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Withheld pursuant to/removed as

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**Ministry of Agriculture and Lands**  
**BRIEFING NOTE FOR MINISTER FOR INFORMATION**

Ref: 165798

Date: March 19, 2009

**Issue:** Follow-up to Hinkson Decision – Exploring Regulatory/Management Options with Fisheries and Oceans Canada.

**Background:**

On February 9, 2009 Justice Hinkson ruled that Provincial regulations specific to aquaculture were *ultra vires* and, as a fishery, aquaculture rightfully should be regulated by the federal government. He ordered that the existing regulatory framework stay in place for 12 months after which Provincial regulations would be without effect. This will result in a regulatory vacuum if governments do not take action.

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**First Nations Considerations:**

The Province has been engaged with the First Nations Leadership Council (FNLC) through its Aquaculture Working Group (AWG) to work together to address mutual interests and concerns about aquaculture. Recent litigation by the Kwicksutaineuk/Ah-Kwa-Mish First Nations (KAFN) as represented by Chief Bob Chamberlin, who is also chair of the AWG, is presenting some difficulty in the relationship and in making progress. Recent correspondence from Chief Chamberlin challenges the Province to respond within 30 days to the recommendations of the Pacific Salmon Forum, requests our intentions regarding decisions on 19 licences and tenures on their territory in light of the Pacific Salmon Forum report and the recent ruling of Justice Hinkson, and engagement with the Province and Canada in a necessary transformation of the salmon farming industry that would presumably be reflected in new regulatory and management arrangements.

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**Next Steps:**

- A meeting with federal representatives at the staff level is scheduled for March 30, 2009 to begin exploring options for the delegation of responsibilities to the province.
- On March 31, 2009, DFO intends to engage industry, environmental organizations and First Nations to advise them that federal/provincial discussions are taking place and of the general nature of those discussions.
- The Ministry will participate and support the March 31 meeting and has provided advice to DFO to utilize the FNLC as the first window into First Nations communities in British Columbia.
- Discussions will be held with the FNLC in April around the provincial concern of AWG representation given the KAFN litigation.
- Discussions on the PSF recommendations with the FNLC and the AWG will be held once a formal response can be confirmed with government (June 2009).

Contact: Al Castledine, Aquaculture Policy, 250 387-9574

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## ISSUE NOTE

### Issue:

- In a decision released February 9, 2009, Justice Hinkson of the British Columbia Supreme Court found that finfish farms on the coast of British Columbia are a “fishery” that falls under the exclusive jurisdiction of the federal Parliament. This decision is significant in that the Province has assumed the role of primary regulator for the past 20 years.

### Background:

- On February 9, 2009 Justice Hinkson ruled that Provincial regulations specific to aquaculture were *ultra vires* and, as a fishery, aquaculture rightfully should be regulated by the federal government. He ordered that the existing regulatory framework stay in place for 12 months after which sections of the *BC Fisheries Act* (power to make regulations for aquaculture), the *Farm Practices Protection (Right to Farm) Act*, and the Aquaculture Regulation in its entirety would only have effect in so far as they apply to the cultivation of marine plants. The Finfish Aquaculture Waste Control Regulation would cease to have any effect. The right of the Province to issue tenures for aquaculture under the Lands Act remains intact.
- The Province decided not to appeal the decision but to explore options with the federal government for regulating the sector. Meetings have taken place with federal counterparts. It is likely that the federal government will create a “British Columbia Aquaculture Regulation” to fill the regulatory vacuum created by the decision and play a greater role in future management than it does currently. It is clear that the Province will continue to be engaged in aquaculture management because of its responsibilities for tenuring of Crown Land for aquaculture.
- It is expected that options for future management with defined provincial and federal roles will be brought forward to Provincial Cabinet in July 2009 for decision or for a mandate for further negotiations with the federal government.

### Decision required:

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**Ministry of Agriculture and Lands**  
**BRIEFING NOTE FOR MINISTER FOR INFORMATION**

Ref: 166596

Date: May 29, 2009

**Issue:** Marine Harvest Canada appeal of Hinkson decision.

**Background:**

- Ms. Alexandra Morton and others' petition challenging the constitutionality of the Province's management and regulation of the aquaculture industry was heard in British Columbia Supreme Court on September 29 to October 2, 2008.
- In a decision released February 9, 2009, Justice Hinkson found that finfish farms on the coast of British Columbia are a "fishery" that falls under the exclusive jurisdiction of the federal Parliament.
- The petitioners did not challenge the jurisdiction of the Province to grant land tenures for aquaculture. Parts of the BC *Fisheries Act* that establish the licensing regime for aquaculture were found to be within the Province's jurisdiction as a means of producing revenue.
- The respondent Marine Harvest Canada is appealing the decision based largely on its concern that the decision is not clear as to who owns the fish in the cages. The Province has chosen not to join the appeal by Marine Harvest Canada.
- Marine Harvest filed its appeal record on or around May 6, 2009. They have 30 days in which to file their factum. After the factum is filed, Marine Harvest can apply for a hearing date.
- It is not likely that an appeal hearing will be completed before December, 2009.

**Discussion:**

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**Summary:**

- Marine Harvest Canada is appealing Justice Hinkson's February 9, 2009 decision that found that finfish farms in British Columbia are a fishery.
- The appeal is not likely to be heard any time before December, 2009.
- The Province of British Columbia is not joining the appeal; however, the Province has filed an appearance so that it can receive notice of proceedings from the Court.

Contact: Gavin Last, Assistant Director Aquaculture Policy Branch, 356-7640

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## MINISTRY OF AGRICULTURE AND LANDS: REVERSE TIMELINE

The following timeline is informed by several assumptions: that aquaculture will continue to be an important economic activity in BC post-Hinkson; that it is in the public interest for appropriate controls to be in place for the protection of the ecosystem and to ensure sustainable development and operation of aquaculture; that BC will continue to administer aquaculture land tenure under the BC *Land Act* and that Canada will provide regulatory oversight through a new BC Aquaculture Regulation under the *Fisheries Act*.

## DECISION-MAKING PROCESS: INTERNAL MILESTONES

Provincial Government Milestones	Deadline	Status
Suspension of Decision ends - Implement new management regime	Feb 09 2010	May need to revisit if court provides an extension and federal government is not in a position to assume responsibility.
<i>Court decision on extension of suspension</i>	<i>December</i>	
<i>Court decision likely on MHC appeal</i>	<i>December</i>	
Approach ratified by Cabinet?	October	Likely not required
<i>Request extension of suspension (if required): Lead by DFO</i>	<i>Mid-Oct</i>	
Conclude negotiations: Agreement in Principle between governments on new approach	November	Date may need to be reassessed due to delay in Federal Cabinet direction
Briefings with Minister, DMs, TB/Cabinet staff, MLAs, GCCNRE	Sept/Oct	Not necessary
<i>Discussions with DFO re: possible extension of suspension</i>	<i>Sept</i>	
Legal advice to guide negotiations	Ongoing	MAG fully engaged
Inter- provincial agency collaboration on approach	Ongoing	Collaborative established
Begin negotiating management agreement	September - October	Delay due to feds not getting a mandate.
Draft negotiation framework		DFO lead
Federal negotiation mandate		Not yet determined
Direction from Cabinet	August 19	Late August
Cabinet Submission	August 18	✓ CS signed by Minister
Brief TB staff, Cabinet Secretariat	Mid-May?	✓ Complete (Pam Shatzko)
MAL DM to brief DMs of MAG, Community Services, MoE, MARR (possibly IGR Secretariat) – policy decisions	Mid-May	✓ Complete
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Submission framework: advise from MARR, MAG, ILMB, MoE	May 4	✓ Complete
Investigate management options (jointly with MoE and federal government)	April-June	On schedule
Cooperatively develop Options & Implications Paper (federal and provincial)	May 11	✓ Complete
Obtain legal advice re scope of decision's effect	May 11	✓ Consider all aquaculture activities

## RESPONDING TO HINKSON DECISION

Sept 3, 2009

Information gathering, analysis (shared with DFO)	March-May	✓ Continuing
Response to court decision - seek direction from Cabinet	March	✓ return for mandate to negotiate

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## RESPONDING TO HINKSON DECISION

Sept 18, 2009

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## Team Clint (First Nation)

### Rethinking the Aquaculture Branch

#### Background :

The Hinkson Decision regarding the Marine Fin Fish licensing function being transferred to DFO, has mandated a change to the Provincial Agency regulating marine finfish operations. What should the new regulatory structure look like?

#### Whereas:

1. The revenue from finfish licensing is minimal (average of \$40,000 annually) so the loss of this program to DFO will not have a big budget impact. Additionally the consultation requirements for finfish licensing has been minimal to the present time as it is overshadowed by the tenure replacement process.
2. Programs remaining with MAL are substantial including Shellfish, Freshwater Fin Fish, Marine Plants, tenures and Commercial Fisheries regulation.
3. MAL has been stymied and ineffective in the past few years and our clientele has lost a good deal of trust that we can be of service. The Assistant Deputy Minister has repeatedly asked what Courtenay can do less of to make room for staff to concentrate on neglected areas. This is an opportunity to take something off the table (finfish licensing) and focus efforts and improve efficiency on the remaining areas so that client satisfaction increases.
4. Many functions of the present organization have not been undertaken to maximum efficiency in previous years because of the fin fish licensing and inspection workload pressures, staff reductions and other priorities. These important under-serviced areas can be more adequately serviced with the present staff when they are relieved of the finfish licensing component. These areas include:
  - Increased biological support for
    - Marine Plant assessments and allocations.
    - shellfish growers both new and established,
    - fresh water finfish operators,
    - tenure applications,
    - monitoring of impacts (+/-) after tenure issuance,
    - First Nations consultations.
    - policy development

- alternate species
- closed containment
- public meetings
- Increased clerical support for
  - compliance officers
  - First Nations consultations
  - policy development
  - website maintenance
- Refocus Compliance Officers on
  - shellfish licence and tenure terms and conditions,
  - marine plants,
  - wild oyster harvest
  - finfish tenure terms and conditions
  - policy development
  - First Nations consultation support
  - Diligent use of aquaculture tenures

5. The Inspector service in Courtenay has lost a clerk and has not had replacements for s.22 The service has taken the hits and needs to retain their current number of four to undertake the necessary inspections of shellfish, hatcheries, freshwater fish sites and commercial fisheries.
6. Clerical staff are presently a bottleneck to the operations. They have been under severe stress due to normal absences (sickness/holidays etc) and increased FN consultation work. More cross training would be appropriate. No decrease in clerical support should be considered as the workload will not decrease measurably because Fin Fish licensing goes to the Federal Gov't. and other areas need clerical support that they are not already receiving.
7. MAL could increase the priority for shellfish operations and freshwater fish health management plans. The shellfish health program has been sidelined for many years due to finfish emphasis. There is a strong need to expand shellfish health management beyond a rudimentary pilot program in order to secure export markets. MAL focus has not been on freshwater or alternate species due to emphasis on salmon. There has been steady interest in developing commercial scale closed containment and freshwater species, such as crayfish and tilapia, as an alternative to salmon, that has been neglected.
8. In the event that Fish Health staff, Environment FAWCR staff and any MAL finfish specialists or policy staff are displaced in this process it is likely



- that they be needed by DFO or by the CFIA or by the Province in positions already vacant through attrition.
9. In short order, natural attrition will likely reduce the number of all positions anyway so it would be prudent to retain the internal corporate memory as much as possible without a lot of present cuts. Five persons are presently close to retirement.
  10. First Nation consultations may not measurably diminish under the new mandate. In the past additional resources have been needed to adequately cover the FN consultations. Additionally, big changes are anticipated province wide on how consultations are done. This component of Aquaculture Operations can continue to exist much as it is today using badly needed resources currently being consumed by the finfish portfolio.  
This is an ideal opportunity to recombine the Policy and Operations Branches under one Director with a Deputy Director to support the reality of having two centers (Victoria and Courtenay). Support staff for Public / Ministerial / Deputy Minister inquiries and briefing notes etc. will be spread throughout the organization in both centers. The policy development function will be everyone's responsibility with a small cadre of people assigned specifically to capturing and entrenching the results in formal policy, regulations or legislation which is posted to an updated website.
  11. In the distant past three FTEs were devoted to Marine Plant issues alone . This is a neglected area and our year to year understanding of the kelp biomass (for instance) is inadequate for management and consultations.
  12. This is not an opportunity to drop e-licensing. It is still needed for shellfish/freshwater/commercial/first nations consultations etc. and will improve the client support, efficiency etc. Sixteen years of delay in this program has helped us arrive at our present position.

Now Therefore;

A Draft Organization Chart has been developed based on the following principles

No increase in budget expenditures

Maintenance of most of the present positions in Operations so there can be increased emphasis on neglected but significant areas of responsibility.

One Branch.

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## RESPONDING TO HINKSON DECISION

Sept 25, 2009

Information gathering, analysis (shared with DFO)	March-May	✓ Continuing
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**ISSUE: British Columbia Supreme Court ruling that marine finfish aquaculture is a matter of federal jurisdiction.**

**BACKGROUND:**

- In February 2009, Justice Hinkson of the BC Supreme Court ruled that finfish (primarily salmon) aquaculture is a fishery and should be under federal jurisdiction.
- The Court upheld the Province's right to provide land tenure for aquaculture operations under the *Land Act*. Provincial marine finfish aquaculture legislation will be valid until February 9, 2010.
- The Province did not appeal the ruling but started informal discussions with Fisheries and Oceans Canada on possible new management options.
- Marine Harvest Canada is appealing the decision. The Court of Appeal is unlikely to render a decision before December 2009. The Ministry of Attorney General assessment is that a complete reversal of the Hinkson J. decision is unlikely.
- Fisheries and Oceans is expecting instructions from their Cabinet to guide negotiations with the Province imminently. It is clear that the federal government will play a greater role in future management than it does currently.

**CROSS JURISDICTIONAL COMPARISON:**

- Other coastal provinces are interested in the outcome of this issue and have requested regular briefings on the matter.

**PROGRAM EXPENDITURE / REVENUE IMPLICATION:**

- In BC, marine finfish aquaculture generates approximately \$500 million and shellfish \$40 million annually. The industry directly employs over 3,000 people (over \$75 million in wages and benefits).
- Approximate provincial revenue from aquaculture in 2008 was \$2.23 million: \$1.5 million land tenure fees (finfish, \$1 million; shellfish, \$500,000), \$680,000 waste management fees and \$50,000 aquaculture licences.
- The total cost of the Provincial Aquaculture Program is estimated to be \$6 million, with 51 full-time-equivalents. Program functions currently include:
  - Crown land administration for aquaculture;
  - Licensing of fish processing, sales in BC and wild commercial oyster harvest; and.
  - Aquaculture policy, licencing and management.
- The first two functions, which include obligations to consult with First Nations, are not directly affected by the Hinkson decision. A diminished role in marine finfish aquaculture will result in an approximate one third reduction in program expenditures

Approved by:	Prepared by:	Alternate Contact:
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**RECOMMENDED RESPONSE:**

- **The British Columbia Supreme Court ruled that the activity of marine finfish aquaculture is a fishery and therefore a matter of federal jurisdiction.**
- **The decision did not strike down all British Columbia aquaculture-related legislation, as the Province continues to be responsible for land tenure for aquaculture, licencing shellfish and freshwater aquaculture and the licensing of fish processing and sales in British Columbia.**
- **As a result, the management of coastal finfish aquaculture remains shared but the balance of responsibility to manage the operational aspects of coastal finfish aquaculture has shifted towards the federal government.**
- **A new approach to aquaculture management with clearly defined provincial and federal roles and responsibilities is needed to fulfill the court's instructions. Full engagement will occur once Fisheries and Oceans Canada receives instructions from their government.**

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## RESPONDING TO HINKSON DECISION

October 9,  
2009

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Brief TB staff, Cabinet Secretariat	Mid-May?	✓ Complete (Pam Shatzko)
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<i>Marine Harvest Canada (MHC) to submit documents for appeal</i>	<i>Mid-May</i>	May 6: Appeal filed; June 19: factum filed - BCMAG <u>may</u> file factum
Submission framework: advise from MARR, MAG, ILMB, MoE	May 4	✓ Complete
Investigate management options (jointly with MoE and federal government)	April-June	On schedule

## RESPONDING TO HINKSON DECISION

October 16,  
2009

Cooperatively develop Options & Implications Paper (federal and provincial)	May 11	✓ Complete
Obtain legal advice re scope of decision's effect	May 11	✓ Consider all aquaculture activities
Information gathering, analysis (shared with DFO)	March-May	✓ Continuing
Response to court decision - seek direction from Cabinet	March	✓ return for mandate to negotiate

CONFIDENTIAL



## MINISTRY OF AGRICULTURE AND LANDS: REVERSE TIMELINE

The following timeline is informed by several assumptions: that aquaculture will continue to be an important economic activity in BC post-Hinkson; that it is in the public interest for appropriate controls to be in place for the protection of the ecosystem and to ensure sustainable development and operation of aquaculture; that BC will continue to administer aquaculture land tenure under the BC Land Act and that Canada will provide regulatory oversight through a new BC Aquaculture Regulation under the Fisheries Act.

## DECISION-MAKING PROCESS: INTERNAL MILESTONES

Provincial Government Milestones	Deadline	Status
Suspension of Decision ends - Implement new management regime	Feb 09 2010	May need to revisit if court provides an extension and federal government is not in a position to assume responsibility.
Court decision on extension of suspension	<del>December</del> / <del>January</del>	
Court decision likely on MHC appeal	<del>December?</del>	Not likely to reverse Hinkson decision <u>Court of Appeal re-directed question back to Hinkson J. Court of Appeal's reasons expected by end of Nov. Cannot estimate timing of Hinkson J's response until we know what he has been asked by Court of Appeal.</u>
<u>Possible return to Cabinet regarding scope of transfer of authority</u> <u>Approach ratified by Cabinet?</u>	<u>December</u> <del>October</del>	<u>Likely not required</u> <u>Decision to return to Cabinet predicated on federal position</u>
Request extension of suspension (if required): Lead by DFO	<del>Mid-Oct</del> <u>Nov/Dec</u>	Awaiting federal direction
Conclude negotiations: Agreement in Principle between governments on new approach	November/ <u>December</u>	Date may need to be reassessed due to delay in Federal Cabinet direction. <u>May need to be changed depending on scope of federal responsibilities agreed to</u>
<del>Briefings with Minister, DMs, TB/Cabinet staff, MLAs, GCCNRE</del>	<del>Sept/Oct</del>	<del>Not necessary</del>
<del>Discussions with DFO re: possible extension of suspension</del>	<del>October</del> <u>Sept</u>	<del>Delayed</del>
Legal advice to guide negotiations	Ongoing	MAG <del>fully</del> -engaged
Inter- provincial agency collaboration on approach	Ongoing	Collaborative established
Begin negotiating management agreement	<del>September-</del> October	<u>Start October 27th</u> <u>Delay due to feds not getting a mandate.</u>
<del>Draft negotiation framework</del>		<del>Delayed due to lack of federal mandate</del>
Federal negotiation mandate	<u>Mid October</u>	<u>DFO provided mandate</u> <u>Deputy Ministers met October 15th</u>
Direction from Cabinet	August 19	Late August

# RESPONDING TO HINKSON DECISION

October 23,  
2009

Cabinet Submission	August 18	✓ CS signed by Minister
Brief TB staff, Cabinet Secretariat	Mid-May?	✓ Complete (Pam Shatzko)
MAL DM to brief DMs of MAG, Community Services, MoE, MARR (possibly IGR Secretariat) – policy decisions	Mid-May	✓ Complete
<i>Marine Harvest Canada (MHC) to submit documents for appeal</i>	<i>Mid-May</i>	May 6: Appeal filed; June 19: factum filed - BCMAG <u>may</u> file factum
Submission framework: advise from MARR, MAG, ILMB, MoE	May 4	✓ Complete
Investigate management options (jointly with MoE and federal government)	April-June	On schedule
Cooperatively develop Options & Implications Paper (federal and provincial)	May 11	✓ Complete
Obtain legal advice re scope of decision's effect	May 11	✓ Consider all aquaculture activities
Information gathering, analysis (shared with DFO)	March-May	✓ Continuing
Response to court decision - seek direction from Cabinet	March	✓ return for mandate to negotiate

## MINISTRY OF AGRICULTURE AND LANDS: REVERSE TIMELINE

The following timeline is informed by several assumptions: that aquaculture will continue to be an important economic activity in BC post-Hinkson; that it is in the public interest for appropriate controls to be in place for the protection of the ecosystem and to ensure sustainable development and operation of aquaculture; that BC will continue to administer aquaculture land tenure under the BC *Land Act* and that Canada will provide regulatory oversight through a new BC Aquaculture Regulation under the *Fisheries Act*.

## DECISION-MAKING PROCESS: INTERNAL MILESTONES

Provincial Government Milestones	Deadline	Status
Suspension of Decision ends - Implement new management regime	Feb 09 2010	May need to revisit if court provides an extension and federal government is not in a position to assume responsibility. <u>Likely that this deadline will not be met given scope of work required.</u>
Court decision on extension of suspension	December/January	
Court decision likely on MHC appeal	December?	Not likely to reverse Hinkson decision Court of Appeal re-directed question back to Hinkson J. Court of Appeal's reasons expected by end of Nov. Cannot estimate timing of Hinkson J's response until we know what he has been asked by Court of Appeal.
Possible return to Cabinet regarding scope of transfer of authority	December	Decision to return to Cabinet predicated on federal position
Request extension of suspension (if required): Lead by DFO	Nov/Dec	<u>Federal government will seek extension in November</u> <u>Awaiting federal direction</u>
Conclude negotiations: Agreement in Principle between governments on new approach	November/December	Date may need to be reassessed due to delay in Federal Cabinet direction. May need to be changed depending on scope of federal responsibilities agreed to
Discussions with DFO re: possible extension of suspension	October	<u>Meeting held with DFO to discuss in general a path forward on Oct 27</u>
Legal advice to guide negotiations	Ongoing	MAG engaged
Inter- provincial agency collaboration on approach	Ongoing	Collaborative established
Begin negotiating management agreement	October	Start October 27th
Federal negotiation mandate	Mid October	DFO provided mandate
Direction from Cabinet	August 19	Late August
Cabinet Submission	August 18	✓ CS signed by Minister
Brief TB staff, Cabinet Secretariat	Mid-May?	✓ Complete (Pam Shatzko)
MAL DM to brief DMs of MAG, Community Services, MoE, MARR (possibly	Mid-May	✓ Complete

- For Discussion Purposes Only -

## RESPONDING TO HINKSON DECISION

October 30,  
2009

IGR Secretariat) – policy decisions		
<i>Marine Harvest Canada (MHC) to submit documents for appeal</i>	<i>Mid-May</i>	May 6: Appeal filed; June 19: factum filed - BCMAG <u>may</u> file factum
Submission framework: advise from MARR, MAG, ILMB, MoE	May 4	✓ Complete
Investigate management options (jointly with MoE and federal government)	April-June	On schedule
Cooperatively develop Options & Implications Paper (federal and provincial)	May 11	✓ Complete
Obtain legal advice re scope of decision's effect	May 11	✓ Consider all aquaculture activities
Information gathering, analysis (shared with DFO)	March-May	✓ Continuing
Response to court decision - seek direction from Cabinet	March	✓ return for mandate to negotiate

**ISSUE: Provincial Actions in Response to British Columbia Supreme Court ruling that marine finfish aquaculture is a matter of federal jurisdiction.**

**BACKGROUND:.**

- In February 2009, Justice Hinkson of the British Columbia Supreme Court ruled that finfish (primarily salmon) aquaculture is a fishery and should be under federal jurisdiction.
- The Province did not appeal the ruling but started informal discussions with Fisheries and Oceans Canada on possible new management options.
- In a September 18, 2009 letter to Minister Thomson, Lana Popham, MLA (Saanich South) expressed criticism based on a perceived lack of activity by the Province in implementing the Court decision.
- MLA Popham stated: "...there has been little discernable action taken. No one, it seems, is taking responsibility for monitoring open net fish farms or enforcing any regulations."
- In reply, Minister Thomson confirmed that the current Provincial regulatory scheme will remain in effect until February 9, 2010 and that governments have been working to ensure that there will be no regulatory gap. Work began immediately and continues, to ensure a smooth transition.
- Anticipating that this might matter might form the basis for a line of questioning during Estimates debate, a comprehensive summary of the work that has been done to date is attached to this note.

**CROSS JURISDICTIONAL COMPARISON:**

- Other coastal provinces are interested in the outcome of this issue and have requested regular briefings on the matter.

**PROGRAM EXPENDITURE / REVENUE IMPLICATION:**

- In BC, marine finfish aquaculture generates approximately \$500 million and shellfish \$40 million annually. The industry directly employs over 3,000 people (over \$75 million in wages and benefits).
- Approximate provincial revenue from aquaculture in 2008 was \$2.23 million: \$1.5 million land tenure fees (finfish, \$1 million; shellfish, \$500,000), \$680,000 waste management fees and \$50,000 aquaculture licences.
- The total cost of the Provincial Aquaculture Program is estimated to be \$6 million, with 51 full-time-equivalents. Program functions currently include:
  - Crown land administration for aquaculture;
  - Licensing of fish processing, sales in BC and wild commercial oyster harvest; and.
  - Aquaculture policy, licencing and management.

Approved by:	Prepared by:	Alternate Contact:
ADM: Harvey Sasaki	Name: Gavin Last	Name: Al Castledine
ADM Approved: October 2, 2009	Branch: Aquaculture Policy	Branch: Aquaculture Policy
Phone: 250-356-1122	Phone: 250 356-7640	Phone: 250 387-9574
Cell: 250-213-9929	Cell: 250 889-2223	Cell: 250 480-9100



**RECOMMENDED RESPONSE:**

- **The British Columbia Supreme Court ruled that marine finfish aquaculture is a fishery and therefore a matter of federal jurisdiction.**
- **The decision did not strike down all British Columbia aquaculture-related legislation. The Province will continue to issue land tenures for aquaculture, and to licence shellfish, freshwater aquaculture, fish processing and sales in British Columbia.**
- **A new approach to aquaculture management with clearly defined provincial and federal roles and responsibilities is needed to fulfill the court's instructions. Full engagement will occur once Fisheries and Oceans Canada receives instructions from their government.**
- **Provincial marine finfish aquaculture legislation is valid and in effect until February 9, 2010.**
- **British Columbians can be confident that the established comprehensive regulatory regime is continuing to provide a high level of protection for wild stocks up until that time, as it has for many years.**
- **The Province will continue to regulate, licence and tenure marine finfish aquaculture under the current framework and make decisions when appropriate until February 2010 when the Province will cease to regulate marine finfish aquaculture.**
- **Both governments have been working to ensure that there will be no regulatory gap and that protection of the ecosystem and wild fish will not be compromised.**
- **Discussions on a "without prejudice" basis commenced without delay following the release of the decision and the work of ensuring a smooth transition continues to move forward at this moment.**
- **The Province is awaiting federal government authorities to advance discussions.**

## MINISTRY OF AGRICULTURE AND LANDS: REVERSE TIMELINE

The following timeline is informed by several assumptions: that aquaculture will continue to be an important economic activity in BC post-Hinkson; that it is in the public interest for appropriate controls to be in place for the protection of the ecosystem and to ensure sustainable development and operation of aquaculture; that BC will continue to administer aquaculture land tenure under the BC *Land Act* and that Canada will provide regulatory oversight through a new BC Aquaculture Regulation under the *Fisheries Act*.

## DECISION-MAKING PROCESS: INTERNAL MILESTONES

Provincial Government Milestones	Deadline	Status
Suspension of Decision ends - Implement new management regime	Feb 09 2010	May need to revisit if court provides an extension and federal government is not in a position to assume responsibility. Likely that this deadline will not be met given scope of work required.
Court decision on extension of suspension	<del>November/December</del> December/January	
Court decision likely on MHC appeal	December?	Not likely to reverse Hinkson decision Court of Appeal re-directed question back to Hinkson J. Court of Appeal's reasons expected by end of Nov. Cannot estimate timing of Hinkson J's response until we know what he has been asked by Court of Appeal.
Possible return to Cabinet regarding scope of transfer of authority <u>and possible provincial costs for management past Feb 2010</u>	December	Decision to return to Cabinet predicated on federal position
Request extension of suspension (if required): Lead by DFO	Nov/Dec	Federal government will seek extension in November
Conclude negotiations: Agreement in Principle between governments on new approach	November/December	Date may need to be reassessed due to delay in Federal Cabinet direction. May need to be changed depending on scope of federal responsibilities agreed to
Discussions with DFO re: possible extension of suspension	October	Meeting held with DFO to discuss in general a path forward on Oct 27
Legal advice to guide negotiations	Ongoing	MAG engaged
Inter- provincial agency collaboration on approach	Ongoing	Collaborative established
Begin negotiating management agreement	October	Start October 27th
Federal negotiation mandate	Mid October	✓ DFO provided mandate
Direction from Cabinet	August 19	✓ Late August
Cabinet Submission	August 18	✓ CS signed by Minister
Brief TB staff, Cabinet Secretariat	Mid-May?	✓ Complete (Pam Shatzko)
MAL DM to brief DMs of MAG, Community Services, MoE, MARR (possibly	Mid-May	✓ Complete



## RESPONDING TO HINKSON DECISION

November 6,  
2009

IGR Secretariat) – policy decisions		
<i>Marine Harvest Canada (MHC) to submit documents for appeal</i>	<i>Mid-May</i>	May 6: Appeal filed; June 19: factum filed - BCMAG <u>may</u> file factum
Submission framework: advise from MARR, MAG, ILMB, MoE	May 4	✓ Complete
Investigate management options (jointly with MoE and federal government)	April-June	On schedule
Cooperatively develop Options & Implications Paper (federal and provincial)	May 11	✓ Complete
Obtain legal advice re scope of decision's effect	May 11	✓ Consider all aquaculture activities
Information gathering, analysis (shared with DFO)	March-May	✓ Continuing
Response to court decision - seek direction from Cabinet	March	✓ return for mandate to negotiate

**Ministry of Agriculture and Lands**  
**BRIEFING NOTE FOR DEPUTY MINISTER FOR INFORMATION**

Ref: 168324

Date: November 4, 2009

**Issue:** Federal Mandate in Response to Hinkson J Decision.

**Background:** We have been informed that the federal mandate is to include all forms of aquaculture in negotiation. This is at odds with direction provided to the Ministry of Agriculture and Lands regarding retention of management authority for shellfish and land-based (freshwater) aquaculture but relinquishing authority for marine finfish aquaculture. Broadly, the argument for federal assumption of control over shellfish is partly grounded in the 1912 delegation of authority to BC to manage the wild oyster fishery (which Hinkson agreed was done properly). If Canada were to rescind this delegation, they believe that they would then resume their jurisdiction over that “fishery”, including culture of shellfish generally by extension of the Hinkson decision. The Ministry of Attorney General (MAG) view is that the above argument is tenuous. Of equal significance is ascertaining how broadly the federal government intends to stretch the definition of “fishery” to include activities such as shellfish and freshwater aquaculture.

**First Nations Considerations:** On October 21, the Union of British Columbia Indian Chiefs (UBCIC) formally requested that senior officials from Ministry of Agriculture and Lands and the Department of Fisheries and Oceans Canada meet with the First Nations Fisheries Council and the Aquaculture Working Group to discuss the proposed change of jurisdiction of the aquaculture industry from the Province to the Federal Government and ensure that First Nations are full participants on a government-to-government level in these jurisdictional discussions.

s.16

**Next Steps:**

- Review MAG legal summary and exchange with DFO for the Department of Justice legal summary.
- Assess the relative strength of the federal and provincial positions.
- Develop a draft Memorandum of Understanding that identifies the differing views on scope and review these differences with the Minister for decision on whether, when and how to proceed to Cabinet to reconsider the provincial direction.

Contact: Al Castledine, Aquaculture Policy, 250 387-9574

DIR \_\_\_\_\_ ADM \_\_\_\_\_

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**CONFIDENTIAL**

**Ministry of Agriculture and Lands**  
**BRIEFING NOTE FOR MINISTER FOR INFORMATION**

Ref: 168321

Date: November 4, 2009

**Issue:** Federal government intends to seek an extension to the period of suspension of BC Supreme Court decision on aquaculture jurisdiction.

**Background:**

In February 2009, Justice Hinkson of the BC Supreme Court ruled that finfish aquaculture is a fishery and should be under federal jurisdiction.

Justice Hinkson ruled that the affected provincial legislation governing management of salmon farming would remain in place until February 9, 2010 at which time it would become without effect.

During the period of suspended judgement the Province continues to be responsible for marine finfish aquaculture regulation and related decision-making.

On October 27, 2009 ADM Sasaki and MAL staff met with Fisheries and Oceans Canada (DFO) in Victoria and learned that the federal government intends to seek an extension to the period of suspended judgment until December 18, 2010.

**First Nations Considerations:**

On October 21, the Union of British Columbia Indian Chiefs (UBCIC) formally requested that senior officials from Ministry of Agriculture and Lands and the Department of Fisheries and Oceans Canada meet with the First Nations Fisheries Council and the Aquaculture Working Group to discuss the proposed change of jurisdiction of the aquaculture industry from the Province to the Federal Government and ensure that First Nations are full participants on a government-to-government level in these jurisdictional discussions.

**Discussion:**

s.16

**Summary:**

- DFO is planning to apply to the BC Supreme Court to extend the suspension of Hinkson, J.'s decision until December 18, 2010. They have yet to approach the Ministry of Attorney General for an indication of support for the motion. The Ministry of Attorney General is uncertain that the federal government has the necessary standing in the proceeding to apply for the extension.
- DFO has signaled this intention to other parties, industry, eNGOs and First Nations.
- If successful, it will be important to ensure that a "regulatory void" is not created. This will mean that the Province will have to consider continuing its services for another fiscal year. It is not clear at this time as to whether or not the federal government is willing to share in the provincial costs to continue beyond February 9, 2010.
- Provincial aquaculture staff are being told that we expect DFO to ask for an extension. It is unknown whether the courts will grant an extension, or if so, for how long.

Contact: Gavin Last, Assistant Director Aquaculture Policy Branch, 356-7640

DIR \_\_\_\_\_ ADM \_\_\_\_\_ DM \_\_\_\_\_

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**CONFIDENTIAL**

## MINISTRY OF AGRICULTURE AND LANDS: REVERSE TIMELINE

The following timeline is informed by several assumptions: that aquaculture will continue to be an important economic activity in BC post-Hinkson; that it is in the public interest for appropriate controls to be in place for the protection of the ecosystem and to ensure sustainable development and operation of aquaculture; that BC will continue to administer aquaculture land tenure under the BC *Land Act* and that Canada will provide regulatory oversight through a new BC Aquaculture Regulation under the *Fisheries Act*.

## DECISION-MAKING PROCESS: INTERNAL MILESTONES

Provincial Government Milestones	Deadline	Status
Suspension of Decision ends - Implement new management regime	Feb 09 2010	May need to revisit if court provides an extension and federal government is not in a position to assume responsibility. Likely that this deadline will not be met given scope of work required
Court decision on extension of suspension	November/December	<u>Hearing date December 21</u>
Court decision likely on MHC appeal	December?	Not likely to reverse Hinkson decision Court of Appeal re-directed question back to Hinkson J. Court of Appeal's reasons expected by end of Nov. Cannot estimate timing of Hinkson J's response until we know what he has been asked by Court of Appeal. <u>May also be heard same time as extension application on Dec 21</u>
Possible return to Cabinet regarding scope of transfer of authority and possible provincial costs for management past Feb 2010	December	Decision to return to Cabinet predicated on federal position
Request extension of suspension (if required): Lead by DFO	Nov/Dec	Federal government <u>will seek extension in November</u> applied for extension on October 9.
Conclude negotiations: Agreement in Principle between governments on new approach	November/December	Date may need to be reassessed due to delay in Federal Cabinet direction. May need to be changed depending on scope of federal responsibilities agreed to
Discussions with DFO re: possible extension of suspension	October	✓ <u>Complete, application Oct 9.</u> Meeting held with DFO to discuss in general a path forward on Oct 27
Legal advice to guide negotiations	Ongoing	MAG engaged
Inter- provincial agency collaboration on approach	Ongoing	Collaborative established
Begin negotiating management agreement	October	Start October 27 <sup>th</sup> , <u>2<sup>nd</sup> meeting Nov 23-24</u>
Federal negotiation mandate	Mid October	✓ DFO provided mandate

# RESPONDING TO HINKSON DECISION

November 20,  
2009

Direction from Cabinet	August 19	✓ Late August
Cabinet Submission	August 18	✓ CS signed by Minister
Brief TB staff, Cabinet Secretariat	Mid-May?	✓ Complete (Pam Shatzko)
MAL DM to brief DMs of MAG, Community Services, MoE, MARR (possibly IGR Secretariat) – policy decisions	Mid-May	✓ Complete
<i>Marine Harvest Canada (MHC) to submit documents for appeal</i>	<i>Mid-May</i>	May 6: Appeal filed; June 19: factum filed <u>July 16, Respondent's (Morton et al) factum. August 10, MAG &amp; AGBC factum -August 18, Appellant's (Marine Harvest) reply (to the Respondents) factum September 16, Canada's factum. Oct 21, matter remitted to Hinkson J. Hearing scheduled Dec 21. BCMAG may file factum</u>
Submission framework: advise from MARR, MAG, ILMB, MoE	May 4	✓ Complete
Investigate management options (jointly with MoE and federal government)	April-June	On schedule
Cooperatively develop Options & Implications Paper (federal and provincial)	May 11	✓ Complete
Obtain legal advice re scope of decision's effect	May 11	✓ Consider all aquaculture activities
Information gathering, analysis (shared with DFO)	March-May	✓ Continuing
Response to court decision - seek direction from Cabinet	March	✓ return for mandate to negotiate



## MINISTRY OF AGRICULTURE AND LANDS: REVERSE TIMELINE

The following timeline is informed by several assumptions: that aquaculture will continue to be an important economic activity in BC post-Hinkson; that it is in the public interest for appropriate controls to be in place for the protection of the ecosystem and to ensure sustainable development and operation of aquaculture; that BC will continue to administer aquaculture land tenure under the BC *Land Act* and that Canada will provide regulatory oversight through a new BC Aquaculture Regulation under the *Fisheries Act*.

## DECISION-MAKING PROCESS: INTERNAL MILESTONES

Provincial Government Milestones	Deadline	Status
Suspension of Decision ends - Implement new management regime	Feb 09 2010	May need to revisit if court provides an extension and federal government is not in a position to assume responsibility. Likely that this deadline will not be met given scope of work required
<i>Court decision on extension of suspension</i>	<i>November/December</i>	<i>Hearing date December 21</i>
<i>Court decision likely on MHC appeal</i>	<i>December?</i>	<i>Not likely to reverse Hinkson decision Court of Appeal re-directed question back to Hinkson J. Court of Appeal's reasons expected by end of Nov. Cannot estimate timing of Hinkson J's response until we know what he has been asked by Court of Appeal. May also be heard same time as extension application on Dec 21</i>
Possible return to Cabinet regarding scope of transfer of authority and possible provincial costs for management past Feb 2010	December	Decision to return to Cabinet predicated on federal position
<i>Request extension of suspension (if required): Lead by DFO</i>	<i>Nov/Dec</i>	<i>Federal government applied for extension on October 9.</i>
Conclude negotiations: Agreement in Principle between governments on new approach	November/December	Date may need to be reassessed due to delay in Federal Cabinet direction. May need to be changed depending on scope of federal responsibilities agreed to
<i>Discussions with DFO re: possible extension of suspension</i>	<i>October</i>	<i>✓ Complete, application Oct 9. Meeting held with DFO to discuss in general a path forward on Oct 27</i>
Legal advice to guide negotiations	Ongoing	MAG engaged
Inter- provincial agency collaboration on approach	Ongoing	Collaborative established
Begin negotiating management agreement	October	Start October 27 <sup>th</sup> , 2 <sup>nd</sup> meeting Nov 23-24
Federal negotiation mandate	Mid October	✓ DFO provided mandate
Direction from Cabinet	August 19	✓ Late August

## RESPONDING TO HINKSON DECISION

November 27,  
2009

Cabinet Submission	August 18	✓ CS signed by Minister
Brief TB staff, Cabinet Secretariat	Mid-May?	✓ Complete (Pam Shatzko)
MAL DM to brief DMs of MAG, Community Services, MoE, MARR (possibly IGR Secretariat) – policy decisions	Mid-May	✓ Complete
<i>Marine Harvest Canada (MHC) to submit documents for appeal</i>	<i>Mid-May</i>	May 6: Appeal filed; June 19: factum filed July 16, Respondent's (Morton et al) factum. August 10, MAG & AGBC factum August 18, Appellant's (Marine Harvest) reply (to the Respondents) factum September 16, Canada's factum. Oct 21, matter remitted to Hinkson J. Hearing scheduled Dec 21.
Submission framework: advise from MARR, MAG, ILMB, MoE	May 4	✓ Complete
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Cooperatively develop Options & Implications Paper (federal and provincial)	May 11	✓ Complete
Obtain legal advice re scope of decision's effect	May 11	✓ Consider all aquaculture activities
Information gathering, analysis (shared with DFO)	March-May	✓ Continuing
Response to court decision - seek direction from Cabinet	March	✓ return for mandate to negotiate



**Ministry of Agriculture and Lands**  
**BRIEFING NOTE FOR MINISTER FOR INFORMATION**

Ref: 168477

Date: November 18, 2009

**Issue:** UPDATE federal request for extension of stay of Hinkson decision.

**Background:**

On November 9, Canada filed an application in BC Supreme Court requesting an extension until December 18, 2010 of the stay of Hinkson J.'s decision regarding finfish aquaculture.

The extension is required by Canada because one year is not long enough to affect a regulatory transition given: the number and varying types of authorizations involved; the large number of operating sites and the high degree of potential impact of a gap in proper governance. Secondly, Canada is developing a regulation for BC aquaculture under their *Fisheries Act* that requires public consultation which will be difficult to complete in a satisfactory way under the existing deadline. Discussions with First Nations alone will demand significantly more time than is currently available. Finally, DFO requires more time given the logistics of staffing and resourcing the transition.

**First Nations Considerations:**

Counsel for the Petitioners (Morton and others) communicated informally that other parties—which may include First Nations—may be interested in appearing before the court in order to make submissions regarding placing restrictive conditions on an extension of the stay of decision.

**Discussion:**

s.14; s.16

**Next Steps:**

Determine and communicate to MAG counsel the Ministry's response to the Petitioners' proposed condition on the extension.

MAG will prepare and submit an argument saying generally that there may be some mischaracterizations of the position of the province, or of our understanding of the effect of the decision but that these are nonetheless irrelevant for purposes of an extension and signal support for the extension application.

Contact: Gavin Last, Assistant Director Aquaculture Policy Branch, 356-7640

DIR AC ADM HS DM

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**CONFIDENTIAL**

## MINISTRY OF AGRICULTURE AND LANDS: REVERSE TIMELINE

The following timeline is informed by several assumptions: that aquaculture will continue to be an important economic activity in BC post-Hinkson; that it is in the public interest for appropriate controls to be in place for the protection of the ecosystem and to ensure sustainable development and operation of aquaculture; that BC will continue to administer aquaculture land tenure under the BC *Land Act* and that Canada will provide regulatory oversight through a new BC Aquaculture Regulation under the *Fisheries Act*.

## DECISION-MAKING PROCESS: INTERNAL MILESTONES

Provincial Government Milestones	Deadline	Status
Suspension of Decision ends - Implement new management regime	Feb 09 2010	May need to revisit if court provides an extension and federal government is not in a position to assume responsibility. Likely that this deadline will not be met given scope of work required
<i>Court decision on extension of suspension</i>	<i>November/December</i>	<i>Hearing date December 21</i>
<i>Court decision likely on MHC appeal</i>	<i>December?</i>	<i>Not likely to reverse Hinkson decision Court of Appeal re-directed question back to Hinkson J. Court of Appeal's reasons expected by end of Nov. Cannot estimate timing of Hinkson J's response until we know what he has been asked by Court of Appeal. May also be heard same time as extension application on Dec 21</i>
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<i>Discussions with DFO re: possible extension of suspension</i>	<i>October</i>	<i>✓ Complete, application Oct 9. Meeting held with DFO to discuss in general a path forward on Oct 27</i>
Legal advice to guide negotiations	Ongoing	MAG engaged
Inter- provincial agency collaboration on approach	Ongoing	Collaborative established
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Federal negotiation mandate	Mid October	✓ DFO provided mandate
Direction from Cabinet	August 19	✓ Late August

## RESPONDING TO HINKSON DECISION

December 4,  
2009

Cabinet Submission	August 18	✓ CS signed by Minister
Brief TB staff, Cabinet Secretariat	Mid-May?	✓ Complete (Pam Shatzko)
MAL DM to brief DMs of MAG, Community Services, MoE, MARR (possibly IGR Secretariat) – policy decisions	Mid-May	✓ Complete
<i>Marine Harvest Canada (MHC) to submit documents for appeal</i>	<i>Mid-May</i>	May 6: Appeal filed; June 19: factum filed July 16, Respondent's (Morton et al) factum. August 10, MAG & AGBC factum August 18, Appellant's (Marine Harvest) reply (to the Respondents) factum September 16, Canada's factum. Oct 21, matter remitted to Hinkson J. Hearing scheduled Dec 21.
Submission framework: advise from MARR, MAG, ILMB, MoE	May 4	✓ Complete
Investigate management options (jointly with MoE and federal government)	April-June	On schedule
Cooperatively develop Options & Implications Paper (federal and provincial)	May 11	✓ Complete
Obtain legal advice re scope of decision's effect	May 11	✓ Consider all aquaculture activities
Information gathering, analysis (shared with DFO)	March-May	✓ Continuing
Response to court decision - seek direction from Cabinet	March	✓ return for mandate to negotiate

## MINISTRY OF AGRICULTURE AND LANDS: REVERSE TIMELINE

The following timeline is informed by several assumptions: that aquaculture will continue to be an important economic activity in BC post-Hinkson; that it is in the public interest for appropriate controls to be in place for the protection of the ecosystem and to ensure sustainable development and operation of aquaculture; that BC will continue to administer aquaculture land tenure under the BC *Land Act* and that Canada will provide regulatory oversight through a new BC Aquaculture Regulation under the *Fisheries Act*.

## DECISION-MAKING PROCESS: INTERNAL MILESTONES

Provincial Government Milestones	Deadline	Status
Suspension of Decision ends - Implement new management regime	Feb 09 2010	May need to revisit if court provides an extension and federal government is not in a position to assume responsibility. Likely that this deadline will not be met given scope of work required
<i>Court decision on extension of suspension</i>	<i>December</i>	<i>Hearing date December 21</i>
<i>Court decision likely on MHC appeal</i>	<i>December?</i>	<i>Not likely to reverse Hinkson decision. Court of Appeal re-directed question back to Hinkson J. Court of Appeal's reasons expected by end of Nov. Cannot estimate timing of Hinkson J's response until we know what he has been asked by Court of Appeal. May also be heard same time as extension application on Dec 21</i>
Possible return to Cabinet regarding scope of transfer of authority and possible provincial costs for management past Feb 2010	<u>Nov'09 to DecemberSpring 2010</u>	Decision to return to Cabinet predicated on federal position – <u>Drafting of CS underway – penultimate draft expected by Jan 29 2010</u>
<i>Request extension of suspension (if required): Lead by DFO</i>	<i>Nov/Dec</i>	<i>Federal government applied for extension on October 9.</i>
<i>Conclude negotiations: Agreement in Principle between governments on new approach federal/provincial MOU on Aquaculture Management</i>	<i>Nov/Dec</i>	<i>Date <del>is being</del> may need to be reassessed due to delay in Federal Cabinet direction and federal position on scope of the Hinkson decision. May need to be changed depending on scope of federal responsibilities agreed to – Expected to finalize MOU by late spring</i>
<i>Request extension of suspension (if required): Lead by DFO</i>	<i>Nov/Dec</i>	<i>✓ Federal government applied for extension <u>to Dec 18 2010</u> on October 9.</i>
<i>Discussions with DFO re: possible extension of suspension</i>	<i>October</i>	<i>✓ <u>Complete, application Oct 9.</u> Meeting held with DFO to discuss in general a path forward on Oct 27</i>
Legal advice to guide negotiations	Ongoing	MAG engaged
Inter- provincial agency collaboration on approach	Ongoing	Collaborative established
Begin negotiating management agreement	October	Start October 27 <sup>th</sup> , 2 <sup>nd</sup> meeting Nov 23-24
Federal negotiation mandate	Mid October	✓ DFO provided mandate
Direction from Cabinet	August 19	✓ Late August
Cabinet Submission	August 18	✓ CS signed by Minister
Brief TB staff, Cabinet Secretariat	Mid-May?	✓ Complete (Pam Shatzko)

- For Discussion Purposes Only -

## RESPONDING TO HINKSON DECISION

December 11, 2009

MAL DM to brief DMs of MAG, Community Services, MoE, MARR (possibly IGR Secretariat) – policy decisions	Mid-May	✓ Complete
<i>Marine Harvest Canada (MHC) to submit documents for appeal</i>	Mid-May	May 6: Appeal filed; June 19: factum filed July 16, Respondent's (Morton et al) factum. August 10, MAG & AGBC factum August 18, Appellant's (Marine Harvest) reply (to the Respondents) factum September 16, Canada's factum. Oct 21, matter remitted to Hinkson J. Hearing scheduled Dec 21.
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