlantic salmon. The MAFF wrote to Homalco on July 20, 2004 to notify them of the application and to obtain their input. A biologist at MAFF "approved" the application on July 28, 2004.

[10] Homalco replied, expressing their concerns about the amendment, and seeking additional information.

[11] These exchanges were followed by a number of letters and emails, as well as telephone communication between the Ministry representatives, Homalco's lawyers, and in some instances, the Homalco themselves. Despite this communication and the expressed desire and willingness to meet in some of the communications, the parties never did have a meeting to discuss the concerns raised by the Homalco. The Ministry, in late November, indicated that it intended to make its decision by December 9. In fact, its decision was made on December 8, without a meeting

occurring between the parties. The Homalco submitted further materials, and the Ministry responded to those materials on January 18, 2005.

[12] These proceedings were commenced on December 22, 2004, after Marine Harvest had placed 700,000 Atlantic smolts out of a possible 1 million in the Church House site.

THE LAW

[13] The Supreme Court of Canada has dealt with the issue of the obligation to consult and accommodate in two recent decisions. These decisions are ***Haida Nation v. British Columbia (Minister of Forests)*** 2004 SCC 73, [2004] S.C.J. No. 70 (S.C.C.) (Q.L.) and ***Taku River Tlingit First Nation v. (British Columbia) (Project Assessment Director)***, [2004] S.C.J. No. 69. These decisions were delivered November 18, 2004. They confirm the Crown's obligations to consult, and decided that a third party in the position of Marine Harvest did not have a duty to consult.

[14] The Supreme Court of Canada in ***Haida***, *supra,* said the following:

> ¶16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger,* [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> ¶17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution

of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown": *Delgamuukw, supra,* at para. 186, quoting *Van der Peet, supra,* at para. 31.

…

¶20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act*, 1982. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra,* at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

…

¶25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982.* The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

…

¶32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982.* This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the

> Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.,* [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation…" (emphasis added).

[15] The Supreme Court of Canada said in the ***Taku****, supra,* case:

> ¶24 The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida, supra,* the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982,* which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

WHEN DOES THE DUTY ARISE?

[16] The petitioner correctly argues that the duty arises when the Crown makes decisions that have a serious impact on asserted Aboriginal rights and title. The duty comes into existence when:

1. the Crown has knowledge, real or constructive of the potential existence of Aboriginal rights or titles; and

2. it contemplates conduct that might adversely affect them.

[17] The Supreme Court of Canada in ***Haida*** said:

> ¶35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation, suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. See *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

(Also see ***Taku*** at ¶25).

[18] In situations where claims have not yet been resolved, the court in ***Haida*** said:

> ¶36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall, supra,* at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. …
>
> ¶37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not be denying the existence of a duty.

¶ 38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. *The Scope and Content of the Duty to Consult and Accommodate*

¶ 39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

¶ 40 In *Delgamuukw, supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.

¶ 41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into

watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

¶ 42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

¶ 43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

¶ 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that

Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

¶ 45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

¶ 46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1998) provides insight:

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ... (at s. 2.0 of Executive Summary)
> ... genuine consultation means a process that involves ...:
>
> - gathering information to test policy proposals
> - putting forward proposals that are not yet finalized
> - seeking Maori opinion on those proposals
> - informing Maori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Maori have to say
> - being prepared to alter the original proposal
> - providing feedback both during the consultation process and after the decision-process. (at s. 2.2 of Deciding)

¶ 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

¶ 48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

¶ 49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *The Concise Oxford Dictionary of Current English* 9th ed. 1995) at p. 9. The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

¶ 50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sióui*, [1990] 1 S.C.R 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

> ¶ 51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision makers.

[19] The court in ***Haida*** then went on to consider the nature of the review of the government's conduct where it is challenged. In particular, the court said the following:

> ¶ 60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.
>
> ¶ 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the

> issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> ¶ 62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective Aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice ... ". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> ¶ 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.
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> H. *Application to the Facts*
>
> (1) *Existence of the Duty*

[20] The process of consultation and accommodation places obligations on both sides of the discussion. The parties are not obliged to reach an agreement, but they are obliged to make reasonable efforts in the process of consultation, and to keep an open mind. Failure to reach an agreement does not mean that consultation and reasonable accommodation has not occurred. Accommodation involves a balancing of competing societal interests with Aboriginal and treaty rights. The Supreme Court

of Canada has made it clear that balance and compromise are inherent in the notion of reconciliation as discussed in ***Haida***.

[21] I find that there is a duty on the Crown to consult in the circumstances of this case. The Crown has actual knowledge of the claims by the Homalco to Aboriginal title and rights in the area of the Bute Inlet. The basis of that knowledge includes the following:

1. The submissions of Homalco's statement of intent filed with the British Columbia Treaty Commission;

2. Information regarding Homalco's traditional and present day use of the Homalco territory transmitted directly to British Columbia and Canada by Homalco elders and other representatives in the course of the treaty process and regional planning process.

3. Information regarding Homalco's traditional and present day use of the Homalco Territory contained in the Homalco Traditional Use Study and in the March 2003 Marine Resources Study prepared by Dorothy Kennedy and Randy Bouchard and transmitted to British Columbia during the course of treaty negotiations.

4. Published information regarding Homalco traditional use and occupation of the Homalco Territory available on reasonable enquiry and Sliammon people, Sliammon lands, 1999.

5. The Homalco had made earlier submissions to MAFF regarding licensing applications with respect to the Marine Harvest fish farm.

[22] The fish farm in question is close to the Church House reserve. The Church House reserve is not presently occupied by the Homalco but it is an area which they have rights to and where they may attend.

[23] The Homalco have claimed the rights to harvest wild salmon stocks, clam beds, rock fish and other stocks and they are concerned about the management protection and enhancement of these resources within their claimed territory.

[24] The Crown is aware that the Homalco claim Aboriginal rights with regard to the wild Pacific salmon stocks that spawn in rivers and creeks flowing into Bute Inlet. The Homalco argue that these wild stocks can pass by the fish farm and be affected by it. The Homalco also argue that their rights to harvest shell fish and clams at sites in the vicinity of the fish farm can be impacted. They argue that these rights are an integral part of their Aboriginal culture for their sustenance needs, social needs and trade.

[25] There may be claims by other bands that overlap a portion of the territory claimed by the Homalco (the Sliammon and the Klahoose), however, I am satisfied that:

1. There is a reasonable probability that the Homalco will be able to establish Aboriginal title to at least some parts of the Homalco Territory including portions of Bute Inlet in the vicinity of Church House.

The Homalco certainly have rights to the use and occupation of the reserve lands;

2. There is a substantial probability that the Homalco will be able to establish Aboriginal rights to harvest wild Pacific salmon and other marine resources of the Homalco territory.

EXTENT OF THE SCOPE AND CONTENT OF THE OBLIGATION TO CONSULT AND ACCOMMODATE IN THIS CASE

[26] The parties disagree as to the scope and content of the obligation to consult and whether there has been reasonable accommodation.

[27] The Homalco argue that they have presented a strong *prima facie* case with regard to their claims to title and rights. The Homalco also argue that the evidence they have presented and the evidence which was submitted to the Ministry demonstrates the seriousness of their concerns and the serious potential risks to their Aboriginal rights to continue to harvest marine resources.

[28] The Ministry, supported by Marine Harvest, argue that in this case the scope and content of the consultation is at the low end of the scale. They say that the obligation to consult relates only to the amendment to the license to substitute Atlantic salmon for Chinook salmon. They argue that any issues regarding the existence or location of the fish farm have been resolved or dealt with when the license was initially granted. They argue that the evidence submitted by the Homalco with regard to the potential harm against wild salmon stocks or marine life

has already been considered when the Province conducted an extensive review of salmon aquaculture in the past. They argue that any new evidence submitted by the Homalco has been considered by the Ministry and is inconsistent with other expert opinions known to the Ministry. They argue that any risk to wild salmon or marine life from the introduction of Atlantic salmon to the Church House fish farm is low or non-existent.

[29] The parties have submitted voluminous affidavits including opinions of various scientists to support their positions. The parties have all agreed that it is not the function of the Court to decide which of these conflicting opinions is correct. Marine Harvest refers to the decision ***Vancouver Island Peace Society v. Canada***, [1992] 3 F.C. 42 at 51 (T.D.). This was a case dealing with a federal decision to allow nuclear powered ships into Canadian ports. Voluminous affidavit material was provided which offered opinions on environmental risks. The Honourable Mr. Justice Strayer said:

> It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected. Whether society would be well served by the Court performing either of these roles, which I gravely doubt, they are not the roles conferred upon it in the exercise of judicial review under section 18 of the Federal Court Act [R.S.C., 1985, c. F-7]

They refer to this material, however, to support their arguments about the risks of potential harm or infringement of the rights claimed by the Homalco.

[30] In their supplemental argument, the Homalco identify what they say are the potential adverse impacts on wild salmon arising from the introduction of Atlantic salmon to include the following:

> (a) The potential of farmed Atlantic salmon from their net cages through accident, negligence or force of nature;
>
> (b) The certainty of 'leakage' of Atlantic salmon from the aquaculture facility;
>
> (c) The potential colonization of the spawning habitat of wild Pacific salmon stocks by escaped Atlantic salmon and their offspring;
>
> (d) The potential displacement of wild stocks through competition from escaped Atlantic salmon for competition for food and other resources;
>
> (e) The potential spread of diseases such as ISA, IHN and Kudoa from farmed Atlantic salmon to wild Pacific salmon stocks;
>
> (f) The potential spread of sea lice from farmed Atlantic salmon to migrating wild Pacific salmon smolts causing significant declines in those stocks;
>
> (g) The potential adverse impact on wild Pacific salmon stocks arising from the cumulative effect of any of these adverse impacts in the impact such as habitat loss, overfishing and climate change which are already causing a significant decline in wild stocks;
>
> (h) The potential scale effects of the introduction of Atlantic salmon to the facility at issue when taken together with the adverse impacts arising from other salmon farms which may have an impact on the relevant stocks.

[31] Regarding shell fish and other marine life the Homalco argue that the impact is effluent from the farm containing feces, food waste, and chemotheropeutants on nearby clam beds and other aquatic life forms may detrimentally affect their interests.

[32] They also raise the issue of the potential impact on marine mammals which may attempt to feed on the Atlantic salmon at the fish farm and be destroyed in order to prevent that.

[33] The Homalco argue that the Ministry has failed to properly consider the significant evidence of potential adverse impacts on their Aboriginal rights and failed to apply proper principles of risk assessment. They also argue that the Ministry, in making its decision, has failed to properly apply the "precautionary principle".

[34] I have been referred to large volumes of scientific information in the affidavits. However, as I said earlier, all of the parties agreed that the court should not become the arbitrator of scientific theories. I agree. However, what is clear from the material is that there are differences in scientific opinion about the effects and risks involved with salmon aquaculture, and particularly the farming of Atlantic salmon and its affect, or potential affect on wild salmon stocks. All of the scientists and panels involved in studying the issues confirm that there are serious gaps in knowledge and that research is needed to fill those gaps.

[35] The Ministry referred to the Salmon Aquaculture Review. The review commenced in 1995 and the report was released August 1997. The study was conducted through the Environmental Assessment Office. Input was received from various groups including scientists and technical experts. The presenters included government agencies, local governments, Aboriginal people, industry, support services to the industry, environmental organizations, wild salmon commercial fishing organizations, recreational and tourism organizations and labour.

[36] The review was to assess environmental, economic, social, cultural, heritage and health impacts related to issues of (1) escaped farm fish, (2) fish health, (3) waste discharges, (4) interactions between salmon farms and coastal mammals and other species, and (5) fish farm siting. The review did not deal with the issue of sea lice but that issue does not appear to have been identified at the time.

[37] The Salmon Aquaculture Review in its summary, Volume 1, p. 4 stated the following:

> The technical advisory team concluded that salmon farming in B.C. as presently practised and at current production levels, presents a low overall risk to the environment. However, this general finding is tempered by certain reservations. First, continuing concern about localized impacts on benthic (sea bed) organisms, shell fish populations and marine mammals suggests the need for additional measures to protect them. Second, significant gaps in the scientific knowledge on which the technical advisory teams' conclusions are based point to the need for monitoring and research in areas such as the potential impacts of interactions of escaped farm salmon with wild populations, identification and control of disease and disease pathogens, potential for disease transfer and impacts from antibiotic residues, and affects of waste discharges on water quality and sea bed life.
>
> Science rarely has the ability to reach definitive conclusions on the risk or potential severity of the consequences of human interactions with complex ecosystems. In the face of this uncertainty, governments still need to make land and resource management decisions. Direction is provided by the precautionary principle which advocates the consideration and anticipation of the potential negative impacts of any activity before it is approved. Similarly, the concept of preventative management allows government to manage, to prevent certain specific events even though not all potential outcomes can be predicted. Where the risk of environmental impacts from an economically important activity is low but the consequences of damages may be significant, the public interest may best be served by dealing with risk, by being precautionary and invoking a series of measures, including: preventative management, adaptive management, and performance-based standards. In the case of salmon farming, this means reducing

> risk by setting high standards for farm operations based on the best available knowledge, and rigorously enforcing the implementation of those standards. And it means being prepared to alter management practices over time to take account of increased understanding of risk and different means of reducing it. This means that industry will be required to adapt to evolving management schemes.

[38] The Ministry argues the response to this report included the development of extensive obligatory requirements dealing with the issues identified by the Salmon Aquaculture Review. The Ministry argues that as a result of this, the practices in salmon aquaculture have greatly improved and, therefore, argue the risks or any potential risks are reduced. It should be noted that since the review and the new regulations, the number of salmon aquaculture sites has also increased.

[39] The thrust of the Salmon Aquaculture Review is not that its recommendations will address all of the concerns. The thrust of the review is that its recommendations are important in reducing potential risks, but that further research and ongoing preventative management and review are required.

[40] The Homalco argue that the application of the precautionary principle or approach requires the Ministry to take steps to avoid the identified risks until further research allows the uncertainty with respect to the extent of those risks to be reduced or eliminated.

[41] The respondent’s arguments are essentially that the precautionary principle does not require government action, but simply says that lack of scientific knowledge is not an excuse to fail to take action. The respondents argue that the adaptive

management approach that the government has taken is in line with precautionary principles and appropriate in this case.

[42] In correspondence and in argument, the Homalco referred to the precautionary principle as defined in the **Bergen Ministerial Declaration on Sustainable Development (1990)** as follows:

> In order to achieve sustainable development, policies must based on the precautionary principle. Environmental measures must anticipate, prevent and attack the cause of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[43] The Homalco take the position that there should be no amendment to allow the aquaculture of Atlantic salmon until the Ministry and Marine Harvest can prove that there is no risk to wild salmon stock. They argue, that the gaps in scientific knowledge and research make it impossible to prove that there is no risk to wild salmon stock. Therefore, they argue that no amendment should be allowed.

[44] The respondents argue that the Homalco have misunderstood the precautionary principle. They argue that the principle really means that lack of scientific knowledge is not a basis for failing to pass regulations or controls to avoid potential serious or irreversible damage to the environment. They argue that it does not mean, nor are governments bound, to prevent all activities which might cause such harm however low the risk might be, or however speculative the risk might be, until it is proven as a certainty that there is no risk.

[45] I agree with the respondents that the precautionary principle does not require governments to halt all activity which may pose some risk to the environment until that can be proven otherwise. The decisions on what activity to allow and how to control it often require a balancing of interests and concerns and a weighing of risks. This is exactly the kind of situation which requires consultation, discussion, exchange of information, and perhaps accommodation.

[46] In some portions of the submissions, it appears the parties are confusing the issues of the obligation to consult and the appropriate accommodation after that consultation. However, I do not think I could say the adaptive management approach is not a proper means of accommodation, although there may be some other things that should be considered. Some of these may be the levels of enforcement of the regulations and monitoring those regulations, et cetera. These matters are certainly the proper subject of consultation and discussions about accommodation, and do not appear to have been considered here. I am sure there are many other matters as well that the parties can discuss, and that may amount to reasonable accommodation.

THE REQUIRED SCOPE AND CONTENT OF CONSULTATION

[47] The respondents argue that the only matters or issues that require consultation were those that involve the change in risks between the introduction of Atlantic as opposed to Chinook salmon at this fish farm. They argue the existence of the fish farm and any potential harm caused by fish farming in general has already been dealt with when the original license was granted. The respondents point to the

fact that the prior Chief and council supported the establishment of this fish farm at this particular location. Marine Harvest had originally considered a different location, but with the encouragement of the Chief agreed to establish the fish farm at the present Church House location. The Chief at that time wrote a letter of support for the granting of a license for a fish farm for Chinook salmon. The original application had been for Chinook and Atlantic salmon but Marine Harvest withdrew its request with regard to Atlantic salmon. Shortly after the licences were granted there were new elections within the band and the Chief and council were replaced. The new Chief and council appeared to oppose fish farming in general and the fish farm at Church House in particular.

[48] The Ministry has taken the position that it is only concerned with regard to the change of species which is the subject matter of consultation. Their position is that unless some new evidence was submitted to them to demonstrate some significant risk over and above that of salmon farming in general, to the Homalco's Aboriginal rights or title, there was no need for anything more than the lowest level of consultation. They argue that any consultation necessary did occur by an exchange of correspondence and the accommodations that were necessary have occurred as a result of the implementation of the detailed Aquaculture Regulations, following the Salmon Aquaculture Review.

[49] I agree that matters which have been extensively consulted on in the past do not require a full repetition of that consultation. However, that does not mean that these matters do not continue to be the subject of review and further consultation in

light of additional knowledge or information. The fact that there may be some controversy about the new evidence or information provided does not mean that it is not a proper matter of consultation. The underlying message in the Salmon Aquaculture Review is that the present state of knowledge is incomplete, further research is required, and that the approaches to management of salmon aquaculture need to be reviewed and altered as the circumstances dictate.

[50] The issue of siting of a particular aquaculture fish farm is not something that is concluded once and for all. Additional information may require a review of the siting and further consultation with the Homalco.

[51] The fact that the Salmon Aquaculture Review occurred and that some Aboriginal people may have been involved in that study does not eliminate or reduce the need for consultation on a site by site basis. Different Aboriginal groups may take different positions on aquaculture. The Homalco are a group of people whose claims to Aboriginal title and Aboriginal rights may well be affected by the actions of the government. It is the obligation of the Crown to consult with them and it is their entitlement to be consulted. In this case, the obligation to consult, and if appropriate, accommodate, is not at the lowest end of the spectrum as argued by the respondents. Nor is it the deep level of consultation that the petitioners argue.

WHAT HAS OCCURRED IN THIS CASE?

[52] The Homalco take the position that the Ministry has failed to fulfill the obligation to consult and accommodate. They argue that the Ministry has failed to

act in good faith through a meaningful process with the intention of substantially addressing the Homalco's concerns.

[53] The Homalco and the Ministry both appear to lack any faith in the good will of the other. The Homalco argue that the Ministry has acted in bad faith. The Homalco argue that the Ministry approved the application by Marine Harvest on July 28, only eight days after sending notice of the application to Homalco and before Homalco could respond. The Homalco argue that there was no genuine consultation after that.

[54] The Ministry argue and believe that the Homalco were not interested in consultation, but had simply decided that they no longer supported aquaculture of any kind. The Ministry believed that the Homalco were not really prepared to engage in meaningful consultation. The Ministry argues in any event that they did consult and have accommodated or addressed the concerns raised by the Homalco. The Ministry argues that the Homalco have not demonstrated any real risk or infringement on any of their claimed rights or title. The Ministry, therefore, argues that any obligation to consult is at the lower end of the scale in any event.

[55] The Ministry received the application to amend the license in April 2004. However, it was not until July 20, 2004, that they wrote to the Homalco advising them of this application, enquiring as to how it may affect the Homalco. The delay is explained by the workload the Ministry experienced at the time. The letter does indicate that the Ministry would be available to discuss any issues with regard to the amended application. The same correspondence was sent to the Klahoose First

Nation and the Sliammon First Nation. The Ministry believes they have overlapping claims to this area. The Klahoose and Sliammon First Nations did not respond to these letters.

[56] The Homalco responded with a letter from their counsel on August 9, 2004. The letter requests a copy of the amended management plan and any studies or documentation furnished by Marine Harvest regarding any applications whether new or for amendments. The Homalco say they require this information in order to properly consult.

[57] Prior to receiving that information, however, the initial response of the Chief and council was that they did not support the amendment application because of too many outstanding risks to the marine environment related to open netcage finfish aquaculture as it presently practiced at the site. They stated the introduction of the Atlantic salmon would only exacerbate those conditions.

[58] The letter included a July 16, 2003 correspondence and a report by Dorothy Kennedy dealing with the traditional use of that area. The July 2003 letter sent was a letter sent by the Homalco's lawyers. It is just over eighteen pages long and deals with an earlier application by Marine Harvest to expand the aquaculture operation by adding two additional pens. The application appears to be made in order to provide additional space for the same number of fish. The material in support of that application and the Ministry's response indicates that it was believed by having additional area there would be better disbursement of waste. It appears that the

application was not to add additional fish but merely to make more room for the fish that were there.

[59] The letter of July 2003 refers to the Homalco's claim and the obligation to consult. The letter refers to the traditional and current uses of the Church House area by the Homalco including the harvesting of clams, oysters, mussels, sea urchins, prawns, herring, red snapper, rock fish and various kinds of wild salmon. The letter makes clear the importance of the wild salmon and other marine resources to the Homalco. The letter then identifies what the Homalco believe to be extremely serious risks to the wild salmon and environment as a result of aquaculture. The risks identified include:

1. Spread of disease;
2. Spread of parasites such as sea lice;
3. Introduction of non-native species, being Atlantic salmon and potential escapements and competition with wild salmon;
4. Destruction of mammals attempting to feed or to feed at the net pens;
5. Pollution from waste feed, excrement, pesticides, antibiotics.

[60] The letter refers to the concerns about sea lice infestation in the Broughton Archipelago in June 2001, and the need to invoke the precautionary principle as a result of these concerns. The letter points out that the Church House site is on a wild salmon migration route and that the wild salmon species are already depressed making them more vulnerable.

[61] The letter makes it clear that the Salmon Aquaculture Review cannot be relied upon because it was based on the then levels of production and as it

identified, there was severe gaps in knowledge or research. The letter takes a position that most of the recommendations by the Salmon Aquaculture Review have not been meaningfully implemented. The letter takes a position that the precautionary principle must be applied "…where any risk of severe, irreversible impacts exist, that risk must be eliminated before those impacts have already occurred and it may then be too late to preserve the wild salmon stocks. It is even more important to apply the precautionary principle where what is at stake are the resources on which the exercise of the most fundamental rights of an Aboriginal people depend." The letter refers to the Supreme Court of Canada decision 114957, ***Canada Ltée (Spraytech, Sociéty and Sociétéd'arrosage the Hudson Town)*** [2001] S.C.J. 42, ¶31, where the precautionary principle is referred to as defined at ¶7 of The Burgen Ministerial Declaration on Sustainable Development (1990) as follows:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the cause of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[62] The letter does recognize that there is little or no evidence of these risks but says the reason is because of the lack of research by the provincial or federal government.

[63] The letter also refers to cumulative impacts they say could arise because of the location and a number of other fish farms in the vicinity.

[64] The letter does refer to the fact that the Homalco had approved Marine Harvest's original application including the one at Church House. The letter makes the point that those approvals were given before more current information was available particularly with regard to the potential impact of sea lice. The letter alleges a lack of full disclosure by the provincial government and Marine Harvest and says that vitiates any approval given.

[65] It is not clear to me what the claims of failure to disclose are based on. The letter concludes stating that meaningful consultation and accommodation is required with regard to the application to add additional netcages that was made in 2003.

[66] The August 9, 2004, letter also refers to a Johnstone Bute Coastal Plan and the submissions of the Homalco with regard to the area that includes the Church House site.

[67] The letter points out that the Homalco have declared this area as a Xwèmalhkwu salmon enhancement and protected area, as a Xwèmalhkwu Xwèmalhkwu rock fish conservation area, and as a Xwèmalhkwu krill conservation area, and a Xwèmalhkwu heritage and protected zone. The letter takes the position that the amendment by adding Atlantic salmon and even the fish farm aquaculture as it is presently practiced is in conflict with those designations.

[68] The letter included a report from a fisheries biologist that indicated the addition of Atlantic salmon would create new risks because of the possibility of

escaped Atlantic salmon competing with native species. The report also indicates that the existing wild salmon stocks are already under pressure or decline.

[69] The Homalco's lawyer sent a second letter dated August 9, 2004, which is a one page letter which encloses the Band Council's Resolution regarding the application and the submission of the Homalco to the Johnstone Bute Coastal Plan.

[70] The letter again asks for the amended management plan and any studies or documentation furnished by Marine Harvest to support the application. The final paragraph of the letter indicates the Homalco would be pleased to meet in person and provide information on their concerns and Aboriginal perspectives and traditional, ecological knowledge, and the potential infringements on their rights and titles.

[71] The August 8, 2004 Band Council Resolution that was attached resolves that the Band and council do not approve of open netcage fin fish aquaculture as presently practiced in British Columbia and in their traditional territory. The letter does not approve the facility at Church House or the amendment to add Atlantic salmon or any species to the operation.

[72] The Church House management plan was provided to Homalco's counsel by email October 4, 2004. The Homalco counsel responded by email on the same date and itemized the information that they required, including the Management Plan; any amended management plans, any studies or reports subsequent to the first management plan for the site, any environmental monitoring results with respect to

the site; any new policy or approach by the proponent to deal with potential escapees; any studies or updated studies by the proponent with respect to historical or current escapement data or monitoring of streams in the environs which they may have used in bringing forward this amendment or any previous amendment or the initial application; any specific consultation the proponent has carried out with my client with respect to learning of any Aboriginal interests in the site area and the surrounding Bute Inlet area, including any important fish streams or marine resources harvested close to or potentially affected by the introduction of yet another species to the site; any updated provincial policies on aquaculture, including specifically the introduction of Atlantic salmon and its potential harm to wild salmon stocks, clam beds, rock fish habitat, et cetera; any previous amendment applications or approvals, including rational for such approval and reconciliation with the potential harm to my client's interest.

[73] A letter dated October 7, 2004, from Homalco's counsel to the Ministry confirms a telephone conversation between counsel and Ministry representatives on September 28, 2004. Their letter repeats the submissions opposing the application and lists them. They ask for information about how Marine Harvest will monitor and respond to potential Atlantic salmon escapes. The letter again speaks of information necessary for consultation and asks if the Minister has taken into account the Johnstone Bute Coastal Plan including the Homalco submission and the conservation declarations made by the Homalco. The letter refers to the Johnstone Bute Coastal Plan with regard to Unit 15 where Church House is located and that

plan provides only tenure modifications relating to anchoring or waste management should be considered.

[74] The letter expresses concern that the Ministry refers to Marine Harvest by the term “client”. The letter confirms that the Ministry representative, Mr. Westlake, will review all of the materials submitted and provide a written response. The letter confirms that Mr. Westlake is prepared to meet with the Homalco and their counsel to review the process by which applications are organized and co-ordinate the status of outstanding applications. It also confirms that communications with regard to the application should be made through counsel and not directly to the Homalco. The letter states at p. 4:

> However, I have now advised our client that you confirm that no aquaculture application would be decided until meaningful consultation had occurred with Homalco. By this I understand that you agree that no decision will be made until any and all follow-up questions and information requests for original or amended management plans, studies or research information provided by the various proponents to your Ministry regarding each and every application has been provided to my client by your Ministry.

[75] A similar letter was sent on October 28, 2004, including further requests for specific information including the following:

> …any studies completed by the proponent since the original management plan for the site, including results of environmental monitoring, letters to the proponent approving any previous amendments, new technical information or reports to the ministry has been provided,and will use in relation to making such a decision.

[76] The Ministry responded to this by an email dated October 29, 2004 indicating they were working on a substantive response to the October 7 letter. The email also discusses the request for clarification about potential earlier escapes.

[77] The Homalco counsel responded by email November 2, 2004, referring to the earlier escape of Chinook salmon that they say occurred, and asking what remediation was proposed.

[78] The Homalco counsel sent an email to the Ministry on November 3, 2004 requesting a copy of Marine Harvest's fish health management plan for the Church House site. This is a document that was submitted by Marine Harvest to the Ministry as a condition of its licence. It again confirms that the Chief and council are prepared to meet with the Ministry to discuss their concerns.

[79] Mr. Westlake did provide a letter dated November 22, 2004 responding to the concerns raised by the Homalco. The letter does point out that the fish health management plan is proprietary, that is, the property of Marine Harvest, and cannot be released by the Ministry. The template for a fish health management plan is referred to. Mr. Westlake indicates that he believes that this information and that available on the electronic website should be sufficient for a response. The letter refers Chief Blaney to the Ministry of Water, Land and Air Protections, FinFish Agriculture Waste Control Regulations and a contact person where Chief Blaney can obtain information that has been gathered by the licence holder in fulfillment of those regulations.

[80] The letter makes it clear that the position of the Ministry is that the Homalco have already approved the initial site, and that the Ministry is seeking information in support of specific concerns relating to the addition of Atlantic salmon. The letter also makes it clear that the Ministry will consider information relating to potential infringements that may have arisen through the operation of the facility since the initial decision to grant the licence.

[81] The letter deals with the report of the biologist indicating that it had been reviewed by the Ministry's biologist and states:

> In their view, the concerns raised in the report are not sufficient to result in a rejection of the species amendment application.

[82] There is no further discussion about why that conclusion has been reached.

[83] The letter states that the anthropological information referred to in the July 2003 letter was relevant to the original licensing, and confirms that the ***Heritage Conservation Act,*** [RSBC 1996] c. 187 protects archaeological resources from disturbance or damage. The letter asks for any specific aspects of the anthropological information contained in the Kennedy report of July 31, 2003 that relates to potential infringement as a result of the amendment application.

[84] The letter states the Johnstone-Bute Coastal Plan is not in effect, but that the Ministry will refer to it for general guidance.

[85] The letter confirms that Atlantic salmon are an approved species for FinFish Aquaculture.

[86] The letter states that the Ministry has received no reports of escapes from the Church House facility, and that the regulations require reporting of any escapes. The letter confirms that Marine Harvest's plan to deal with escapes is contained in the management plan which was forwarded to the Homalco or their counsel. The letter refers to the regulatory framework that deals with escapes and its requirements that each aquaculture facility implemented Best Management Practices document describing how they will meet the regulations.

[87] The letter confirmed that the Department of Fisheries and Oceans ("DFO") did not object to the application pending negotiation of an authorization to "Harmfully Alter, Disrupt and Destroy" habitat under the federal ***Fisheries Act***.

[88] The letter confirms that it is aware of the Homalco's opposition to the application, and will ensure that the Ministry's statutory decision maker is aware of their position.

[89] The letter confirms the Ministry's interest in further discussions with Homalco, and suggests that a meeting could be arranged to discuss those concerns, particularly the monitoring of potential escapes and regarding the proximity of the fish farm to shellfish resources. The letter confirms that Marine Harvest has expressed a willingness to participate in those discussions. The letter also refers to the fact that Marine Harvest is participating in the development of a multi-stakeholder area management process for finfish aquaculture that includes areas within the Homalco's asserted traditional territory.

[90] The letter concludes:

> Unless there are specific infringement concerns, MAFF will be making a decision on this application on December 9, 2004. If there are specific infringement concerns related to this amendment application, we ask that you provide them to us by the end of November.

[91] The Homalco's counsel responded by letter dated November 29, 2004 indicating that they have significant substantive concerns and will be providing a substantive response in reply. The letter confirmed that Homalco had an interest in meeting with Mr. Westlake to attempt to address those concerns. The letter confirms that counsel had been asked by their clients to coordinate that meeting time.

[92] The Ministry replied by letter November 30, 2004 confirming that the Ministry would be happy to meet with Homalco and their counsel, but that they required a written copy of the substantive concerns so that they could be reviewed ahead of time and an agenda be formulated. The letter confirms that a decision will be made on the application on December 9, 2004. The letter asks for the substantive response no later than December 2.

[93] The letter confirms that if a meeting is not possible, the concerns of the Homalco will be taken into consideration.

[94] Chief Blaney responded to that letter by his of December 2, 2004, expressing his disappointment in the response from the Ministry, and seeking meaningful consultation by way of a meeting between the Ministry and the Chief and council.

He confirms that, in his opinion, meaningful consultation should include meeting with them and addressing their concerns prior to making a decision. He confirms that further submissions will be delivered. He states that the short timeline given by the Ministry is not reasonable, especially given that it took approximately a month for the Ministry to respond to counsel's letter at the end of October 2004. The letter asks that a decision not be made prior to the Ministry knowing the Homalco's concerns and meeting with them.

[95] The Ministry responded by letter dated December 3, 2004 confirming a willingness to meet with the Homalco, and confirming the need to develop an agenda before any meeting. The letter does state, however, that they are prepared to meet with the band and counsel, either on December 6 or December 8.

[96] Chief Blaney responded by letter dated December 3, 2004, and stated that a number of requests for information remained outstanding. He asked that at any meeting Ministry staff be prepared to substantially and meaningfully respond to numerous concerns and impacts on the Homalco rights that have already been raised. He expresses concern that substantial and meaningful consultations cannot occur if the meeting does not occur until December 8, when the decision is to be made December 9, 2004. He formally requests an extension of the deadline for making a decision on the application. He confirms that he will be unavailable on December 6 or 8, because he is required to be in Ottawa and asks for an extension of the deadline so that a proper meeting can occur. He confirms that Homalco's further submissions would be sent within a week.

[97] The actual approval by the Ministry was granted on December 8, 2004, and the Homalco were notified of this on December 10, 2004. They were told a decision had made, but not the nature of the decision. When learning of the decision, Homalco's counsel immediately forwarded their further submissions to the Ministry on December 10, 2004.

[98] The Ministry advised Chief Blaney, by letter dated December 17, 2004, that the decision was made before receiving the December 10 submission, but offers to continue discussions. The letter confirms that the Ministry will review the materials received on December 10 and 13, provide a response. The letter also confirms that the Ministry is prepared to meet and discuss the response with the Homalco, and consider any new information when renewals of the licence occur. The letter confirms that the application to amend the licence was approved.

[99] The Homalco's counsel then sent a letter December 20, 2004, seeking the name of the statutory decision maker and a copy of the decision as soon as possible.

[100] The Ministry provided a response to the December 10 submissions by letter dated January 18, 2005, after these proceedings were commenced. The covering letter pointed out that many of the concerns appeared to relate to the site and the original licence rather than the amendment to allow Atlantic salmon, as opposed to Chinook salmon. The letter confirms that the response deals with those issues, with the concerns about the site as well as the amendment. The letter also states that

the Ministry is committed to meaningful consultation, including meetings with the Homalco, if requested.

[101] The response consists of a twenty-seven page document that deals with the concerns raised in the material of the Homalco's on an item by item basis. Attached to the report were thirteen appendices referred to in the response. The response is extensive, and I accept that it is an honest attempt by Mr. Westlake to address the concerns raised. Basically, the position is that the government does apply the precautionary principle in dealing with aquaculture by way of an adapted management strategy and by implementation of detailed regulations controlling aquaculture. The Ministry states that the application of the precautionary approach includes an assessment of the proposed risks, incorporates mitigation and management strategies and adjustments based on experience. The response confirms that aquaculture has to develop in consideration of its possible effects on other marine resources and in a precautionary manner.

[102] The response also takes the position that the amendment to allow Atlantic salmon in the Church House facility will not produce any infringement of asserted Aboriginal rights, and then addresses the assertions made by the Homalco on an item by item basis.

[103] The response at page 9 indicates that the Ministry's position is that the initial approval by the Homalco of the Church House site is binding on the Homalco. The response states that the Ministry will continue to respond to new scientific information where appropriate, but that new information does not invalidate the

processes or approvals that predate that information. The response is that this information will be considered in future management strategies if appropriate. The response reviews the submissions made by the Homalco and the evidence in support of those submissions, and comments on it.

[104] Page 20 of the report deals with the requirement by DFO for an authorization to Harmfully Alter, Disrupt and Destroy habitat ("HADD"). The response essentially is that that is a matter between DFO and Marine Harvest, and it was not a condition of the amendment. The Homalco are simply referred to the DFO. The response is not particularly helpful to the Homalco. I would have expected that the Ministry would be concerned about whether Marine Harvest was compliant with all of the federal regulations as well as the provincial regulations.

[105] The response concludes this is an initial response provided for Homalco's consideration and future discussion. The response also states that the Ministry is committed to meaningful consultation, including meetings as are required to fully understand the Homalco's position and accommodate any unidentified infringements on rights or title.

HAS SUFFICIENT OR APPROPRIATE CONSULTATION OCCURRED?

[106] I agree with the Ministry that all of their responses are relevant. They form an excellent basis for continuing discussion. However, the responses by themselves do not amount to the level of consultation that I find was necessary in this case. I understand why the Ministry might conclude that the Homalco's statement of

concerns were really a statement of position, on which they had little interest in moving. Despite the strong position that the Homalco appeared to take, however, the communications from them made it clear that they wished to discuss their position with the Ministry. They did not assert, at any time, that they were not prepared to change their position as a result of further consultation.

[107] I do not agree with the Homalco's assertion that the Ministry was not prepared to engage in meaningful consultation because it had already made up its mind with regard to this application. The Homalco argue that the Ministry has been guilty of bad faith, or sharp dealing, because the licence has the word "Approved" dated July 28, 2004. I understand why this would initially give them some concern, but the explanation given by the Ministry is reasonable. The "Approved" simply indicates when the Ministry's biologist had reviewed the application to make an initial determination as to whether it meets their requirements. It is clear throughout the correspondence that the Ministry understood that consultation with the Homalco was necessary before a final determination was made as to whether the "Approval" would be made effective. The effective date of the approval was December 8, 2004. I am not convinced that the Ministry has been guilty of bad faith or sharp dealing as alleged by the Homalco.

[108] I find that the Ministry has erred in failing to consult to the extent necessary in these particular circumstances. The Ministry believed that the change of species from Chinook to Atlantic salmon was not a significant amendment, and did not have any different impact on the claims or rights of the Homalco than the original licence.

Based on that starting point, they believed that the level of consultation required was not great. Their approach also was that it was only with regard to the effect of the amendment itself that they were required to consult. They believed that the matter would proceed fairly quickly, and when correspondence continued until late 2004, found themselves in a situation where Marine Harvest was making inquiries as to when the amendment might be granted, because they had been raising smolts and needed to place them somewhere. This combination of circumstances led the Ministry to proceed with the final approval of the amendment before there was an opportunity for them to meet with the Homalco, discuss their concerns and the Ministry's response. The concerns raised by the Homalco were not frivolous or vexatious. The Ministry does not agree with the scientific opinions presented by the Homalco, and the response required was significantly more than that contained in the letter of November 22, 2004. The letter of January 18, 2005 is a good foundation for the face to face meetings that consultation requires. Consultation, in some cases, may include the parties educating each other as to their concerns and responses to those concerns. The concerns raised may not necessarily be accepted, but they may still lead to some reasonable accommodation of those concerns. This type of consultation should have occurred before the amendment to the existing licence was approved.

STANDARD OF REVIEW

[109] On the issue of standard of review, the counsel referred to the comments of the Supreme Court of Canada in ***Haida*** at ¶61 to 63 as follows:

> ¶ 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> ¶ 62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice ... ". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> ¶ 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[110] In determining the standard of review on a judicial review procedure, the courts often distinguish between questions of law where the standard is correctness,

and questions of fact or mixed fact in law, where the court may show a degree of deference to the decision maker. The deference recognizes in some cases the expertise of the decision maker in an area where the courts may not have the same expertise. In cases such as this, the decision maker may have expertise which the court does not have with regard to the analysis of scientific evidence. However, the decision maker does not have any special expertise over and above that of the court in determining when the obligation to consult arises. In determining whether the decision maker has correctly decided whether an obligation to consult has arisen, the standard of review is correctness.

REQUEST FOR INFORMATION

[111] The Homalco argue that there has been a breach of the obligation to consult because of a failure to provide information. Certainly, the obligation to consult includes the provision of relevant information that the Ministry may have in its possession. A great deal of information was provided, but there were some items that were still in contention between the parties. Some of the information that was only provided at the hearing included some survey results conducted on behalf of the Ministry or Marine Harvest of the seabed beneath and around the fish netcages. The Ministry failed to provide this information simply as a result of an oversight not with any intention to deprive the Homalco of information they required in order to engage in meaningful consultation.

[112] The Homalco were provided with the management plan relating to the Church House site, or at least part of it, but did not receive a copy of the fish health

management plan. Marine Harvest took the position that the information contained in that plan is proprietary information. They are concerned that if it is delivered to the Homalco that it could be used for purposes other than consultation. They are concerned that it may get into the hands of their competitors, or could be used by the Homalco themselves, if they decided to enter the aquaculture business. The Homalco are, at present, opposed to aquaculture in the area they claim as their traditional territory, but that has not always been the case. They were involved in applications to allow the aquaculture of Atlantic salmon in the Bute Inlet as recently as 2002. It does not appear that they are presently pursuing those applications. Marine Harvest is also concerned that the information may be delivered to the Georgia Strait Alliance, an organization opposed to aquaculture, and with whom the Homalco are presently cooperating.

[113] I accept Marine Harvest's argument that the Fish Health Management Plan, which is a 218 page comprehensive document, does contain confidential proprietary information. The document specifically details operational instructions and procedures during all stages of production, specifies operational instructions and procedures determined by their veterinarian or fish house staff. The document is for the use of the operators' site staff in training, and in day-to-day contact with the fish by the fish house staff. Marine Harvest also use this document in making decisions about fish health. The Fish Health Management also applies to sites other than the Church House site. I accept Marine Harvest's argument that it contains the collective experience and expertise in producing Chinook and Atlantic salmon. This

expertise is derived from extensive research and experience of their experts, and enables Marine Harvest to maintain a competitive advantage over its competitors.

[114] The Best Management Practices Plan may also contain confidential information. However, it was my understanding that this plan had been disclosed. The plan contains the process by which Marine Harvest meets its obligations under the regulations dealing with aquaculture. Some of the information may not be confidential or proprietary. However, I accept that some of it may contain in-house specific procedures, technologies and techniques developed and used by Marine Harvest. Marine Harvest says that this information is based on expertise that has allowed it to be the only aquaculture company in North America that is both IS014001 and IS09001 certified. Marine Harvest does say that it is prepared to share this information, provided there are confidentiality arrangements and communication protocol agreements in place.

[115] The Ministry and Marine Harvest point out that the template for the fish health management plan, that has been provided to the Homalco, which they were able to access on the Ministry's website, gives the Homalco a great deal of information about the sort of things which would be contained in the plan. Marine Harvest indicates that they are prepared to sit down with the Homalco and discuss the contents of the fish health management plan, as they do with the Ministry, but they wish some assurances to be made regarding the confidentiality of that information.

[116] I find that the concerns raised by Marine Harvest are reasonable. I would not order the production of the fish health management plan without specific terms that

protect the interests of Marine Harvest, if actual production of the plan is necessary. Marine Harvest's suggestion that they meet and discuss the contents of the plan with the Homalco under certain conditions may be sufficient to meet the needs of all of the parties.

THE REMEDY

[117] The Homalco argue that the only appropriate remedy is a declaration that the Ministry has failed to properly consult, and an order quashing the approval of the amendment. They say an order should then be made that all of the Atlantic salmon presently at the Church House site be removed until consultation and, if necessary, reasonable accommodation is made for their concerns. They say this is necessary to put them in the position they were in before December 8, 2004.

[118] The Ministry and Marine Harvest argue that such an order is unnecessary and inappropriate in these circumstances. They argue that even on the evidence provided by the Homalco, the risks that they raise regarding potential infringement of their Aboriginal rights are at the low end of the scale. Marine Harvest argues that it would cost them approximately $300,000.00 to move the Atlantic salmon that are presently at the Church House site. They also argue that this would have a significant impact on their potential earnings because they would lose the capacity for rearing salmon that they have at the Church House site. In other words, even if they had somewhere else to place these salmon, they will still lose the opportunity to use the Church House site and profit from the activities there. They estimate that

the value of the salmon presently at Church House will be approximately 15 million dollars when the salmon reaches the stage where they are able to harvest them.

[119] I find that it would be unreasonable to order the immediate removal of all of the Atlantic salmon presently at the Church House site.

[120] Marine Harvest, in their argument, points out that the court has a discretion to exercise in determining what remedy to apply in a judicial review proceeding. They cite from ***Brown and Evans, Judicial Review of Administrative Action in Canada:***

> The exercise of the court's supervisory jurisdiction is discretionary. That is, even where a litigant has established a ground on which the courts may intervene in the administrative process, relief will not necessarily be granted: the court may decline to provide a remedy for reasons other than the merits of the application for a judicial review.
>
> (**Judicial Review of Administrative Action in Canada Volume I Toronto**: canvas back, loose leaf updated August 2003 release chapter 3 … pages 3-1).

[121] Marine Harvest points to other cases in which the court did grant a remedy short of attempting to place the parties back in their original positions.

[122] Some of those cases are:

Cheslatta Carrier Nation v. British Columbia (Project Assessment Director) (1998), 53 B.C.L.R. (3D) 1 (S.C.). In this case, Chief Justice Williams, as he then was, attempted to balance the rights and potential prejudices to the parties, and

made orders requiring the respondents to fulfil their obligation to consult meaningfully and properly and made directions for production of information.

They refer to the ***Gitxsan First Nation v. British Columbia (Minister of Forests)*** 2002 BCSC 1701. In that case, Mr. Justice Tysoe dealt with the issue of remedies, beginning at ¶100. There Mr. Justice Tysoe also referred to a decision ***Haida Nation v. British Columbia (Minister of Forests)***, [2002] B.C.C.A 147 (Haida No. 1) where the court declined to quash a decision of the Ministry even though consultation had not occurred. Haida No. 1 was a decision of the Court of Appeal, and the Court of Appeal indicated that a decision on whether or not to quash the licence itself, or the transfer of the licence, is better determined after the extent of any infringement had been determined.

[123] Similarly, in ***Gitxsan****, supra,* Mr. Justice Tysoe determined at ¶106:

> …it is my view that it is preferable to first make a declaration with respect to the duty of consultation on an interim basis and to then allow the parties to undertake a proper process of consultation and accommodation. If the process does not succeed, the matter can be brought back before the Court for further directions or further declarations.

[124] Mr. Justice Tysoe also dealt with the issue of the disclosure of information. In that case, he found that there should be discussion between the parties as to the exact type and extent of information to be provided before the court makes a determination as to whether specific documents should be provided. (¶113).

[125] Marine Harvest suggests that an appropriate order in this case that would balance the interests of all of the parties would include:

1. an adjournment of the application for judicial review;

2. a declaration of the need for further consultation between the Homalco and the Crown;

3. some direction as to the scope and content of the consultation, and potentially the schedule for consultation;

4. an encouragement to Marine Harvest to participate in an appropriate way in the consultation (which Marine Harvest is prepared to do);

5. some direction on the provision of information, subject to protection for confidentiality with respect to the fish health management plan and the best management plan;

6. providing leave to the parties to seek further directions; and

7. providing leave to the Homalco to pursue its remedy in the event that they are of the view that further consultation and accommodation are inadequate.

[126] I find that the remedy suggested by Marine Harvest is appropriate.

[127] Therefore, I make the following orders:

1. I adjourn the application for judicial review generally;

2. I declare that the Minister had, and continues to have, a legally enforceable duty to the Homalco to consult with them in good faith, and to endeavour to seek workable accommodation between their interests and the long-term objectives of the Crown and Marine Harvest, and the public interest, both Aboriginal and non-Aboriginal. This includes issues surrounding the location and management of the Church House fish farm and the amendment to the existing licence to allow the introduction of Atlantic salmon;

3. The parties are at liberty to apply for further directions if they are unable to agree on a schedule for consultation;

4. Marine Harvest is to participate in an appropriate way in the consultation;

5. Marine Harvest will provide information subject to protection of confidentiality with respect to the fish health management plan and the best management plan. The parties have liberty to apply if they are unable to agree under the specific terms required to protect the confidentiality of the information;

6. Marine Harvest will not add any more Atlantic salmon to the Church House site until the process of consultation and potential accommodation has been completed, and the Ministry confirms the amendment of the licence, if it does so;

7. The Ministry is to approach this consultation with an open mind and be prepared to withdraw its approval of the amendment if, after reasonable consultation, it determines that it is necessary to do so, or add whatever conditions appear to be necessary for reasonable accommodation of the concerns of the Homalco;

8. The parties have leave to apply for further directions;

9. The Homalco have leave to bring the matter back before the court in the event that they are of the view that further consultation and accommodation are inadequate.

[128] In making this order I have considered the factors referred to in Marine Harvest's argument:

Marine Harvest argues the factors to consider are:

a) that there is no direct or immediate interference with Homalco's claimed rights arising from the farm raising Atlantic salmon rather than Pacific. I would point out, however, that it is not simply direct or immediate interference which is a concern. It is also indirect and potential future interference. This is the very subject matter of the consultation. This is also a matter on which the various scientists differ;

b) concerns of the Homalco respecting risks to wild salmon and to the marine environment or substantively addressed through the regulatory

> requirements which govern the operation of the fish farm (e.g. protection against escapes, and measures respecting fish health, waste management and general protection of the environment).

I have considered the regulatory requirements, but again, that is not the end of the matter. Those are the proper subject matters of discussion during consultation. There may well be additional measures which should be taken to address the concerns of the Homalco.

[129] Marine Harvest also refers to:

a) The fact that there was consultation prior to the decision, further submission issued by the Homalco after the decision (on December 10, 2004), and the substantive response giving additional reasons by the Crown on January 18, 2005;

b) This does indicate a willingness to consult and is a good starting point;

c) The recognition that the obligation to consult and accommodate is an evolving one, which was only fully articulated by the Supreme Court of Canada on November 18, 2004 (in ***Haida*** and in ***Taku River***), only twenty days before the decision of MAFF was made on December 8, 2004. Each of the parties to the consultation can take direction respecting rights and obligations from these cases.

However, I note the recognition of the obligation to consult is not a new one and did not arise simply out of the Supreme Court of Canada

decisions referred to. The obligation to consult has been recognized by the courts for a considerable period of time, and the British Columbia Court of Appeal decision in ***Haida*** certainly made it clear that the province had this obligation whether or not they agreed with that decision or were appealing it.

d) The fact that Marine Harvest, as a third party, has relied on the December 8, 2004 decision, and would suffer significant damages if the decision was quashed and the salmon requested to be removed. This would be particularly unjust if the only issue is further consultation and a similar decision may be the ultimate result.

I have pointed out the estimated financial cost to Marine Harvest. I also find that they are entitled to rely on the amendment granted to them.

e) The fact that further consultation may well satisfy the Homalco in their concerns, or identify some further accommodation which could be implemented, in other words, that setting aside the decision may be premature.

I agree that this is a reasonable matter to consider, including the willingness of Marine Harvest to participate in that consultation.

f) The fact that continuing with the Atlantic salmon in the fish farm will not cause irreparable harm (e.g. unlike carrying on with timber harvesting

> or building a road). If the ultimate decision of the court, after a period of further consultation, is that the December 8, 2004 decision should be set aside, the salmon could then be removed. The potential for any harm during an interim period allowing for further consultation is low (remote).
>
> To some extent this is part of the argument that is made and the disagreement between the scientists. The consultation, including the early portion of the consultation, could be specific steps that may be taken to further minimize the risk above and beyond the existing regulations, or steps that could be taken to ensure that the existing regulations are enforced.

[130] I have also considered the evidence submitted about Marine Harvest's practices. Marine Harvest's evidence is that they take seriously all of their obligations under the regulations, and pride themselves in the manner in which they operate their fish farms. They state they are the world's largest aquaculture company, and the largest producer and suppler of farmed salmon. They point out that they own or operate 19 salmon farms in British Columbia, all but five of which are currently licensed for both Chinook and Atlantic salmon production. They also point out that they own and operate two land-based fresh water hatcheries that produce almost all of the smolts that they use.

[131] Their position is that they are at the leading edge of development in aquaculture and are committed to conducting their operations to maximize

environmental protection of fish health. They argue that they impose their own stringent environmental management and fish health policies, as well as applying all of the governmental regulations and policies.

[132] Marine Harvest points out that its environmental management system for its fin fish production sites is registered to the Environmental Management System Standard IS014001: 1996 which is an international standard that specifies a process for controlling and improving a company's environmental performance. In addition to the creation and implementation of strict policies and procedures, there must be a monitoring system in place to monitor compliance. The standards also require internal and external audits to ensure compliance. Marine Harvest is also IS09001 certified, which deals with quality management systems, including product quality, management style, customer relations and other business related issues. Marine Harvest points out that they are one of only five aquaculture companies worldwide who hold both IS014001 and IS09001 registrations. Their management plan includes a goal to eliminate all escapes from marine netcage operations, and a detailed fish escape prevention and response plan. They say that this plan is implemented daily.

[133] I should deal with the comment made by Mr. Westlake in his affidavit #2 at paragraph 25, which reads as follows:

> In my view, if I were to recommend that MAFF deny Marine Harvest's application to farm Atlantic salmon on the basis that escapees might cause one or any of the various harms that are identified from time to time, I could not recommend approval of Atlantic or any other salmon farming at all in British Columbia.

[134] It was suggested that this was one of the principle reasons that Mr. Westlake recommended approval of the amendment. Counsel for the Ministry argues that Mr. Westlake is merely indicating the issues with regard to escapees have already been considered at length, and that the appropriate regulations and policies are in place to deal with that issue. The Ministry argues this is really not a new or significant issue.

[135] Clearly, the Ministry must deal with each application on its own merits, and consult and address the individual concerns of the Homalco with regard to this specific sight. If, after consultation, reasonable accommodation of the concerns raised by the Homalco required a refusal to allow the amendment, then that would be the decision that the Ministry must make. The Ministry must deal with the concerns of potential infringements on a sight by sight basis, not based on any general policy.

[136] There was a significant amount of argument about the admissibility and consideration of certain evidence, including the scientific evidence. Counsel have made it clear that they do not feel it is the court's position to chose between the scientific opinions. Therefore, I have not found it necessary to consider the arguments about the validity or qualifications of the various scientists making their opinions. The only use I have made of the scientific evidence, is for the purposes of concluding that there is some basis for the Homalco's concerns without deciding the strength or weight that should be given to those opinions of concern.

[137] The Homalco did argue that the provincial jurisdiction under s. 92(5) of the ***Constitution Act*** 1867 which is the basis of the authority for the ***Fisheries Act***,

[RSBC 1996) c. 149 and the way in which the regulations are framed as prohibitions or requirements for permission, supports the argument that the purpose and the constitutional obligations in the ***Fisheries Act*** are to conserve the stock of fish and to protect the fish environment. They referred to **Peter Hogg, Constitutional Law 3rd Edition** at 29.5(c) as follows:

> The management of public lands in section 92(5) [of the *Constitution Act 1867*] must include measures to conserve the stock of fish and to protect the fish environment. [my emphasis added]

[138] No authority was cited for the proposition that the ***Fisheries Act*** and regulations must conserve the stock of fish and protect the fish environment. I conclude that all Hogg was saying is that the powers that the province has under s. 92(5) must include measures to conserve, not that the province must pass legislation and regulations to conserve stock. He is merely stating what the province can do as a result of its legislative authority, not what it must do.

RELIEF UNDER PARAGRAPH 7 OF THE PETITION

[139] Paragraph 7 of the petition applies for the following relief:

> 7. An interlocutory and permanent injunction prohibiting the Respondent, Marine Harvest Canada, from placing Atlantic salmon in the Church House fish farm without proper authorization from the Department of Fisheries and Oceans for the harmful alteration, disruption or destruction ["HADD"] of fish habitat pursuant to s. 35(2) of the ***Fisheries Act*** and without obtaining a licence pursuant to s. 55 of the **Fisheries (General) Regulations**.

[140] Marine Harvest argues that relief applied for in paragraph 7 of the petition is not available under Rule 10 of the **Rules of Court** and that it is not available under the ***Judicial Review Procedures Act***.

[141] I am satisfied that if it were necessary, directions could be given as to how to resolve this issue to eliminate any concerns whether the petition under Rule 10 was the appropriate method of pursuing this relief. Rule 2(3) states:

> (3) The court shall not wholly set aside a proceeding on the ground that it was required to be commenced by an originating process other than the one employed.

[142] In other words, appropriate directions or orders could be made to allow the matter to be resolved, even though it had been commenced by way of petition.

[143] I agree with the petitioner that an injunction can be included in claims for relief under the ***Judicial Review Procedures Act***.

[144] Marine Harvest also argues that this claim for relief really relates to the exercise of the jurisdiction of the federal Minister of Fisheries and Oceans, and that the petitioners have started separate proceedings for relief in the federal court where these matters should be resolved.

[145] The Homalco respond by saying that they are simply attempting to prevent a breach of a federal statute, where that breach may have a direct impact upon themselves. They point to the decision ***Re National Capital Commission et al v. Pugliese et al***; ***Re Regional Municipality of Ottawa – Carleton et al and Dunn***,

97 D.L.R. (3d) 631. The Supreme Court of Canada found that individual homeowners had a right of action for damages to their property. They say that damage arose when the defendants breached the Ontario ***Water Resources Act*** by abstracting more than 10,000 gallons of water per day without a permit. They argued that the removal of under-surface water caused their properties to subside and suffer damage. The Homalco argue that this demonstrates that an individual may have the right to sue a party for breach of a statute.

[146] The Federal ***Fisheries Act*** provides that someone shall not cause a HADD without a permit. In this case, there is discussion between Marine Harvest and the Department of Fisheries as to whether they require a permit to cause a HADD in this case. The initial operation of the Church House site operated under an agreement not to cause a HADD. Marine Harvest is in the process of negotiating with the Department of Fisheries to determine whether a permit to cause a HADD is necessary, or should be granted. There is evidence that the Department of Fisheries may require a permit, but it is not clear on the evidence that Marine Harvest is operating in contravention of the ***Fisheries Act***. The Department of Fisheries and Oceans did send a letter to the Ministry on July 14, 2004 indicating that they were not opposed to the amendment of the licence, provided Marine Harvest obtained a HADD. Marine Harvest was in the process of negotiating for a HADD, but only as part of an overall process to convert permits not to cause a HADD to a permit to cause a HADD. It is not clear that they were unable to continue to operate with the existing permit.

[147] Marine Harvest also points out that the petition has not alleged that the Church House facility has caused a HADD, or is likely to cause a HADD. Nor is there any evidentiary foundation to conclude that the facility has caused a HADD, or is expected to cause a HADD. The Ministry has referred to the decision ***Operation Dismantle Inc. v. Canada***, [1985] 1 S.C.R. 441. This dealt with a judicial review of a Cabinet decision relating to missile testing. The opponents were concerned about risks of nuclear war and alleged that their s. 7 ***Charter*** rights, life and security of the person were being infringed. The court said that the government did not have a duty to refrain from the action it proposed to take based on the ***Charter*** rights, and the allegation of infringement was based on speculation or hypotheses about possible effects of the government action (¶29). The court in ***Operation Dismantle*** said the following at ¶34 through ¶36:

> ¶ 34 A similar concern with the problems inherent in basing relief on the prediction of future events is found in the principles relating to injunctive relief. Professor Sharpe, Injunctions and Specific [page458] Performance (1983), clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective, at pp. 30-31:
>
> > All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered....
> >
> > Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues quia timet -- because he fears -- and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.

> ¶ 35 The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": (Sharpe, supra, at p. 31). In Redland Bricks Ltd. v. Morris, [1970] A.C. 652, at p. 665, per Lord Upjohn, the House of Lords laid down four general propositions concerning the circumstances in which mandatory injunctive relief could be granted on the basis of prospective harm. The first of these stated [at p. 665]:
>
> 1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.... It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.
>
> ¶ 36 It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

[148] I conclude that this is a matter better resolved through the process provided by the ***Fisheries*** Act, rather than making findings with only a portion of the evidence available. In these circumstances, even if I have discretion or the authority to grant an injunction, I decline to do so on the evidence before me.

[149] I am satisfied that this is a matter that is more properly handled, at this stage, through the Department of Fisheries and Oceans. Certainly, I anticipate the Department of Fisheries and Oceans would consult with the Homalco on the issue of whether a permit for a HADD should be granted, or whether an agreement to prevent a HADD is appropriate. Those matters, however, may be the subject of the proceedings in the federal court, and I do not wish to make any further comment on them.

[150] The parties have not addressed the issue of costs. They are at liberty to do so if they are unable to agree on that issue.

“”R.E. Powers, J.”
The Honourable Mr. Justice R.E. Powers

March 23, 2005 – ***Revised Judgment***

Corrigendum issued advising that on the first page, counsel for the Respondent, The Minister of Agriculture Food and Fisheries should read L. Mrozinski and P.E. Yearwood.

At paragraph 1, “Xwemahlkwu” should read “Xwèmalhkwu” and elsewhere throughout the judgment.

At paragraph 3, “Neutreco Canada Inc.” should be spelled “Nutreco Canada Inc.”.

At paragraph 8, “Bartlett” should read “Bartlett Island”.

At paragraph 21, clause 3: “Homalco Treaty” should read “Homalco Territory”.

At paragraph 24, the second line: “wild Pacific salmon stocks spawn” should read “wild Pacific salmon stocks that spawn”.

At paragraph 31, the reference to “affluent” should be “effluent”.

At paragraph 35, 26, 38 and 39 the courts refers to the “salmon agriculture report” and should be referred to the “Salmon Aquaculture Review”. Also at paragraph 35, the “Environmental Assessment Office” should be capitalized.

At paragraph 56, second line: “amendment management plan” should read “amended management plan”.

At paragraph 57, third line: “open netcage fin fish culture” should read “open netcage finfish aquaculture”.

At paragraph 61, 69 and 73, “Johnson” should read “Johnstone”.

At paragraph 98, fourth line: “received on December 10 and 13 and provides a response” should read “received on December 10 and 13 provide a response”.

At paragraph 122, ninth line: “(Haidia No. 1)” should read “(Haida No. 1)”.

At paragraph 127.7 it reads:

> "… to withdraw its approval of the amendment if, after reasonable compensation, it determines …"

and should read:

> "… to withdraw its approval of the amendment if, after reasonable consultation, it determines …"