IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Marine Harvest Canada Inc. v. Morton,* 2017 BCSC 2383

Date: 20171222
Docket: S179586
Registry: Vancouver

Between:

Marine Harvest Canada Inc.

Plaintiff

And

Alexandra Morton, Ernest Alfred, Sherry Janine, Molina Dawson, Karissa Glendale John Doe and Jane Doe

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:	R.W. Millen B. Hicks
Counsel for the Defendants, Molina Dawson and Karissa Glendale:	M. Nefstead
Counsel for the Defendant, Alexandra Morton:	G. McDade, Q.C.
Place and Date of Hearing:	Vancouver, B.C. November 14 and December 14, 2017
Place and Date of Judgment:	Vancouver, B.C. December 22, 2017

[1] The Plaintiff, Marine Harvest Canada Inc., has applied for an injunction against a number of individuals, many of whom are unnamed, and who have occupied the Plaintiff's aquaculture facilities. Two of these individuals are the respondents, Ms. Molina Dawson and Ms. Karissa Glendale (the "Named Respondents"). Counsel for the Named Respondents argues that the primary issues on this application are whether Marine Harvest is able to establish that it will suffer irreparable harm if the injunction is not granted and whether the rights that the Named Respondents assert can co-exist with the rights of Marine Harvest.

1. The Parties

a) Marine Harvest

[2] Marine Harvest is a company that operates in British Columbia and that supplies various farm raised Atlantic salmon food products. Its headquarters are in Campbell River. It has four hatcheries in various locations on Vancouver Island. It has three processing plants that are located in Port Hardy, Kletmu and Surrey. It has eleven active salt water farm facilities in the Broughton Archipelago between the northern part of Vancouver Island and the Mainland. One of these facilities, the Midsummer facility, is particularly important and it is the focus of this application. That facility is located near the northwest corner of Midsummer Island.

[3] Marine Harvest is a significant company that has more than 570 employees in various positions at its various operations. It is actively involved in various communities on Vancouver Island. For example, in 2016 it supported approximately 120 different service groups, sports teams and various other programs. It provided multiple scholarships to these communities.

[4] It is relevant that Marine Harvest operations are located within the traditional territories of 24 First Nations. The company has confidential agreements with a number of these Nations, and with First Nation-owned businesses. These agreements provide benefits to First Nations and their members, including employment priority for First Nations' members, First Nation-specific scholarships, direct contracting opportunities for First Nation businesses, and information-sharing

and environmental monitoring commitments by Marine Harvest. A significant number of the Company's employees are of First Nations background.

[5] Marine Harvest has initiated certification to the salmon standards of the Aquaculture Stewardship Council ("ASC"), and was the first company in North America to achieve that certification. To date, about half of the Company's sites have been certified to the ASC standards, and it is working to achieve certification for the remainder. The ASC was founded by the World Wide Fund for Nature (WWF) and the Dutch Sustainable Trade Initiative, as an international non-profit organization that sets standards for sustainable aquaculture. The ASC standards address issues of environmental and social sustainability.

[6] Marine Harvest is also four-star certified to the Global Aquaculture Alliance Best Aquaculture Practices. The Global Aquaculture Alliance is an international non-profit trade association that promotes best practices for sustainable aquaculture. Its certification program sets standards for aquaculture operations, including the raising of Atlantic salmon.

[7] The materials filed by Marine Harvest described, at some length, the fish farming process. Much of that detail is, for present purposes, not important. What is important is that the raising of salmon is carefully timed and structured and that interferences with that timing and structure can quickly give rise to significant losses.

[8] Each of the Plaintiff's sites is a net-pen Atlantic salmon farm. Each has somewhat different dimensions. Each is made up of underwater pens where the fish are kept. The pens are then connected by walkways that surround the pens. Many are in relatively remote locations. For example, one of the sites called Port Elizabeth is approximately two hours from Port McNeill by standard transport boat. The Midsummer site is approximately one hour away by boat.

[9] Each of these sites has an office, a storage structure and living quarters for staff. Midsummer also has a floating structure, attached to the walkways, where fish feed and equipment is stored. The living quarters for the Midsummer site are located

on nearby Cedar Island, Marine Harvest also has a dock at Cedar Island as the living quarters there are only accessible by boat or float plane. Each facility or site is normally staffed by one manager, two assistant managers and several fish farm technicians. These employees work on an "8 day in, 6 day out" schedule and are then relieved by replacement staff.

[10] Each of Marine Harvest's farm facilities is authorized by a Licence of Occupation from the British Columbia Ministry of Forests, Lands and Natural Resources, an Aquaculture Licence from the Federal Department of Fisheries and Oceans and an authorization from the Canadian Coast Guard, on behalf of the federal Minister of Transport, under the *Navigation Protection Act*, R.S.C., 1985, c. N-22. Some facilities have additional permits. For example, the Midsummer facility also has a Parks Permit from the British Columbia Ministry of Environment and Climate Change Strategy that authorizes Marine Harvest to place and maintain staff residences and related structures on Cedar Island.

b) The Named Respondents

[11] Ms. Glendale, who filed an affidavit dated December 2, 2017 has deposed that she had "been in occupation" of the Midsummer fish farm since September 6, 2017. Ms. Glendale is from the Namgis First Nation on her grandmother's side but she is registered with the Da'naxda'xw First Nation from her grandfather's side. Her affidavit addresses, among other things, her connections to the land, why wild salmon are important to her and why she opposes fish farming.

[12] Ms. Dawson also filed an affidavit dated December 2, 2017. She has deposed that she was involved at the camp that had been built on the Midsummer facility from September 11, 2017 to November 13, 2017. Ms. Dawson belongs to the Musgamagw Dzawada'enuxw Nation. She has been "involved in activism against fish farms in (her) Nation's traditional territory and on Vancouver Island in general" for seven years. Her affidavit addresses, among other things, the importance of fish in her community and why she is concerned about fish farms.

2. History of these Proceedings

[13] Marine Harvest has filed several affidavits that address conduct at different points in time and at different fish farming sites. The occupation of its Swanson site, located near the northern shore of Swanson Island, began on August 24, 2017. On August 27, 2017 there were approximately thirty "occupiers" on the facility. At one time various persons built tents and a wood structure on the walkways around the fish pens. The occupiers eventually left the walkways and moved to facilities belonging to Marine Harvest on the shores nearby. One affidavit dated October 16, 2017 states that as of that date the occupiers were still there. I have no knowledge of what transpired thereafter.

[14] On August 31, 2017 several occupiers boarded the Wicklow Point farm facility and set up tents on its steel walkways. They left a week later. They returned on October 5, 2017 and again boarded the farm.

[15] The occupation of the Midsummer site began on September 4, 2017. Once again tents and other structures, which I will describe more fully shortly, were constructed on the walkways of the Midsummer site. The Midsummer facility was "occupied" until November 17, 2017.

[16] On October 15, 2017 several individuals set up tents on the main walkways of the Port Elizabeth site.

[17] The Defendants have consistently refused to leave these sites when they have been asked to do so. The Plaintiff sought to have this application heard on October 18, 2017. For reasons that are unknown to me the application was adjourned and the Plaintiff was granted leave to reset its application on thirty-six hours notice.

[18] The Plaintiff next sought to have its application heard on November 14, 2017. I was to hear the application. Counsel for Ms. Dawson and Ms. Glendale sought a thirty day adjournment. I granted the adjournment on the condition, *inter alia*, that Ms. Dawson and Ms. Glendale undertake to vacate the Midsummer site and that all

tents, structures and other personal belongings be removed from the site by November 17, 2017.

3. The Activities Giving Rise to the Application

[19] The present application seeks relief against Ms. Dawson and Ms. Glendale as well as against John and Jane Doe in relation to activities at the Midsummer facility. Ms. Dawson and Ms. Glendale were represented at the hearing. Counsel for the Defendant Ms. Morton was present but did not, subject to a limited matter I will return to, participate in the hearing. Similarly counsel for the RCMP was present in the courtroom but did not, subject to a limited issue, actively participate in the hearing.

[20] Counsel for Ms. Glendale and Ms. Dawson urged me not to issue any injunction arising from this application. Alternatively, he urged me not to issue an injunction against Ms. Glendale or Ms. Dawson on the basis that not all the Defendants ought "to be painted with the same brush". It is thus necessary to distinguish, to some extent, between the relief being sought against John and Jane Doe, or the numerous persons who have been involved in the "occupation" of some of the Plaintiff's various operating sites, and the Named Respondents.

[21] Furthermore, though the Plaintiff in this application only seeks to enjoin conduct at its Midsummer facility I consider that the nature and range of conduct that has taken place at both that site, as well as at other sites, informs the present application. Such conduct addresses both the forms of harm that have thus far occurred as well as types of harm that are of concern. In addition, it gives content to one of the responses given by the Named Respondents to this application - that being that what the Named Respondents seek to do is to "monitor" the Plaintiff's activities.

[22] The conduct that the Plaintiff, or its employees, have faced has been varied. Virtually none of the events that I describe in the pages that follow is denied or contradicted in any meaningful way.

a) The Occupation of the Plaintiff's Facilities

[23] I have said that at different times a number of individuals have "occupied" various sites at which the Plaintiff operates. In the days prior to November 14, when counsel appeared before me and I required that the structures at the Midsummer site be removed, there were approximately a dozen occupiers at the Midsummer facility. They had built four to five tents, a bunk house, a kitchen and an outhouse on the walkways of the Midsummer site. The larger structures were about six feet wide, seven feet high and eight to ten feet long. They were built of wood, plastic and other materials.

[24] The tents, bunkhouse, kitchen and outhouse were all placed on separate walkways and were placed in a manner that interfered with the ability of staff to do their work. The occupiers had also left their gear on the site's walkways. The occupiers, and the structures they had constructed, were described as having "really taken over the site". There had also been a steady stream of boats that brought people, supplies and equipment to the Midsummer site and that were often tied, without authority, to its walkways.

b) Damage to the Plaintiff's Equipment or Materials

[25] Some of the occupiers have tampered with Marine Harvest's equipment. On September 26, 2017 a Mr. Willie is alleged to have damaged equipment at the Midsummer site. The RCMP became involved. Mr. Willie was arrested and thereafter released on conditions.

c) Risk to the Site and to Employees

[26] Marine Harvest's application materials, including correspondence from the Fire Chief of the local volunteer fire department, describe the potential fire hazard that arose from the wood stoves and heaters that were placed in the structures at the Midsummer site. Apparently propane tanks were brought to and from the site. The occupiers have used power tools and have brought generators and other equipment to the Midsummer site that the Plaintiff would not normally permit, without

certain precautions, on account of the safety concerns that arise from the use of that equipment.

[27] The structures that were constructed on the site gave rise to other concerns. These structures were built on the walkways of the site. Most walkways are two metres wide. The materials filed by the Named Respondents argue that there remained room for the employees of Marine Harvest to use other walkways that avoided their structures. Marine Harvest's materials, however, indicate that at the Port Elizabeth facility, for example, the remaining walkways are narrower, being only one metre wide. Furthermore, the walkways have no handrails. These walkways are hazardous for staff, particularly in poor or windy weather or when they are required to carry equipment and feed bags to the pens.

[28] From now until the spring there are likely to be one to two storms a week that are so severe or hazardous that staff have to stay inside. Winds can reach 100 km/h and swells often reach two to three metres in height.

[29] Finally, Marine Harvest has expressed concern for individuals who have come to their sites without adequate protective equipment and who had to be helped, or who have fallen into the water. It has also written to the occupiers expressing concern that their structures, on comparatively narrow open water walkways, would be unsafe in severe winter weather conditions.

d) Threatening Behaviour

[30] Some of the occupiers have engaged in threatening behaviour towards Marine Harvest's staff. The Plaintiff has been advised by a number of its staff that they are concerned for their personal safety and that they and their families are being targeted in their home communities.

[31] In a Facebook exchange between two individuals, one of them being the Defendant, Mr. Alfred, on a Facebook page labelled "Get the Fish Farms Out", one wrote to the other: "Ernest Alfred it wont stop until we stop them from making $. So it wont stop until we can prevent employees from working for them. The quickest way

to stop this would be to stalk the employees find out where they live and set up protest at the HOUSE and block routes to the farms. Keep their kids up all night with noise until they quit. EMPLOYEES are the key …".

[32] On October 12, 2017, upon learning that Marine Harvest was planning to restock its Port Elizabeth facility, Mr. Alfred posted a video on the Facebook page in which he stated that "Any action taken by Marine Harvest or the RCMP will be viewed as hostile".

[33] On a different occasion an individual, on being told that fish were about to be delivered to the Midsummer site, remarked "maybe I should get my knife".

[34] It is relevant that in some cases the number of occupiers at the Plaintiff's various sites have significantly outnumbered the number of staff or workers at the site.

[35] Some staff from the Midsummer site, and from another site, have indicated that they may not return to work in light of the occupation. Marine Harvest has had to implement a compensation premium for site staff working at these locations in order to address the difficult circumstances that its staff are facing.

[36] In addition, for the first time Marine Harvest has had to hire a private security firm to provide guards at sites and with the intention of making staff feel more secure.

e) Interference with the Plaintiff's Operations

[37] The Plaintiff has repeatedly been advised by various occupiers that they would prevent Marine Harvest from restocking their pens with new smolts, which are juvenile salmon. Such restocking is essential to the business of the Plaintiff.

[38] There have, in fact, been several incidents where individuals have interfered with such efforts. In or about August 24, 2017 after the Swanson site had been occupied, Marine Harvest could not, for a period of time, proceed with the harvest

and removal of salmon from the facility. When the occupiers later moved to nearby facilities on the shore the Plaintiff was able to proceed with the intended harvest.

[39] On September 8, 2017 four individuals, including Ms. Glendale, attempted to prevent restocking activity at the Midsummer site. These individuals positioned themselves under the crane of a fish carrying vessel as it attempted to unload smolts into a pen. The unloading could not proceed because it would have been unsafe to do so. The individuals eventually allowed the unloading to proceed when a RCMP vessel approached the facility. A similar event had occurred at the Midsummer site on September 6, 2017.

[40] As a result of these incidents Marine Harvest decided to defer the delivery of additional fish to the site with the result that for some months the site only operated at about forty per cent of its capacity.

[41] On October 15, 2017 two named Defendants, Ms. Morton and Mr. Alfred appeared at the Port Elizabeth site in a boat during the period when smolts were being offloaded from a vessel. The RCMP intercepted them on a walkway perhaps fifty feet from where the vessel was offloading fish into a pen. The exchanges that are described in the materials, particularly on the part of Mr. Alfred, are antagonistic and threatening.

4. Events after November 14, 2017

[42] Numerous individuals have continued to board the Plaintiff's different operating sites, to interfere with its operations and importantly, to threaten continued interference. These incidents have occurred after the November 14 hearing that I have described. These matters are detailed at some length in the affidavits of Mr. Dobbs dated November 28, 2017 and December 11, 2017.

[43] These incidents include the arrival, on November 17, 2017, of twelve individuals at the Midsummer staff camp on Cedar Island. The individuals told the assistant manager of the site that they were going to set up their camp next to the Marine Harvest residence in order to occupy the Marine Harvest land base. Their

apparent leader, Mr. Alfred, told the Marine Harvest employees that “they were evicted”, that “business as usual is over”, that if they thought the “injunction is taking care of us, you are gravely mistaken” and that “my job is to make you uncomfortable”. He told the assistant manager to call the police and tell the police that “we are about to take over your camp now”. When these individuals were told that the RCMP were on their way they dispersed. It appears that they have now set up camp elsewhere on the Island.

[44] I have said that various individuals have previously occupied or boarded the Wicklow Point site. On December 1, 2017 several persons, including Ms. Dawson and Ms. Glendale, boarded the Wicklow Point site and delivered a notice that, among other things, purported to “evict” Marine Harvest. The notice also indicated that the occupiers “have found it necessary to take direct action, including but not limited to “occupying these illegal worksites”” and that “these re-occupations will continue as long as is necessary”. The persons who had boarded the facility left shortly thereafter.

[45] On December 1, 2017 the vessel that left Wicklow Point and another vessel, carrying approximately a dozen individuals arrived at the Plaintiff’s Potts Bay facility. Numerous individuals, again including Ms. Duncan and Ms. Glendale, boarded the facility. These individuals again handed out a copy of the notice I described in the previous paragraph. They thereafter left.

[46] On December 1, 2017 Ms. Dawson posted remarks on her Facebook page stating “we went to 6 illegally run Marine Harvest and Cermaq sits [sic] today to bring a letter stating that we are not done and we are not the ones trespassing”.

[47] On December 5, 2017, seven further individuals again arrived at the Potts Bay facility and four of them boarded the facility. One individual wore scuba diving equipment. The occupiers unhooked the containment net that covered a pen and the scuba diver entered the pen and swam about for twenty five minutes. Apparently such activities give rise to a bio-security risk, can cause “very valuable broodstock to

be contaminated" which would then give rise to "significant" economic consequences for the Plaintiff. The occupiers thereafter left.

[48] On December 6, 2017 the Plaintiff had arranged to transfer semi-mature fish to empty pens at the Midsummer site. On that day, as the fish were being unloaded from a vessel, four individuals in a separate boat "rammed the bow of the boat into the farm facility". The individual said that they "would not stop until the industry is gone". The occupiers then pulled their boat off of the farm facility. Less than an hour later they returned and again "drove their boat into the farm facility so that its bow was pressed up against the farm".

[49] On December 9, 2017 five individuals arrived in a boat at the Plaintiff's Glacier Bay site which is northeast of Broughton Island. One individual said he was Ms. Glendale's father. One was Ms. Dawson. The individuals boarded the Glacier Bay facility as fish were being loaded into its pens. The individuals refused to leave when asked to do so and filmed the unloading of the fish.

5. Analysis and Legal Framework

[50] There are several considerations and realities that are important in the present application. First, many of the cases I was provided arise in the context of disputes over social housing, or pipelines, or mining or logging operations. These cases are often the product of government decisions and government policy. It is not the role of courts, generally speaking, to examine or involve themselves in the wisdom of such policies. Instead, courts are concerned with the legality of behaviour or conduct. In the context of interlocutory injunctions they are primarily concerned with balancing the relative risks of either granting or withholding the injunction before an adjudication of the rights in issue can take place.

[51] The relevant legal framework for an interlocutory injunction is well established. In this case, counsel agreed on the framework that is captured in the following summary from the Plaintiff's Notice of Application:

> 53. To obtain an interlocutory injunction, the applicant must establish that:

> (a) there is a serious issue to be tried;
>
> (b) the applicant would suffer irreparable harm if the relief if not granted; and
>
> (c) the balance of convenience favours granting the injunction.
>
> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311
>
> 54. The Court ought not "become a prisoner of a formula". The factors set out above are not a series of independent hurdles that an applicant must meet, but rather 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.
>
> *British Columbia (A.G.) v. Wale*, [1986] B.C.J. No. 1395 (C.A.)
> Law and Equity Act, R.S.B.C. 1996, c. 253, s. 39

A. Serious Question to be Tried

[52] The threshold for whether there is a serious question to be tried is a low one. This is due to the interim nature of the relief being sought and because typically the evidence has not been fully developed at this early stage of the litigation. The Court must only undertake a preliminary assessment of the merits of the case, and need only be satisfied that the application is neither vexatious nor frivolous: *RJR-MacDonald Inc.*, at para. 50.

i) The Claims of Marine Harvest

[53] The Amended Notice of Civil Claim filed by Marine Harvest raises several causes of action. Those causes of action are, in part, based on the various permits and licenses that I have described.

[54] Counsel for the Named Respondents accepts the legal validity of these various permits and licenses. This is important. This is not a case where it is argued, for example, that there is some deficiency or invalidity in the various permits that the Plaintiff holds or, for example, that there was inadequate consultation before these permits and licenses were issued. Indeed, the decision of the Federal Department of Fisheries and Oceans, to issue various licenses to Marine Harvest, was previously challenged and upheld in *Kwicksutaineuk Ah-kwa-Mish First Nation v. Canada (Attorney General) et al.,* 2012 FC 517.

[55] Accordingly, as there is no legal challenge to Marine Harvest's permits, licenses or activities and as the evidence it has filed is overwhelmingly unchallenged, it is clear that Marine Harvest has raised a serious question with respect to the various causes of action it advances. Because no challenge is brought, on this application, to the applicability of these causes of action I have not referred to or developed the various authorities I was provided. These causes of action, their various legal elements and the general evidence in relation to them, is as follows:

1. Trespass to Land: A trespass to land consists of entering upon another party's property without lawful justification, or placing or erecting some material object on that property without the right to do so. Trespass is committed if a defendant does not leave the lands after being put on notice by the occupier that entry is prohibited.

[56] A person authorized to occupy land pursuant to a license such as a License of Occupation can sustain a claim in trespass. In particular the License of Occupation issued to Marine Harvest, for its Midsummer site, under the *Land Act*, R.S.B.C. 1996, c. 245 enables Marine Harvest, under s. 65 of that legislation, to bring an action for trespass "in the same manner and to the same extent as if the person were the registered owner of the land".

[57] Counsel for Ms. Morton advised me that in the Response to Civil Claim that was filed on her behalf, the ability to maintain an action in trespass on the basis of a Licence of Occupation has been put in issue and he urged me not to make any determination that might affect that issue. I have not done so. I have, instead, said that the issue, at this stage, is whether Marine Harvest has raised a serious question about its right to bring an action in trespass.

[58] Marine Harvest has raised a serious question that: i) Marine Harvest is lawfully entitled to erect its facility at and occupy the Midsummer site pursuant to its License of Occupation; ii) Marine Harvest is lawfully entitled to operate the Midsummer site pursuant to its License of Occupation, its Marine Fish Aquaculture

License issued under the *Fisheries Act* and its approvals issued under the *Navigation Protection Act*; iii) Marine Harvest did not give permission to the Defendants to enter upon the Midsummer facility or to bring objects or erect structures upon it; iv) the Defendants have, without lawful excuse or authorization, entered upon and occupied the Midsummer site; and v) Marine Harvest has demanded that the Defendants vacate the Midsummer site but the Defendants have refused to do so.

2. Trespass to Chattels: A trespass to chattels is established where there is direct physical interference with a chattel in the possession of the Plaintiff without lawful justification.

[59] Marine Harvest has raised a serious question that: i) Marine Harvest owns or possesses the walkways, pens and physical structures at the Midsummer site; and ii) the Defendants have physically interfered with these facilities by occupying them, building structures on them and mooring vessels to them without any permission or authority to do so.

3. Private Nuisance: A private nuisance is the unreasonable interference with an occupiers' use and enjoyment of land. That interference must be substantial and more than a trivial annoyance.

[60] Marine Harvest has raised a serious question that: i) the Defendants have interfered with its operations at the Midsummer site; ii) the Defendants have occupied portions of the farm facility and have erected tents and other structures thereby rendering those areas of the facility inaccessible to Marine Harvest; iii) the Defendants have created safety risks at the Midsummer site creating a risk of injury and substantial damage to property; and iv) the Defendants have attempted to prevent Marine Harvest from running its business.

4. Intimidation: An action in intimidation will be made out where a defendant makes a threat, either expressly or impliedly by conduct, of an unlawful act

and, as a result, the threatened party does or refrains from doing some act which they are entitled to do, thereby giving rise to damage.

[61] Marine Harvest has raised a serious question that: i) the Defendants have demanded that Marine Harvest refrain from restocking any of its farms in the region, including at the Midsummer site; ii) the Defendants have threatened to occupy Marine Harvest property, interfere with its operations and target its employees and their families in their home communities; and iii) with the result that Marine Harvest has deferred the delivery of salmon to the Midsummer site, implemented a compensation premium to employees and hired a private security firm.

5. Conspiracy: A conspiracy arises when two or more persons agree to do an unlawful act, or to do a lawful act by unlawful means. There are thus two actionable forms of a civil conspiracy.

[62] Marine Harvest has raised a serious question that: i) the Defendants are united by the common objective of harming Marine Harvest's business; and ii) the Defendants have carried out the acts that I have described above with the intention and for the purpose of causing harm to Marine Harvest.

[63] Accordingly, I am satisfied that there is merit to each of the causes of action that Marine Harvest advances. As such it has met the threshold for establishing a serious question to be tried.

ii) The Position of the Defendants

[64] None of the Defendants has, as is often the case, filed a cross-application seeking injunctive relief against the Plaintiff's activities. There is then no formal requirement to determine whether the Defendants, or any of them, have raised a serious question. Nevertheless, it is useful to understand the positions that they have advanced. Furthermore, when considering where the balance of convenience lies as between the parties, the strength of their respective positions becomes relevant.

[65] It is again necessary to distinguish between the position of the various unnamed (John and Jane Doe) Defendants and the position of the Named Respondents.

a) The Unnamed Defendants

[66] There simply is no basis for the unnamed Defendants to be acting as they are. Many, if not most, of them were aware of this application. The materials before me suggest that some of them have left the Plaintiff's sites in order to avoid service and others have thrown the various application materials of the Plaintiff in the water when they have been served.

[67] The various unnamed Defendants have chosen not to participate in this application. They have chosen not to formally contest or question the legal entitlement of Marine Harvest to conduct its business. They have not sought to justify or explain their own conduct.

[68] There is therefore no competing position, on behalf of these Defendants, that responds to the claims being made by the Plaintiff. There can only be one result or consequence of such conduct. It is absolutely self-evident that unnamed, and largely unknown, persons cannot unilaterally engage in various forms of unlawful conduct with the object of interfering with or harming the business of Marine Harvest.

b) The Position of the Named Respondents

[69] I have said that counsel for Ms. Dawson and Ms. Glendale does not contest the validity or legality of the various permits and licenses that the Plaintiff operates under or the right of the Plaintiff to conduct its business. Counsel also accepts that neither Ms. Dawson nor Ms. Glendale are the rights holding collective that would have standing to bring a title claim. Finally, counsel for Ms. Dawson and Ms. Glendale has not yet filed a Response to the Plaintiff's Notice of Claim and, accordingly, I am unable to review or consider a formal pleading that advances their position.

[70] Counsel argued, however, that an aboriginal title case has been commenced by others. Again, I was not provided with those pleadings and was unable to review the claim to see what title, interest or rights were being claimed. Counsel further argued, however that an incident of that claim, is the aboriginal right to govern. That right extends to the responsibility to protect the water and resources that support the claimant's culture and way of life. It was asserted that Ms. Glendale and Ms. Dawson were exercising this aboriginal right under the authority of hereditary leadership. Finally, it is asserted that an incident of this right to govern is the right to "monitor" the activities of persons or entities that pose a threat to these various interests.

[71] In support of these assertions counsel relied on the affidavit of Tiakwalai (Charles Coon) one of the hereditary leaders of Kwitwasut'inukw and a member of Kwikwasut'inukw Hawkwa'mis First Nation. In his affidavit he has deposed, among other things:

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 the Midsummer facility to maintain "a presence there in order to observe and monitor the operations of the Fish Farm and register concerns …"; and

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

[72] The relative strength of the position advanced on behalf of Ms. Glendale and Ms. Dawson can, at this early stage, be briefly addressed from at least three perspectives. First, I am told that there is no existing authority that recognizes either a right to govern, or a right to "monitor" as an incident to the right to govern, prior to title being determined. I was referred, by counsel for Ms. Glendale and Ms. Dawson, to *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675, in which a mining company and two First Nations each applied for injunctions restraining the conduct of the other. In the *Taseko* decision, however, the Court emphasized the "entitlement to

aboriginal rights and the importance of the lands in question (to the two First Nations) had been established and recognized …" (at para. 46). Furthermore, though the decision addressed a "responsibility for stewardship", for example at para. 11, the decision did not address the "right", for example, to "monitor" the ongoing activities of the mining company. The fact that no case law yet addresses such a right at any stage, and in particular, before title has been established, must necessarily make the claim more difficult.

[73] Second, the word "monitor" is comparatively benign. The word used in most of the materials before me, including by Ms. Dawson and Ms. Glendale, was "occupy". Indeed, counsel for the Named Respondents described the issue before me as "whether the occupation should continue until trial". Nevertheless, it is useful to consider what the content of the right "to monitor" might be. I understand that the right to "monitor" would extend to building structures on Marine Harvest's facilities and to boarding those facilities at the pleasure of Ms. Dawson and Ms. Glendale. It appears to extend to undoing the covers to Marine Harvest's fish pens and going scuba diving in them. Would it extend to entering its offices or its residences, climbing into Marine Harvest's vessels or onto its equipment? Again, this would appear to be a difficult right to establish.

[74] Finally, the evidence advanced by Ms. Glendale and Ms. Dawson does not suggest that their purpose has been to "monitor" or oversee the activities of Marine Harvest. That word does not appear in their affidavits. Instead, Ms. Glendale accepts that she has, on one occasion, interfered with Marine Harvest's activities. They have both in the past and recently delivered "eviction notices" to Marine Harvest. They have also expressed an intention to continue with these activities though they say they wish to do so peacefully. Respectfully, none of this is consistent with a desire to "monitor".

[75] A related point arises. It is uncontradicted, on the evidence before me, that the Plaintiff has, on numerous occasions, offered to sit down with the Defendants, or some of them, to discuss their concerns. The Defendants have had no interest in

such discussions. The Plaintiff has advised the Defendants, or some of them, that its protocols include being able to arrange visits at its sites by third parties. The Defendants have expressed no interest in participating in such activities. Finally, I have earlier said that Marine Harvest has negotiated agreements with some First Nations that include "information sharing and environmental monitoring commitments" by Marine Harvest. Once again, it does not appear that the Defendants have expressed any interest in such agreements.

[76] These various legal and factual considerations, albeit at the interlocutory stage, suggest that the position advanced on behalf of Ms. Glendale and Ms. Dawson is weak. This, again, is relevant when weighing the balance of convenience.

6. Irreparable Harm

[77] In most cases an interlocutory injunction should not be granted unless an applicant satisfies the court that there is doubt as to whether damages would be an adequate remedy: *Wale* at p. 5. There are various means by which an applicant can establish that the harm it will suffer will be irreparable in nature. In this case several such means are relevant.

[78] In *RJR-MacDonald Inc.* 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 …

[79] Though an inability to pay damages is not determinative it is a relevant consideration. Additional cases which have placed weight on this consideration include *Trans Mountain Pipeline ULC v. Gold*, 2014 BCSC 2133 at para. 122 and *Red Chris Development Co. Ltd. v. Quock*, 2014 BCSC 2399 at para. 64.

[80] Both Ms. Dawson and Ms. Glendale have described themselves, in their affidavits, as unemployed. Some issue arose as to where the burden lies to establish that Ms. Dawson and Ms. Glendale either can or can't pay the damages that might arise from their conduct. In *British Columbia Hydro and Power Authority v. Boon,*

2016 BCSC 355 Butler J., at para. 67, suggested that this onus lies with the party opposing the injunction. I agree and consider that this is necessarily so. Such information will lie in the knowledge of a defendant. If a defendant is able to pay a damage award, arising from a judgement, it is open to that defendant to assert and/or establish this. Furthermore, the urgency with which interlocutory injunction applications are often heard also militates against requiring a plaintiff to address or investigate the financial circumstances of a defendant, though there may well be cases where a plaintiff does have such information.

[81] The evidence before me suggests that the Named Respondents are unlikely to be able to satisfy any damage award that may be made at trial. I consider that that inability is an important and relevant consideration.

[82] Second, a trespass to land and/or to chattels is normally considered to satisfy the requirement of irreparable harm. In *Boon* Butler J. said:

> [59] First, where a *prima facie* case of trespass is made out, the natural remedy is an injunction. This is because an act of trespass is actionable *per se* and does not require proof of damages. Hydro relies on the decision in *Board of School Trustees of School District No. 27 (Cariboo-Chilcotin) v. Van Osch et al*, 2004 BCSC 1827. The court granted an injunction to restrain the defendants from occupying a school which the plaintiff decided to close. The court concluded at para. 14:
>
> > [14] In the present case the School Board has established that it possesses title to the lands comprising the School and that title is not in issue. It has a strong *prima facie* case in trespass against the defendants. None of the defendants have advanced an arguable case that their continuing possession of the School is as of right and, given their failure to do so, questions of balance of convenience or irreparable harm do not arise.

[83] In *Sol Sante Club v. Biefeld*, 2005 BCSC 1908 the Court said:

> [18] However, the general test does not apply in trespass cases. Many cases support the proposition that once an applicant establishes a *prima facie* case that his or her property rights are being wrongfully interfered with by another and the other party intends to continue the wrong, an injunction should issue without regard to the remaining parts of the general test.

[84] In *Paul v. Canadian Pacific Ltd.*, [1988] 2 S.C.R. 654, which dealt with a claim for permanent injunction, but which was referred to in *Sol Sante Club*, the Court said:

> **27** The issue in this case is whether a permanent injunction should be awarded against the respondents. CP, in our view, has either a leasehold interest in the head lessor's right-of-way or an absolute interest in the right-of-way if a 990-year lease can be viewed as tantamount to a transfer. Generally speaking, an injunction will issue to restrain an interference or anticipated interference with a person's rightful enjoyment of the use of his land. Robert Sharpe has noted in his book entitled Injunctions and Specific Performance (1983), at p. 180 that "The discretion in this area has crystallized to the point that, in practical terms, the [page674] conventional primacy of common law damages over equitable relief is reversed. Where property rights are concerned, it is almost that damages are presumed inadequate, and an injunction to restrain continuation of the wrong is the usual remedy." However, if it is found that the Band also has an interest in the land comprising the eastern crossing, then a court may be more reluctant, depending upon the nature of the Band's interest, to grant a permanent injunction against them.

[85] Accordingly, on this basis as well I consider that the need to show irreparable harm has been satisfied.

[86] A further matter arises. I consider that the activities of the Defendants that I have described gives rise to real safety issues. I repeat that there is no effort before me to enjoin Marine Harvest's activities. The proposition is that Marine Harvest's ongoing activities should coexist with the Defendants' and/or the Named Respondents' ongoing conduct. I consider that this suggestion, if given effect to, would create real safety risks for both the Plaintiff's employees and for the Defendants. I further consider that personal harm can never be adequately compensated for by damages.

[87] One last point arises. In the Hon. R.J. Sharpe, *Injunctions and Specific Performance*, Loose-leaf Edition, updated to November, 2017, the author, at p. 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 Marine Harvest has established that it will suffer irreparable harm if an injunction is not granted. Alternatively, I consider the balance of convenience so strongly favours Marine Harvest that the importance of showing irreparable harm is diminished.

7. Balance of Convenience

[89] In *RJR-MacDonald*, the Court held, at para. 62, that the third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: “a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits”. The Court then, at para. 63, further noted that the factors that underlie an assessment of the balance of convenience are varied and numerous.

[90] One such factor is the strength of the parties’ respective positions: *Boon* at para. 69 and *Sharpe* at 2-62. Here, Marine Harvest’s position is markedly stronger. It is either conceded (by the Named Respondents) or otherwise unchallenged by the remaining Defendants that Marine Harvest has the legal authority to conduct its business. The position of the Named Respondents, for the reasons I have described, is much more difficult.

[91] I further consider that the risk of harm from the forms of conduct that I have described outweighs any risk from the Plaintiff’s continued operation of its business – which is lawfully authorized.

[92] I also consider it relevant that absent an injunction the various forms of conduct I have described will likely continue. At the November 14 hearing I granted a thirty day adjournment so that the Named Respondents and others could, in good faith, assemble the materials necessary to respond to the Plaintiff’s application. The conduct that followed thereafter and the repeated assertions that such conduct will continue militate strongly in favour of the injunction that Marine Harvest seeks. These various forms of interference with the Plaintiff’s activities and operations have

now gone on for nearly four months. These forms of interference, if anything, have accelerated in the last few weeks. It is necessary to address these matters.

[93] A further factor is relevant. The unnamed Defendants have made no effort to explain or justify the legality of their conduct. The fact that they feel strongly about the underlying issues that they wish to address cannot justify their conduct. The Court in such circumstances, for important and principled reasons, is compelled to protect the lawfulness of the Plaintiff's conduct and business and to address the illegality of the Defendant's behaviour. There is, in a sense, nothing to "balance" or to "weigh".

[94] In *Slocan Forest Products Ltd. v. Valhalla Wilderness Society*, [1998] B.C.J. No. 1255 the Court dealt with an illegal blockade of a logging road. Meiklem J., in comments that I consider apposite, 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.

8. Status Quo

[95] Marine Harvest argued that the status quo supports its position. In *RJR-MacDonald* the Court, at para. 75 said that consideration of the status quo was "of limited value in private law cases". Accordingly, I do not consider that I need to address this issue.

9. Disposition

[96] I am satisfied that an injunction in the form of the draft Order being sought by Marine Harvest, in its Notice of Application, should be granted. One issue arises from that draft Order. Paragraphs 5 and 6 of the proposed Order contain an enforcement clause. There is some mixed authority about the appropriateness of including such clauses when an injunction is first granted.

[97] Two factors are relevant. First, in *West Fraser Mills Ltd. v. 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.

[98] The foregoing considerations are directly relevant in the present circumstances.

[99] Second, counsel for the Named Respondents did not oppose the inclusion of the enforcement clauses in the proposed Order. Furthermore, counsel for the RCMP, who was present at the application, did not express opposition to the inclusion of the enforcement clause and he confirmed the appropriateness of the language in the clause.

[100] Marine Harvest did not seek cost of this application and I need not deal with that issue.

"Voith J."