

# Aquaculture Governance in Canada: Regulation, Property Rights and Constitutional Impediments



Phillip Saunders & Meinhard Doelle  
Marine & Environmental Law Institute  
Schulich School of Law  
Dalhousie University  
Halifax, Canada



# Overview

- Constitutional Issues: Legislative Control and Property Rights
- Federal Regulatory Role
- Federally Led Regulation: BC & PEI
- Provincially Led Regulation: NB, NS, & NL
- Regulatory Reform in NS
- Principles and Governance



# Aquaculture Industry In Canada

- Long history of oyster culture - but industry developing mainly since 1980s
  - Significant growth 80s and 90s - then slowed
  - Salmon dominant species
- BC: approx 740 sites, annual production approx \$540 million
  - Controversies over escapes, interference with wild stocks, disease, waste deposit



- New Brunswick
  - Salmon in Bay of Fundy farmed since 1978; 2012 value approx. \$185 million, 30,000 MT
  - Similar concerns with escape, wild stocks and waste deposition
  - One case of unlawful pesticide use - approx \$900,000 fine

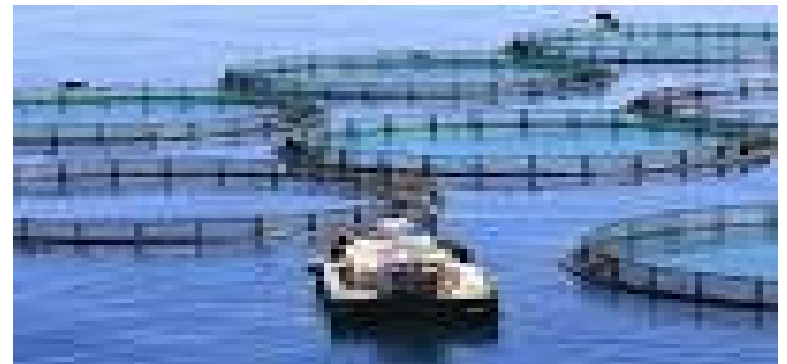


- Nova Scotia - recent growth in salmon - more diverse and some land-based. Fishery, tourism conflicts
- PEI - mainly shellfish
- Newfoundland - more recent - mainly Atlantic Salmon



# Jurisdiction over Aquaculture

- *Constitution Act 1867:*  
Legislative vs Proprietary  
Jurisdiction (Provincial vs.  
federal governments)
  - One level of government may control grant of marine *tenure* (lease or licence)
  - But *regulatory* jurisdiction of other level maintained
- In essence: within provinces, Prov. level can own seabed, control leasing as result
- But federal regulatory control over various heads of jurisdiction maintained



- Federal Jurisdiction (Const. Act s 91)
  - Fisheries
  - Navigation
  - Extraprovincial & Interprovincial trade
- Provincial Jurisdiction (Const. Act s 92)
  - Property and civil rights (aquaculture as a business)
  - Management and sale of public lands (tenure over seabed)
  - Local works and undertakings
  - Agriculture (shared)
- Aboriginal rights
  - Aboriginal *rights* (customary use rights)
  - Aboriginal *title* (communal, quasi-ownership)
  - Duty to consult (prior to interference with rights or title)

- No one level of government can control, regulate alone
  - Cooperative approach emerged, often based on MOUs, whereby federal, provincial levels cooperated - but with different leads
  - Provinces legislated to control grant of tenure. federal regulated (licensed) within jurisdiction)
  - Also licensed business more generally
- NS, Nfld, NB, BC - provinces took lead under provincial legislation
  - PEI - federal govt took lead, with provincial cooperation

# Impact of *Morton* Decision

- *Morton v British Columbia* 2010 BCSC
  - Challenge to provincial jurisdiction to regulate aquaculture
  - Court held: finfish aquaculture is a "fishery" for constitutional purposes: therefore federal jurisdiction
    - Reasoning?? Waters in which wild fish exist; and cultured fish eventually have to be caught!
- Ousted provincial regs - but province still controls lease - also marine plant aquaculture
  - Multiple regulatory agencies required
- Not yet taken to Supreme Court of Canada - not yet followed in other provinces
  - So... a bit of a mess



# Sources of Uncertainty

## A Jurisdiction over coastal waters

- Provinces cannot legislate extra-territorially
- Provinces own areas that they controlled as colonies when they entered Confederation
- No one set answer: common law rule *inter fauces terrae* ("within the jaws of the land")
- Almost a bay-by-bay determination in some areas
- And as aquaculture moves offshore - clearly outside provinces
- SO: where is provincial legislation actually applicable??
- Some possibility under *Oceans Act* to declare provincial legislation applicable to marine areas - not used



## B General Licensing Jurisdiction

- In NS, NL and NB - provinces take lead in regulatory requirements - feds, regulate by sector
- But *Morton* invalidated this approach in BC
- *IF Morton* followed more generally:
  - Forces federal Fisheries Dept into role they don't want
  - BC Regs passed in response to *Morton* are minimal at best
  - Inappropriate = is it "fishery" or more analgous to "agriculture"?

## C **Property Rights vs Right to Fish**

- Public Right of Fishing under *Magna Carta*
  - Requires *explicit legislative act* to overcome
  - And, thanks to Judicial Cttee of Privy Council - only federal legislation will do: even *in* provinces (*BC Fisheries Reference*)
- Problem: can provincial legislation be valid basis for excluding fisheries from aquaculture areas?
  - Could lead to private actions for public nuisance
  - No federal Act - although *Fisheries Act* does allow some designation of aquaculture area
  - Outside Provinces - legislation inapplicable in any event





# Federal Role

(Outside BC, PEI)



## Fisheries and Oceans Canada

- Lead federal department
- Fisheries Act Regulations proposed but not finalized
- *Fisheries Act*: permits required for: certain works and undertakings; deposits of "deleterious substances"; capture of brood stock; interprovincial transfer of live fish
- *Species at Risk Act*: taking of designated species; possible declaration of areas as "off-limits" due to impact on species, but not mandatory
- *Oceans Act*: weak mandate for integrated ocean management

# Canadian Food Inspection Agency

- *Health of Animals Act* -
  - Health of animals for import and export
  - Quarantine and control of areas affected by animal disease;
  - Prohibition of importation of listed species; and control of movement of aquatic species
- *Fish Inspection Act*: Inspection, facilities certification, labelling
- *Feeds Act* - regulation of animal feeds, including aquaculture

## Health Canada

- *Food and Drugs Act* - production, import, export, interprovincial transport and sale of foods and drugs.
  - Drugs approved in aquaculture must have approval
- *Pest Management Regulatory Agency* - Evaluation and registration of pesticides for use, including for potential use in aquaculture

## **Transport Canada**

- *Navigation Protection Act* - permits for interference with navigation in designated waters (most aquaculture areas)
- *Canada Shipping Act* - peripheral impact on licensed vessels

## **Canadian Environmental Assessment Agency**

- Almost no role - EA only required under special discretionary powers

# Federally Led Regulatory Approach

- BC & PEI
- Licence-based approach
- Province still issues leases in provincial waters and regulates land-based facilities
- Focus on control of pests & pathogens, containment & pollution
- No EA requirements
- Differences between PEI and BC minor





# Provincially Led Regulatory Approach

- NL, NS, NB
- Some variation in regulatory approaches
- Lease & licence approach
- Focus on control of pests & pathogens, containment, and pollution
- Limited public engagement unless provincial EA is triggered



# NS Regulatory Reform: 7 Guiding Principles

1. Effectiveness
2. Openness
3. Transparency
4. Accountability
5. Proportionality
6. Integration
7. Precaution



# NS Reform: Regulatory Goals

1. Environmental protection & sustainable use
2. Fairness in allocating public resources
3. Low impact high value use of resources
4. Compatible with other sectors
5. Benefits proportional to resources used/affected
6. Protection of wild salmon
7. Meaningful public engagement
8. Attentive to local communities
9. Supporting sustainable growth of the industry
10. Enforceable, affordable, efficient & effective regulations

# NS Reform: Key Changes

- Core focus on low impact/high value aquaculture
- “Open book” regulatory transparency
- Functional separation of promotion & regulation (within DFA)
- Environment monitoring moved to DOE
- Key standards set in legislation
- Much less discretion in process and decision-making
- Strong focus on health & wellbeing of farmed fish

# NS Reform: Site Selection

- Red, yellow and green areas identified for marine based fin-fish operations
- Regulatory process and terms & conditions will differ depending on red, yellow or green classification
- Clear standardized process for shellfish operations
- Removal where sites prove unsuitable

# NS Reform: Other Key Changes

- Clarification of leaseholder rights and strengthened enforcement of leases
- Standing Regulatory Advisory Committee
- Independent Science Advice Mechanism
- Five-year Review



For More Information:

[www.aquaculturereview.ca](http://www.aquaculturereview.ca)



# Governance Principles

- As in NS Regulatory Reform Process
  - Principled governance goal - including precaution, integration, ecosystem approach
  - BUT - current fractured jurisdictional system presents problem
    - At federal level - multiple departments with multiple goals, approaches: "Lead" Agency Illusory
    - Precaution, transparency not mandated - discretionary
    - Add the provincial level, and aboriginal rights - no systematic means of achieving, eg. **zonal planning** to ensure ecosystem approach and integration
  - All comes back to political will - but at very least see need for Federal Act - possibly delegating lead to Provinces with mandatory principles?
    - Achieve delegation via *Oceans Act*?