

FEDERAL COURT

BETWEEN:

ALEXANDRA MORTON

Applicant

and

MINISTER OF FISHERIES AND OCEANS

Respondent

NOTICE OF APPLICATION

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*, RSC 1985, C F-7

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.



Date: October 12, 2016

Issued by: _____

**ORIGINAL SIGNED BY
FRANK FEDORAK
A SIGNÉ L'ORIGINAL**

Address of Local office:
Federal Court
Pacific Centre
PO Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO: **Minister of Fisheries and Oceans**
c/o Department of Justice Canada
Vancouver Regional Office
900 – 840 Howe Street,
Vancouver, BC V6Z 2S9

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of OCT 12 2016 A.D. 20 _____

Dated this _____ day of OCT 12 2016 20 _____



APPLICATION

Alexandra Morton challenges the Minister of Fisheries and Oceans' (the "**Minister**") ongoing policy or practice of issuing fish-transfer licences without first considering whether *Piscine reovirus* and Heart and Skeletal Muscle Inflammation ("**HSMI**") are present in the fish proposed for transfer (the "**Illegal Policy**"). The Illegal Policy is contrary to s. 56 of *Fishery (General) Regulations* (the "**Regulations**") and therefore unlawful. Section 56(b) requires that fish to be transferred do not have any disease or disease agent that may be harmful to the conservation and protection of fish.

The Illegal Policy was confirmed by the Minister's delegate on September 29, 2016.

The applicant makes application for:

1. An order declaring that:
 - a) the Illegal Policy of not testing for *Piscine reovirus* and HSMI when issuing transfer licences is unlawful; and
 - b) the Minister lacks the jurisdiction to licence the transfer of fish carrying diseases or disease agents that may be harmful to the conservation and protection of fish.
2. An order that the applicant shall not be required to pay costs to the respondent in the event that this application is dismissed.
3. Costs.
4. Such further and other relief as counsel may advise and this Court deems just.

The grounds for the application are:

The Parties

1. Alexandra Morton is the applicant. Ms. Morton is a public interest litigant with no personal, proprietary, or pecuniary interest in the outcome of this application. Ms. Morton has a demonstrated record of protecting the marine environment from the impacts of salmon aquaculture.
2. The Minister is the respondent. The Minister is responsible for issuing fish transfer licences under s. 56 of the *Regulations*. The Minister has delegated

responsibility for issuing fish transfer licences to the Introductions and Transfers Committee (the “Committee”).

The Illegal Policy

3. On July 22, 2016, the Committee informed Ms. Morton that they do not require testing for *Piscine reovirus* or HSMI and do not gather information about the presence of *Piscine reovirus* or HSMI in relation to salmon transfers – this is the Illegal Policy at issue in this proceeding.

4. *Piscine reovirus* is the virus that is thought to cause the disease HSMI. HSMI causes high morbidity and mortality in fish.

5. The Illegal Policy is unlawful because it is contrary to s. 56 of the *Regulations*.

Section 56 of the Regulations Requires Testing for Piscine Reovirus and HSMI

6. Transferring live fish to a fish rearing facility is governed by Part VIII of the *Regulations*. Part VIII consists of ss. 54 to 57.

7. Pursuant to s. 54, for the purposes of Part VIII, “licence” means a licence to release live fish into fish habitat or to transfer live fish to a fish rearing facility.

8. Section 55 prohibits transferring fish to rearing facilities except under the authority of a transfer licence.

9. Under s. 56, the Minister can only issue a transfer licence if three regulatory preconditions are met:

- (a) the transfer “would be in keeping with the proper management and control of the fisheries”;
- (b) the fish to be transferred “do not have any disease or disease agent that may be harmful to the protection and conservation of fish”; and
- (c) the transfer “will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks”.

10. Pursuant to s. 56(b), the Minister cannot issue a fish-transfer licence if the fish “have any disease or disease agent that **may** be harmful to the protection and conservation of fish” [Emphasis added].

11. Thus, the Minister must ensure that the fish sought to be transferred do not have any potentially harmful diseases or disease agents prior to issuing transfer licences.

12. In practical terms, this means the Minister must test for known diseases and disease agents prior to issuing transfer licences, and refuse to transfer fish carrying potentially harmful diseases or disease agents.

Piscine reovirus is a disease agent that may cause the harmful disease HSMI

13. HSMI was first identified in Norway, following significant outbreaks of the disease in fish farms.

14. HSMI causes high morbidity (inability to eat and swim normally, likely preventing fish from migrating up rivers) and mortality in infected fish.

15. In 2010, *Piscine reovirus* was identified as the disease agent likely causing HSMI.

16. Subsequent research has confirmed the association.

17. No other causal agent has been identified.

18. *Piscine reovirus* has been found on fish farms in British Columbia.

19. *Piscine reovirus* is contagious and can spread to wild fish.

20. HSMI has now been diagnosed in British Columbia and Chile, among other countries.

21. In May 2016 the Department of Fisheries and Oceans announced that it had preliminary diagnoses of HSMI on an Atlantic salmon farm in BC.

22. In June 2016 Ms. Morton wrote to the Committee to confirm the Committee was testing for *Piscine reovirus* as part of the transfer licence application process.

23. In July 2016, the Committee informed Ms. Morton that its policy was to not consider PRV or HSMI.
24. The Committee confirmed their position on September 29, 2016.
25. *Piscine reovirus* is a contagious disease agent that may be harmful to the protection and conservation of fish because it is associated with, and thought to cause, the heart and muscle damage characteristic of HSMI.
26. HSMI is a disease that is harmful to the protection and conservation of fish because HSMI can cause high morbidity as well as mortality in fish.
27. The Minister is able to test for both *Piscine reovirus* and HSMI.
28. The Illegal Policy to not test for, or gather any information about, *Piscine reovirus* and HSMI when issuing fish transfer licences is contrary to s. 56 of the *Regulations*.
29. The Illegal Policy is inconsistent with the precautionary approach required by the *Regulations*, and further, inconsistent with the precautionary principle.
30. In addition, the Applicant relies generally on the *Federal Courts Rules*, and such further additional grounds as counsel may identify and this Court may consider.

Jurisdiction:

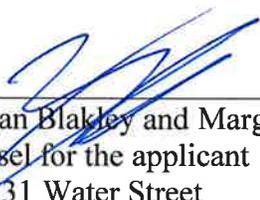
31. Pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the Federal Court has jurisdiction to hear this judicial review application and to grant the relief sought.

[Continued on next page]

This Application will be supported by the following material:

1. Affidavit of Alexandra Morton, to be served.
2. Such further and additional materials as counsel may advise and this Court may allow.

Date: 10/12/2016



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