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Sea change for salmon farms ~ Patrick Brown

Who's in charge of salmon farms? For twenty years they have been under the BC Ministry of Agriculture and Lands but right at the moment, it looks as if that will end within a year. It all started four years ago with suggestions that concentrations of sea lice from salmon farms in the Broughton Archipelago were attacking and killing wild salmon fry as they migrated by.

In December 2004, Premier Campbell appointed the Pacific Salmon Forum (PSF), led by former federal Fisheries Minister John Fraser, to investigate and make recommendations. This year, at the beginning of February, the forum submitted its report, which not only made recommendations about salmon farms and sea lice, but also about provincial regulations and the provincial government's science policy.

Meanwhile, last October, the BC Supreme Court heard a case brought by Alexandra Morton, a biologist who lives in the Broughton Archipelago (along BC's mid-coast) and maybe the province's most active campaigner on salmon farm issues. Morton claimed that farmed salmon swimming in net pens in the sea were actually a 'fishery' and therefore constitutionally came under the authority of the federal Department of Fisheries and Oceans and that the BC regulations were outside its power and jurisdiction.

On February 9, Justice Christopher Hinkson agreed. Ron Cantelon, recently appointed Minister of Agriculture, has 30 days to launch an appeal, and at press time has not yet indicated whether he will do so.

Meanwhile, at almost the same time as the release of the Pacific Salmon Forum's report, eight First Nations in the Broughton launched a class-action lawsuit against the provincial government over its regulation of the open-net salmon farms, claiming that their aboriginal rights to the wild fishery had been damaged. The suit, which must yet be certified as a class action, is led by Chief Bob Chamberlin of the

Kwicksutaineuk/Ah-Kwa-Mish First Nations, based in Alert Bay.

Sea Lice Salmon Scourge

Sea lice live and feed on salmon of all sizes. Larger salmon can and do tolerate them, but the tiny 'fry', entering salt water for the first time from the streams and rivers where they hatched, are particularly vulnerable to sea lice infestation.

Floating net-pen salmon farms containing concentrations of farmed Atlantic salmon provide opportunities for unusual concentrations of sea lice to exist, and to transfer to fry as they swim by. In the Broughton, many such farms (see map, above) are located adjacent to migration routes, and sea lice infestation

of young fry may have contributed to a decline in returning stocks over the past few years. However, the Pacific Salmon Forum says there is 'no scientific consensus' on this.

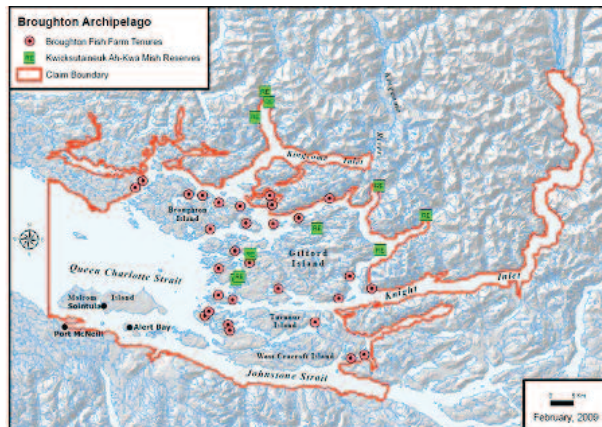
The salmon farms have responded by treating their fish with chemicals, and in some cases following farms when wild salmon migrations take place. However, declines in returning wild salmon stocks continue.

In addition, fish farms are accused of not adequately preventing escape of Atlantic

salmon, and of polluting the sea bottom beneath their locations with large quantities of salmon feces.

Provincial Laws and Regulations

The BC provincial government has actively encouraged the development of a substantial salmon farm industry in several locations on the coast inside and outside Vancouver Island. It has licensed locations and passed a number of laws regulating the industry, mainly under the Ministry of Agriculture and Lands. It has held that sea-based aquaculture is in fact a form of agriculture, an area constitutionally under the authority of provincial governments. It has protected the farms from liability under the *Right to Farm Act*.



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On the other hand, wild fish come under the constitutional authority of the federal government and its Department of Fisheries and Oceans (DFO). Thus the provincial government bears no responsibility for the wild fishery; it may be considered in the course of environmental review of development proposals for water-dependent industry, although this is usually as a result of referrals to, or intervention by, DFO.

The Pacific Salmon Forum

The recent report of the provincially-appointed Pacific Salmon Forum attempts to reconcile net-pen aquaculture and the wild salmon fishery. It sums up its terms of reference as: 'Today the public policy challenge is to find ways to ensure that this newer industry can prosper without harming wild salmon or long-established activities that depend upon them.'

But the forum does not appear to have allowed this definition to limit their thinking.

In fact, its first and most important recommendation is that British Columbia adopt what it terms a 'transformative management' approach, 'not just to salmon but to the management of all resource industries operating in our watersheds and marine systems,' which could include pretty well all of the province. (A specific reference was made to the run-of-river power proposal in Bute Inlet.)

The Constitution Matters

Alexandra Morton, accompanied by a number of environmental and fishing organizations, and represented by well-known environmental lawyer Greg McDade, asked the Supreme Court to declare that fish, wild or farmed, swimming in the sea, were federal rather than provincial. Her action was against the Province of British Columbia, and Marine Harvest Canada Inc, operator of a net pen salmon farm, representative of the 28 farms in the Broughton Archipelago. It is rare that such a constitutional challenge is originated by a private citizen, but Judge Hinkson accepted it as an important matter of public policy.

After considering submissions by the Province of BC and Marine Harvest Canada Inc (the federal government did not participate) the judge concluded, whatever the lawyer for the Province said, that aquaculture was not agriculture, and that the term had been adopted by the province in order to make it

appear that their legislation was constitutionally legitimate. Finfish farms, he said, were clearly a fishery, as they occupied areas of the sea formerly occupied by wild fish; they were either part of the BC fishery or a fishery unto themselves. Either way, constitutionally, fisheries came under the federal government.

Further, salmon farms interfered with the public's right to fish in the sea, and polluted the water, all contrary to the federal *Fisheries Act*.

Morton had sought an immediate halt to the provincial regulation of salmon farms, to the extent that the license held by the Marine Harvest farm named in the action would not be renewed. Judge Hinkson declined to grant this, since it would lead to a regulatory vacuum while DFO took over, and instead ruled that the provincial laws and regulations, while *ultra vires*, could continue for another twelve months. At the end of that time, the *Fisheries Act* and DFO regulations would apply and should be enforced. (Morton's informative videos can be viewed: www.callingfromthecoast.com.)

First Nations Court Action

The class action recently initiated by the First Nations in the Broughton Archipelago must be certified by the courts before it can go ahead. But basically, it seeks action by the provincial government to stop issuing salmon aquaculture permits in the Broughton 'until adequate consultation and accommodation has occurred' with First Nations. They say that salmon farms have caused a decline in the wild salmon stocks. This, they charge, has infringed their fishing rights. They also want the provincial government to 'remediate' the impact of salmon farms on wild salmon.

Commentary

At press time, the provincial government still has time to appeal the Supreme Court's demolition of their salmon farming laws and regulations. The effect of a changeover to DFO regulation is not clear, and just how it can be reconciled with the governance recommendations of the Pacific Salmon Forum is also unclear.

It is significant, however, that the forum made such broad recommendations as to the ecological management and regulation of watersheds and marine areas. Maybe the salmon have the right allies at last. ✍

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