
CANADA / JUDGMENT

Cermaq Canada Ltd. v. Stewart

2017 BCSC 2526

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Supreme Court of British Columbia

DECIDED

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2017 BCSC 2526 Cermaq Canada Ltd. v. Stewart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cermaq Canada Ltd. v. Stewart,

2017 BCSC 2526

Date: 20171222

Docket: S1711528

Registry: Vancouver

Between:

Cermaq Canada Ltd.

Plaintiff

And

Noah Stewart, Jasper Rosen, Karissa Glendale, Molina Dawson, Jane Doe, and John Doe

Defendants

Before: The Honourable Mr. Justice Voith

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

B. Gilbride

D. Bryant

K. O'Callaghan

Counsel for Defendants, Karissa Glendale and Molina Dawson:

M. Nefstead

Place and Date of Hearing:

Vancouver, B.C.

December 21, 2017

Place and Date of Judgment:

Vancouver, B.C.

December 22, 2017

- [1] THE COURT: The plaintiff Cermaq Canada Ltd. ("Cermaq") seeks to enjoin various forms of interference with a number of its fish farming operations that are located in the Broughton Archipelago.
- [2] It seeks this injunction both against various unnamed or John Doe and Jane Doe defendants and against several named defendants. I am satisfied that Cermaq has complied with the service requirements that I imposed when I allowed it to bring this application on short notice last week.
- [3] Only two named defendants, Ms. Glendale and Ms. Dawson appeared, through their counsel, to address the injunction that Cermaq seeks. Counsel for Ms. Dawson and Ms. Glendale does not question the legal right of Cermaq to operate under the various permits or licences that it holds. He opposes the issuance of an injunction as against his clients on the basis that the aboriginal rights they assert are compatible with or can co-exist with Cermaq's entitlement to conduct its business and on the basis that Cermaq is unable to establish that it will suffer irreparable harm if the injunction is not granted.

Background and Context

- [4] This injunction application turns on the evidence in the application record that has been filed. It is relevant, however, that the opposition that Cermaq faces is part of a larger context.
- [5] There are a number of individuals who are opposed to fish farming in the Broughton Archipelago. This past week, another company called Marine Harvest Canada Inc. applied, before me, for an interlocutory injunction against various named defendants, including Ms. Glendale and Ms. Dawson, as well as against numerous unnamed or John Doe and Jane Doe defendants.

- [6] In reasons for judgment issued earlier today and indexed at 2017 BCSC 2383, (the "Marine Harvest Reasons"), I granted the interlocutory injunction that Marine Harvest sought.
- [7] The Marine Harvest Reasons are indirectly relevant because though the plaintiffs in the two cases are different, a number of the defendants, including Ms. Glendale and Ms. Dawson, are the same. Ms. Glendale and Ms. Dawson are also represented by the same counsel in both cases. Aspects of the behaviour being complained of by Marine Harvest and by Cermaq are the same or similar, though there are aspects of this behaviour that are also different. The legal positions advanced by counsel from Ms. Dawson and Ms. Glendale are essentially the same in both cases.
- [8] Because of the nature of the activity that Cermaq complains of, because of the frequency of that activity and how it appears to be accelerating, and because of the imminence of the Christmas and New Year's holidays, I considered it necessary to deliver these oral reasons as quickly as I reasonably could.

The Parties

a) The Plaintiff

- [9] The description of Cermaq and of its business that follows largely mirrors the description that is found in the Plaintiff's Notice of Application. I have confirmed that that description is consistent with the evidence in the record that is before me.
- [10] Cermaq is the second largest salmon aquaculture producer in British Columbia. It operates three hatcheries, one spawning facility, and twenty eight sea sites or salmon farms and two processing plants. It employs more than 250 people. Of its twenty eight licensed farm sites, eleven are on the east coast of Vancouver Island, eight of which are in the Broughton Archipelago, and three are off the coast of Campbell River.
- [11] For each of these farm sites, Cermaq holds both a Licence of Occupation issued under the Land Act, R.S.B.C. 1996, c. 245 by the British Columbia Ministry of Forests, Lands, and Natural Resource Operations and a Marine FinFish Aquaculture Licence issued under the Fisheries Act, R.S.B.C. 1996, c. 149 by the federal Ministry of Fisheries and Oceans, authorizing Cermaq to carry out aquaculture activities at the site.
- [12] The Licences of Occupation set out the tenure area, both by geographical coordinates and by maps, in which Cermaq is authorized to conduct finfish aquaculture.
- [13] Pursuant to the Licences of Occupation, Cermaq has the right to conduct aquaculture operations within the entire tenured areas. The Aquaculture Licences authorize Cermaq to conduct aquaculture activities pursuant to the conditions of those Licences. All of Cermaq's sea sites are net-pen Atlantic salmon farms.

[14] The fish at each site are kept in underwater net pens. The pens are connected by metal walkways, and there is a walkway around the perimeter of the pens for the staff to access the pens during their work. Each site also has other infrastructure. This includes a feed barge, a feeding system and feed, a float house providing work staff accommodation and work floats. Typically, each operating site has three to four staff employees on duty at a time, including a site manager.

[15] Staff generally works a schedule in which they work and live at the site for eight days and then have six days off. While on shift, employees live on the floating staff accommodations at the site. The sites are remote and only accessible by boat or float plane. Assistance is generally an hour away.

[16] Cermaq's eight farm locations in the Broughton Archipelago are:

1. Burdwood;
2. Sir Edmund Bay, which is called "Sir Ed";
3. Cypress Harbour;
4. Cliff Bay;
5. Cecil Island;
6. Maude Island;
7. Simmonds Point; and
8. Wehlis Point.

Three of these sites are currently operational, those being Burdwood, Cypress Harbour, and Sir Ed.

[17] As part of its operations, Cermaq transfers smolts, which are juvenile salmon, from its hatcheries to those sites or its other licensed sites may transfer fish between sites. The sites that are currently not operated with fish are nevertheless frequently used to provide accommodations for staff crew such as maintenance and fish health crews and for contract crews, such as divers or net anchoring crews.

b) The Defendants

[18] None of the unnamed defendants, though many clearly would be aware of this application, chose to file any material or to make any submissions.

[19] Ms. Dawson filed an affidavit in which she deposes that she is a member of the Musgamagw Dzawada'enuxw Nation. She has been actively involved in opposing fish farming for seven years. She describes her family, why wild salmon are important to both her and her community, and why she opposes fish farming. She describes the support she has from others for her activities.

[20] Ms. Glendale did not file an affidavit on this application, but she did on the Marine Harvest application. Her affidavit on that application was similar in content to the affidavit of Ms. Dawson.

Cermaq's Operating and Biosecurity Protocols.

- [21] Many of the forms of activity that the defendants have engaged in, particularly in recent weeks, are said to give rise to serious risk to the health of the fish that Cermaq is farming. To put those risks in context and to assess the seriousness of that risk, it is useful to address the fish protection protocols that Cermaq has developed and that it follows. Those protocols are, again, usefully summarized in its Notice of Application.
- [22] In order to prevent or reduce risk to fish health, Cermaq has implemented a number of operating procedures called "biosecurity measures". These biosecurity measures are in place to protect Cermaq's facilities from contamination and the fish from risk of disease and to prevent any cross-contamination from occurring between Cermaq sites and from other aquaculture sites.
- [23] The most important causes of disease in farmed fish are people and equipment, and a key focus of Cermaq's biosecurity measures is to prevent both people and equipment from introducing pathogens from other wild or farmed fish populations.
- [24] Cermaq's biosecurity procedures for visitors include:
- a) visitors are not permitted to have been at any non-Cermaq facility or have visited a Cermaq facility out of the "order of visitation" within the past twenty four hours. The "order of visitation" requires that visits must not occur outside of the order from youngest to oldest fish.
 - b) Cermaq reserves the right to deny access to its facilities for fish health or safety reasons.
 - c) all vessels are required to dock at a visitor docking station.
 - d) visitors are to be picked up at the visitor docking station using Cermaq's site vessel, must wear appropriate foot wear, must use a foot bath prior to or immediately upon boarding the site vessel.
 - e) visitors must use a foot bath as they access the facility from the site vessel at the visitor access point, which does not allow direct access to the cages.
- [25] Cermaq also has detailed biosecurity protocols for divers. These protocols are rigorous. For instance, diving gear must be specific to Cermaq sites. These and other specific biosecurity protocols are developed for several pages in the affidavit of Cermaq's Communications and Corporate Sustainability Director.

[26] Cermaq sites are active work sites, and in order to maintain biosecurity and safety, Cermaq does not allow people who are not invited and do not have prior authorization on site. Cermaq does this for the safety of each of its workers, unauthorized individuals, and the fish. In particular, bringing unauthorized individuals to a site, who do not follow Cermaq's safety and biosecurity protocols, creates a risk of harm to the fish.

[27] These biosecurity protocols are not fanciful nor do they reflect excessive concern. They are, in part, mandated by the federal Marine Finfish Aquaculture Licences that Cermaq holds.

[28] Clause 2.1 of appendix 4 of these Licences, under the heading "Biosecurity", provides:

Disease-causing agents (pathogens) may be spread by sick fish (wild or cultured) through the water, on shared equipment, other animals, or inadvertently by personnel, visitors or their personal gear. Entrance of potential pathogens is minimized by supporting an effective biosecurity "barrier" at each facility. Biosecurity measures apply to all personnel, visitors, divers, suppliers, regulators, vessels, and all equipment. Biosecurity has three main goals: keeping fish healthy, keeping pathogens out, and keeping disease from spreading.

[29] Clause 2.5.1, under the heading, "Personnel/Visitor/Diver/Supplier movement", provides:

Where possible, personnel and visitors avoid travel between Cermaq Canada Ltd.'s containment arrays. If such travel is unavoidable, personnel and visitors adhere to all biosecurity procedures at each facility. Procedures are posted or explained to all visitors as part of the visitor log-in event. Suppliers are advised of containment array procedures and delivery-order in advance. Suppliers attending multiple facilities may be denied access. Staff will notify suppliers and divers if any specific disease of concern arises.

[30] This, then, in turn references Cermaq's proprietary standard operating procedures, and there are a number of them, as well as Cermaq Canada Ltd.'s Fish Health Management Plan.

[31] Clause 2.5.2, under the heading, "Equipment/Vehicle movement", provides:

Where possible, Cermaq Canada Ltd.'s equipment is not shared between containment arrays. This includes fish handling equipment, vehicles, feeding, monitoring, and other equipment. Equipment is kept as clean as possible at all times to prevent possible spread of pathogens; it is cleaned and disinfected after each use and re-stored to its proper location. Equipment drying is also practised when possible. Items which must be used at more than one facility are subject to biosecurity and disinfection measures.

[32] There is then, again, reference to specific Cermaq proprietary standard operating procedures, as well as to Cermaq Canada Ltd.'s Fish Health Management Plan. These specific clauses are followed by pages of further guidelines or requirements.

The Defendants' Conduct that Gives Rise to this Application

- [33] The materials filed by Cermaq depose that for eighteen months, or since August of 2016, there have been more than fifteen incidents at its various sites in the Broughton Archipelago in which persons have visited those sites, boarded the sites, and/or have intimidated staff by approaching, anchoring at, or circling the sites.
- [34] None of the evidence in any of these affidavits is contested or contradicted. The details of many of these early incidents are not developed. In one affidavit, a Cermaq assistant manager has, however, deposed that over the last eighteen months, individuals had docked at and come on board the Sir Ed facility on about a dozen occasions when he was on shift. He is aware of other similar instances that took place when he was not working at the facility. These individuals have been asked to leave, but they have refused to do so.
- [35] Cermaq's more detailed chronology begins in August 2017 when an unnamed male came on the Sir Ed facility without authority and placed a camera in a fish pen in violation of the plaintiff's biosecurity protocols. That same month, Ms. Glendale boarded the Sir Ed facility. She was asked to leave but refused to do so.
- [36] It is relevant that on November 14, 2017, in the Marine Harvest proceedings, I granted the defendants in that action a 30-day adjournment, on the condition that they vacated a Marine Harvest facility called "Midsummer" and that they remove the various structures they had constructed on that facility.
- [37] In the Marine Harvest Reasons, at paras. 42 to 49, I detailed the various ongoing interferences at Marine Harvest facilities, including by Ms. Glendale and Ms. Dawson between November 17 and December 14, 2017, when the hearing of the Marine Harvest injunction application took place.
- [38] I raise this because it is during this same time period that various unnamed or John Doe and Jane Doe defendants, as well as Ms. Glendale and Ms. Dawson, began to attend at Cermaq facilities.
- [39] I also raise this because it appears, for example, from a Facebook post by Ms. Dawson, that the defendants or some of them, including Ms. Dawson, visited or boarded six different Marine Harvest and Cermaq facilities on the same day. Such activities are directly relevant to Cermaq's biosecurity concerns and to the potential harm to the fish at its facilities.
- [40] Cermaq's materials detail five incidents in a 10-day span of time at its Burdwood and Sir Ed sites. On December 1, 2017, approximately a dozen individuals tied two boats to the Burdwood site. This included Ms. Dawson and Ms. Glendale. They were asked to leave but refused to do so.
- [41] One individual took a Cermaq dip net. She did not return it when she was asked to do so. Ms. Glendale then read a notice which included the following excerpts or statements:

In short, the site you are currently occupying is illegal and your company is the one in fact trespassing.

Because of the lack of action and response to our concerns, lack of consent, and previous eviction notices, we, members of the Musgamagw Dzawada'enuxw and allies, have found it necessary to take direct action, including but not limited to occupying these illegally run worksites.

We would like to state that these re-occupations will continue for as long as necessary. If your company is interested in ending an occupation or other action, the best way to do so would be to come up with and implement a solid plan to remove all Atlantic salmon from this unceded Musgamagw Dzawada'enuxw territory, along with all equipment and structures used to grow them.

[42] The statement also asserted that the activities of the individuals who opposed Cermaq's operations were intended to be peaceful and that there was no wish to harm Cermaq's employees.

[43] After Ms. Glendale finished reading this notice, two other individuals placed a kayak into one of the fish pens and began to kayak in the pen. The defendant Mr. Rosen then began to use a dip net to catch fish in the pen. Another individual, the defendant Mr. Stewart, who wore a wetsuit, jumped into the pen and began swimming about with a camera. While this was occurring, others hung a banner from the dock that stated, "Ban fish farms". Another male individual began using a Cermaq dip net to reach into the pens. He caught two fish, held them up for several minutes, and then threw them back in the water.

[44] Each of these acts was a serious violation of Cermaq's biosecurity protocols. The group then left about an hour after they first boarded the facility.

[45] On December 5, 2017, a group of approximately seven individuals arrived at the Burdwood facility in a boat. They were all told they could not dock or come on the facility. Three of them got out of the boat. One was in scuba gear. One tried to remove the net from the top of the pen that contained brood salmon. He was told to stop and he ignored that instruction. The man in the scuba gear then dove over the rail into the pen.

[46] The Cermaq materials depose:

As noted above, a brood pen is a pen that contains fish specially selected for spawning. Contamination of a brood pen has serious negative implications for our company, as those fish are used to obtain eggs, which are then used to restock all of our farms. We take contamination of all of our pens very seriously. The financial implications of contamination of brood pens is very severe. It could ruin a whole years' production in the future.

- [47] The individuals who boarded Burdwood departed about forty minutes later. Three other incidents took place that share certain similarities. On December 8, 2017, a boat with four or five persons, including Ms. Glendale circled the buoys, which formed the perimeter of the facility. Those buoys are only fifteen metres from the docks on the outside of the fish pens. This took place for ten to twenty minutes.
- [48] On December 9, three boats carrying ten to twelve persons circled the Sir Ed site close to the buoys that I have described. One of those individuals was Ms. Glendale. The boats then left and anchored within view of the facility. Later that evening, two of the boats came by again and flashed lights into the facility.
- [49] On December 10, 2017, at the Burdwood facility, a boat with four or five individuals again circled the facility and flew a drone over the facility for almost an hour.
- [50] These activities give rise to various concerns. First, they disrupt Cermaq's operations and activities. Cermaq crews have to focus on what is taking place and see if the vessels will dock and people will board. They are unable to work. It also has to be appreciated that these facilities are perhaps two hundred metres, or two football fields long, and there are only three or four Cermaq staff on them.
- [51] Second, several Cermaq staff have deposed that these activities are intimidating and threatening. One individual has deposed that after one of these events, he stayed up all night to see if the people would return and board the site. Again, it has to be understood that staff are often outnumbered. The sites are remote, and help is at least an hour away. Furthermore, employees are often photographed, and their photographs are placed online together with negative comments. Employees have been stopped in streets in their communities and have been berated.

Analysis

- [52] The relevant legal framework for this application is clear and not in dispute. To obtain an interlocutory injunction, an applicant must establish:
- a) there is a serious issue to be tried;
 - b) the applicant will suffer irreparable harm if relief is not granted; and
 - c) the balance of convenience favours granting the injunction: see *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
- [53] These are not inflexible considerations and they do not give rise to a series of independent hurdles that an applicant must meet. Rather, they are a guide to coming to a just and equitable result. The fundamental question is whether the granting of an injunction is just and equitable in all the circumstances: see *British Columbia (A.G.) v. Wale*, [1986] B.C.J. No. 1395 (C.A.).

i) A Serious Question to be Tried

- [54] The threshold for whether there is a serious question to be tried is a low one. The court need only make a preliminary assessment of the merits of the case and need only be satisfied that the application is neither vexatious or frivolous: RJR at para. 50.
- [55] In this case, this threshold is easily met by Cermaq. Its right to operate under its various permits and licences is not challenged. Furthermore, the evidence it has led of interference and of other wrongful acts at its facilities is not contradicted in any serious way.
- [56] The Notice of Civil Claim filed by Cermaq relies on various causes of action, including trespass to land and chattels, private nuisance, inducing breach of contract, intentional interference with economic relations by unlawful means, intimidation, and conspiracy. It also relies on s. 423, intimidation, and s. 433, mischief, of the Criminal Code, as forms of the unlawful conduct that are necessary elements of some of the causes of action that it has advanced.
- [57] Because no issue is raised with respect to Cermaq's ability to raise a serious question to be tried, I do not consider it necessary to develop each of the causes of action and the numerous authorities I was provided with. This was done in Cermaq's Notice of Application which I have reviewed carefully.
- [58] Furthermore, because no injunction is sought by any of the defendants, there is no need, in conceptual terms, to consider whether the defendants or any of them have raised a serious question to be tried. What, if any position has been raised in response to Cermaq's application may, however, be otherwise relevant.
- [59] First, none of the named or unnamed defendants, other than Ms. Glendale or Ms. Dawson have responded in any way to this application. There is, accordingly, a lawful and permitted activity being undertaken by Cermaq on the one hand, and an unexplained, unauthorized, and apparently illegal set of behaviours on the part of the defendants, other than Ms. Glendale and Ms. Dawson, on the other.
- [60] In such circumstances, there can only be one outcome. There are no competing positions to weigh or balance. There are no competing equities.
- [61] In *Slocan Forest Products Ltd. v. Valhalla Wilderness Society*, [1998] B.C.J. 1255, the Court addressed the illegal blockade of a logging road. Meiklem J. said:

22 The balancing of convenience that was under consideration on July 16, 1997 and is reviewed on this application, is not one between the plaintiff as one lawful resource user and Mr. Anderson as another lawful resource user in conflict, such as it would have been if Mr. Anderson brought an application to enjoin the plaintiff from road construction or logging, which would clearly make relevant the likelihood of harm to the watershed he relies on. Nor was it an appropriate forum to review the wisdom of issuing permits to log 17 cut-blocks or construct roads on hydrologically unstable terrain in crucial watersheds. It was a balancing of convenience between

a plaintiff with the legal right to construct, use and maintain a public road, use a forest road and harvest timber on one hand, and a crowd of persons who resorted to illegal use of a blockade to impede that legal right, on the other.

23 The virtue of this cause and the objective correctness of their values and their assessment of potential harm from the road construction and logging are all completely irrelevant because the rule of law in our democracy requires that rights are established and adjudicated by due process, not by force. Once it was established that user rights had been granted after due process by properly authorized administrative officials, there is indeed nothing that can be placed on the balance on the side of the blockade.

- [62] Counsel for Ms. Glendale and Ms. Dawson urged that no injunction be issued as against any defendant to restrain any of the conduct that I have described. I do not consider that this is a serious submission.
- [63] It has no principled basis at law. It also gives rise to a manifestly untenable result. It would mean that persons or entities who conduct their affairs lawfully would have no means to protect their businesses, their property, or themselves. It would suggest that illegal forms of self-help are either justified or potentially effective.
- [64] I wish to return to a point I made in open court during the adjournment application in the Marine Harvest proceedings. The authorities that I have been referred to revealed that many people feel strongly about many things. Injunctions have been sought to prevent interferences with abortion clinics, with the development of social housing, with marijuana dispensaries, with logging and mining and pipeline development, and with many other forms of existing and planned activities.
- [65] It is elected governments that decide whether such activity or such development should take place. It is also, for the most part, government officials or decision-makers that set the standards and conditions under which activities take place. In the case, for example, of logging activities, it is Provincial foresters, biologists, fishery experts, and other environmental scientists that determine both where logging can occur and the conditions under which logging can take place.
- [66] The same is true of fish farming. Both the provincial and federal government play an important regulatory role in such cases. Where the interests or rights of First Nations are involved, those decisions can only be made following consultation. There is often consultation with other stakeholders.
- [67] Even following these processes, however, there will often be disagreement. Some will view the conditions or standards that exist under the licences that are issued as too rigorous, others as too lax. Some will continue to oppose any activity of any sort regardless of how inclusive the consultative process has been or how stringent the conditions of a particular licence may be.

- [68] Different stakeholders, who are involved in these processes and who remain unsatisfied, have various options. They can continue to lobby government. They can also challenge the legality of the permits or authorizations that have been issued. They can do this on various basis, including because there has been inadequate consultation.
- [69] Some such challenges are successful and some are not. In the case of Marine Harvest's federal permits, there was in fact such an unsuccessful legal challenge: see *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada* (Attorney General of Canada), 2012 FC 517.
- [70] What is not possible, what is simply not on the table, is for individuals to act unilaterally and unlawfully and to choose to forego any political or legal process to achieve their objects.
- [71] The fact that such behaviour will necessarily lead to a court exercising its authority and enjoining that behaviour does not reflect a failing on the part of the courts. Instead, that result is a necessary and fundamental aspect, both of a civil society and of the rule of law: see, for example, *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355; *Slocan Forest Products Ltd. v. The Valhalla Wilderness Society*, 1998 CanLII 2079 (BCSC), paras. 22-25; *International Forest Products Ltd. Kern et al*, 2000 BCSC 1141, paras. 60 and 61; *Red Chris Development Company Ltd. v. Quock*, 2006 BCSC 1472, para. 34; *British Columbia Transmissions Corporation v. Lemoignan*, 2008 BCSC 1045 at paras. 20, 25, 26 and 31; *Red Chris Development Company Ltd. v. Quock*, 2014 BCSC 239, paras. 44, 70, 71 and 77; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, para. 42; *BHP v. PSAC et al*, 2006 NWTSC 29, para. 10; and *Hudson Bay Mining Smelting Co. Limited v. Dumas*, 2014 MBCA 6, para. 102.

ii) The Position of Ms. Glendale and Ms. Dawson

- [72] Counsel for Cermaq argued that it was wrong for Ms. Glendale and Ms. Dawson to have engaged in wrongful behaviour and to have only come to court to explain their position after they were sued and were compelled to do so: *Behn v. Moulton Contracting* 2013 SCC 26 at paras. 37 and 42. They suggested, on this basis, that I ought not to now hear from them. I consider that that position, in this case, would be unnecessarily rigid.
- [73] The position advanced by Ms. Dawson and Ms. Glendale, on this application, is the same position that was advanced on their behalf in the Marine Harvest application: see *Marine Harvest Reasons* at paras. 69 to 71.
- [74] Their counsel accepts that they do not, in their own right, have the standing to bring a title claim. They rely, however, on an aboriginal right to govern and they argue that that right extends to the responsibility to protect the waters and resources that support their culture and their way of life. They have exercised this right, they say, under the authority of hereditary leadership. And incident of this right to govern, it is argued, is the right to monitor the activities of persons or companies that threaten these interests and resources.

[75] It is further argued that Ms. Glendale's and Ms. Dawson's activities are consistent with this right to monitor. In support of these assertions, Ms. Glendale has attached an affidavit of a Charles Coon, a hereditary leader of the Kwitwasut'inukw, in which Mr. Coon has deposed that:

- a) he has a responsibility in relation to stewardship of waters and resources;
- b) the members of his nation have serious concerns about fish farming;
- c) he understands that Ms. Dawson and Ms. Glendale have attended at various fish farming facilities to maintain:

... a presence there in order to observe and monitor the operation of the fish farm and register concerns.

- d) these monitoring activities are consistent with the responsibilities of these communities and leadership to protect the resources in the area.

[76] In the Marine Harvest Reasons, at para. 72 to 75, I address three broad difficulties with the position advanced on behalf of Ms. Glendale and Ms. Dawson.

[77] First, I was advised that there is, as of yet, no case law that recognizes any right to govern or to "monitor", particularly before a right of title is established. This necessarily makes such a claim or right more difficult to establish.

[78] Second, it is not clear what the content of that right to monitor would be. In the context of the Marine Harvest case, it appeared to include the right to build structures on Marine Harvest facilities and to camp on those structures for weeks or months at a time. It also appears to include the right to dock beside and board Cermaq's facilities at the pleasure of Ms. Glendale or Ms. Dawson and without regard to Cermaq's biosecurity protocols. It is not clear whether it extends to kayaking or swimming in Cermaq's fish pens, again, without any regard to the harm that might be caused. A right to monitor with such attributes or incidents would again appear to be exceedingly difficult to establish.

[79] Finally, the activities of Ms. Glendale and Ms. Dawson, as described in the affidavits of Cermaq, do not appear to have much to do with monitoring. The word "monitor" does not appear in Ms. Glendale's affidavit, nor does she, in any way, describe what she wishes to do in the way of monitoring activity.

[80] I also note that Cermaq's materials speak to various protocols under which third parties can visit the facilities, while at the same time adhering to Cermaq's biosafety protocols. There has been no apparent interest on the part of Ms. Glendale or Ms. Dawson to attend at Cermaq's facilities in this way.

iii) Irreparable Harm

[81] In RJR-MacDonald, the Court at para. 59 said:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

- [82] Irreparable harm can be established in many ways. One way, though not determinative, is to show that the defendant would not be able to pay the damages that would or might arise from the behaviours being complained of: see *Trans Mountain Pipeline ULC v. Gold*, 2014 BCSC 2133, at para. 122, *Red Chris Development Company Ltd. v. Quock*, 2014 BCSC 2399, at para. 64, and *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355, at para. 67.
- [83] In this case, the evidence before me indicates that the missed feedings at the Burdwood site, on December 1 and December 5, on account of the interference of the defendants on those dates, gave rise to a loss of approximately 3,000 kilograms of "marketable biomass" and approximately \$23,000 in revenue.
- [84] Missing a full day of feeding at a fully stocked site would give rise to a loss of revenue of \$100,000 per day. If a breach of a biosecurity protocol gave rise to disease in the fish at a facility, the losses are potentially enormous. If Cermaq lost the production fish at a fully stocked site, it would lose revenue in excess of \$21 million.
- [85] Clear proof of irreparable harm is not required to support an injunction, instead this aspect of the test is satisfied if the risk of irreparable harm is established: *Boon* at para. 66 to 68 and *Vector Aerospace Helicopter Services Inc. v. Aries Construction Management (2014) Ltd.*, 2016 BCSC 1453, at paras. 55 to 57.
- [86] In addition, trespasses to land, and I would say to chattels, has often been found to satisfy the requirement of irreparable harm: see, for example, *Boon* at para. 59 and *The Sol Sante Club v. Biefeld*, 2005 BCSC 1908, at para. 18.
- [87] Finally, in *The Honourable R.J. Sharpe, Injunctions and Specific Performance*, loose-leaf edition, updated in November 2017, the author at page 2-46 states:

Irreparable harm and the assessment of the balance of convenience are very closely linked. In some cases where the balance of convenience strongly favours an injunction, conclusive proof of irreparable harm may not be required.

- [88] Accordingly, I am satisfied that Cermaq has established that it will suffer irreparable harm if an injunction is not granted. Alternatively, I consider the balance of convenience so strongly favours Cermaq that the importance of showing irreparable harm is diminished.

iv) The Balance of Convenience

- [89] The third aspect of the RJR framework, described at para. 60, turns on:

... a determination of which of the two parties will suffer the greater harm for the granting or refusal of an interlocutory injunction, pending a decision on the merits.

- [90] The factors that are relevant when weighing the balance of convenience are numerous: RJR, at para. 63. One such factor is the respective strengths of the parties' positions: Boon at para. 69, and Injunction and Specific Performance at 2-62.
- [91] Here Ms. Dawson and Ms. Glendale concede that Cermaq is operating legally under the permits that it holds. Their position, in contrast and for the reasons I have described, is much more difficult. It is relevant that the forms of activity and interference I have described have been taking place for 18 months and are increasing in frequency.
- [92] Finally, I consider that the potential harm from the continued conduct of Ms. Glendale and Ms. Dawson, who seem indifferent to the safety protocols of Cermaq, outweighs the risks of harm from Cermaq's operations, which have been conducted in accordance with the requirements of the authorizations it holds.

Conclusions

- [93] For the foregoing reasons, I am satisfied that the injunction Cermaq seeks should be issued. At the hearing before me, there was considerable discussion about the form of order Cermaq sought and its initial draft order was revised in several respects.
- [94] Three aspects of its final draft order require comment. First, the draft order contains an enforcement provision. Counsel for the RCMP took no position on whether an injunction should be issued. It did not, however, oppose the inclusion of an enforcement clause, and counsel confirmed the acceptability of the language in that clause.
- [95] Furthermore, in *West Fraser Mills v. Members of Lax Kw'Alaams Indian Band*, 2004 BCSC 815, Gerow, J. said:
- [26] As well, I am granting the enforcement order sought. Although enforcement orders such as the one sought here are not automatically granted I have considered the large number of potential participants in a roadblock, the remoteness of the area, identification difficulties and the position of the RCMP that they will not act without an order directing them to do so and have concluded that such an order is appropriate. *Canada Post Corp. v. Canadian Union of Postal Workers (CUPW)*, [1991] B.C.J. No. 3444 (S.C.).
- [27] As well, the inclusion of the enforcement provisions clearly spells out the consequences of non-compliance and may make the order fairer in that members of the public need not take the word of the police that the arrest and detention of violators is authorized as it is clearly set out in the order. *MacMillan Bloedel v. Simpson*, [1996] 2 S.C.R. 1048.
- [96] Similarly, in *Red Chris Development Company Ltd. v. Quock*, 2006 BCSC 1472, the Court said:
- [39] The Plaintiff has applied for an enforcement order couched in terms suggested by the RCMP. In the ordinary course of events, I would not be inclined to give such an order in the first instance and in the absence of a representative of the RCMP since its members will be responsible for its execution. However, where, as here, the location of the blockade is

extremely isolated and the persons instituting the blockade may well vary from day to day, and the time for the Plaintiff to perform its exploration activities is limited, it appears to me to be appropriate. I note as well that the enforcement order preserves police discretion, although I suggest that an Order of this Court should be regarded as requiring the police to take action if there is resistance to obeying it.

- [97] I consider that the considerations identified in each of *West Fraser Mills* and in *Red Chris Development* are directly relevant to the present case.
- [98] Second, paragraph 2 of the draft order now has language that would, in effect, prevent all defendants from "watching, besetting, or circling" within fifteen metres of the buoys that I described earlier at any of one of eight identified Cermaq sites.
- [99] The words "watching" and "besetting" are words of art and have a precise meaning: see, for example, *Everywoman's Health Centre Society (1988) v. Bridges*, [1993] B.C.J. 2599 (B.C.S.C.), at paras. 23 to 30.
- [100] The requirement that persons not engage in such activities, within fifteen metres of Cermaq's buoys, properly balances the right of anyone to travel on open waters and the right of Cermaq's workers to conduct their business without feeling threatened and without being concerned that their site may be boarded and their activities interfered with.
- [101] Counsel for the RCMP confirmed that the terms of this provision were specific enough for the purposes of the RCMP. Counsel for Ms. Glendale and Ms. Dawson, without accepting the need for any such order, accepted that this language was sufficiently clear that it would be understood by his clients.
- [102] Finally, the draft Cermaq order purports to extend to eight different Cermaq sites, though not all of these sites have yet been interfered with.
- [103] It is necessary to be both principled and pragmatic. In the *Marine Harvest* case, when I required that the structures that had been built on one of its facilities be removed, that was done. But multiple other sites were then visited and boarded in the ensuing days.
- [104] In this case, the notice that Ms. Glendale read to Cermaq staff indicated that:
- Re-occupations will continue for as long as necessary.
- [105] With the record of what has taken place, including the frequency of various forms of interference and the length of time over which these events have occurred, I consider that this aspect of the order Cermaq seeks is appropriate.
- [106] Accordingly, I am prepared to issue the form of order that Cermaq seeks with the various amendments that were identified, provided to me in writing, and made on the record at the hearing before me yesterday.
- [107] Cermaq did not seek costs of this application, and I need not address that issue.

"Voith, J."

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