Federal Court  Cour fédérale

Date: 20120503

Docket: T-70-11

Citation: 2012 FC 517

Ottawa, Ontario, May 3, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

KWICKSUTAINEUK AH-KWA-MISH FIRST NATION

Applicant

and

ATTORNEY GENERAL OF CANADA, MINISTER OF FISHERIES AND OCEANS, MARINE HARVEST CANADA INC. AND EWOS CANADA LTD., DBA MAINSTREAM CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review is a direct consequence of the decision reached by the British Columbia Supreme Court on February 9, 2009 in *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136, 174 ACWS (3d) 103 [*Morton*], wherein it was held that the provincial regulatory regime for aquaculture was constitutionally invalid, and that the activity of finfish

farming is a matter of exclusive federal jurisdiction. The Court struck down the provincial regulatory regime as *ultra vires* the provincial legislature but suspended its decision for 12 months. It was then extended to December 18, 2010 (*Morton v British Columbia (Agriculture and Lands)*, 2010 BCSC 100, 2 BCLR (5th) 306), to allow the federal government time to consider and put into place federal regulatory legislation.

[2] That decision meant that approximately 680 BC provincial aquaculture licences would expire on December 18, 2010 and could not be renewed by the Province. In these circumstances, Canada had 22 months to consult on and implement an entirely new regulatory and licensing regime for aquaculture and take the steps necessary to make decisions on the issuance of federal aquaculture licences effective December 19, 2010.

[3] Following consultation regarding the new regulatory regime and the common terms and conditions that would apply to each new licence, the Department of Fisheries and Oceans' ("DFO") new regulations came into force on December 9, 2010 and most licences were issued effective December 19, 2010.

[4] Pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the Kwicksutaineuk Ah-Kwa-Mish First Nation (the "KAFN" or the "Applicant") has brought this application for judicial review of the decision of DFO to issue finfish aquaculture licences to the two corporate Respondents, Ewos Canada Ltd., dba Mainstream Canada ("Mainstream Canada") and Marine Harvest Canada Inc. ("Marine Harvest").

1. Facts

[5] This application relates to aquaculture in British Columbia, and in particular to salmon aquaculture. The term "aquaculture" refers to the aquatic form of agriculture where stocks are cared for, raised to marketable size, and then harvested for processing, sale and consumption. Finfish are a grouping of vertebrate species that have been successfully domesticated through aquaculture practice. Atlantic salmon are the predominant species grown by Canadian aquaculture.

[6] Salmon aquaculture is a significant contributor to the economy. Salmon farming generates over $50 million in wages annually. In 2007, for example, salmon farming contributed $370 million to the provincial economy (Thomson Affidavit, paras 9-16; Respondent's Record, pp. 359-361).

[7] There appears to be some 28 fish farms in the Broughton Archipelago, which primarily cultivate Atlantic salmon. This Archipelago is located on the West coast of British Columbia, between Kingcome Inlet and Knight Inlet, at the southern extremity of Queen Charlotte Strait, on the South-Central coast of British Columbia, and covers an area of approximately 5,000 square kilometres.

[8] The Burdwood farm site is located in Raleigh Passage, off the Burdwood Group Islands. This operation has a tenure area of 34.33 hectares. The first aquaculture licence was issued by the Province on February 17, 1992. Burdwood was acquired by Mainstream Canada, along with several other sites, from Heritage Salmon Limited in July 2005. It continues to be a producing

aquaculture site and, according to Mainstream Canada, is an integral site for its operations on the East coast of Vancouver Island. The Province had licensed this site for the production of Atlantic salmon to a total maximum production per cycle of 3000 metric tonnes and a maximum net cage area of 12,600 m^2 (Thomson Affidavit, paras 111-112; Jensen Affidavit, paras 10, 17-22, 24 and 81, Ewos Canada Ltd.'s Record).

[9] The Blunden Pass site is located in Blunden Passage off Baker Island. The operation has a tenure area of 16.1 hectares. An aquaculture licence was first issued by the Province on or about February 24, 1993. It was licensed by the Province for the production of Atlantic salmon and black cod to a total maximum production per cycle of 1840 metric tonnes and a maximum net cage area of 7200 m^2. It appears that this site has been fallow since 2003, but is a back-up site and is to be used in order to allow fallowing of other sites.

[10] The Applicant is an Aboriginal group, and an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5, whose traditional territory is within the Broughton Archipelago near Johnstone Strait between mainland British Columbia and Vancouver Island. The KAFN is a member of the Musgamagw Tsawataineuk Tribal Council ("MTTC"), along with the following three First Nations: the Gwawaenuk Tribe, the Namgis First Nation and the Tsawataineuk.

[11] The KAFN has ten Indian reserves within the meaning of the *Indian Act* which are located within the Broughton Archipelago and which are associated with their traditional fishing stations. The KAFN claim that the marine waters within the Broughton Archipelago are their fishing grounds, and that the harvesting of seafood for food, social and ceremonial purposes in this area is

integral to their distinctive culture as an Aboriginal group. Fishing has been the primary occupation of the members of the KAFN since time immemorial. Both before and after contact with Europeans, fishing has been the primary means of sustenance for the KAFN and also of great cultural importance, according to Chief Robert Chamberlin (Applicant's Record, pp. 575-576, at paras 11-14).

[12] The KAFN claim that the abundance and quality of their fishery is in decline, and attribute the decline in part to the presence of salmon farms in their territory. This has been a recurrent theme in the consultation with various Aboriginal groups both by provincial and federal authorities since the introduction of farm fishing. It is argued that at least some of the fish farms, including the Burdwood site, are located on the juvenile out-migration routes of pink and coho salmon stocks traditionally harvested by the KAFN, and which are presently in a depressed state.

[13] The fish farms are floating nets that are secured to the sea floor in deep marine water by anchors and occupy the column of water above their anchors up to the surface of the water. These nets contain hundreds of thousands of fish which are raised from cultivated eggs in a hatchery and are then moved to the nets, where they remain until they are harvested.

[14] The scientific evidence with respect to the environmental and health hazards created by fish farms is obviously the subject of much debate. The Applicant, like many other Aboriginal groups and environmental non-governmental organizations, contend that a large number of Atlantic salmon harvested in these fish farms escape in the Broughton Archipelago and then compete with the wild salmon in the area for wild food. It is also argued that a large amount of waste and floating material

generated by the antibiotics and other drugs that are fed to farm fish leave the nets and have a detrimental effect on the wild salmon. Some scientists are also of the view that aquaculture exacerbates the proliferation of sea lice, which threaten the wild salmon, and that the presence of fish farms interferes with the migratory routes of the wild salmon.

[15] From 1988 (the advent of aquaculture in BC) through February 2009, the Province was generally responsible for overseeing the aquaculture industry's operations pursuant to provincial laws and regulations. Canada had a relatively limited role in regard to aquaculture. DFO, the lead federal agency for aquaculture, was responsible for administering, monitoring and enforcing compliance with federal laws and regulations relating to conservation and protection, environmental and habitat protection, and aquatic animal health. DFO conducted scientific research related to aquaculture policy and carried out initiatives to improve the business climate for aquaculture. Environment Canada, Transport Canada, Health Canada and the Canadian Food Inspection Agency were also involved in various aspects of the regulation of the industry. The respective responsibilities of the Province and Canada were addressed in a 1988 Memorandum of Understanding (Thomson Affidavit, paras 18-24; Respondent's Record, pp. 361-363).

[16] As previously mentioned, the BC Supreme Court held in February 2009 that the regulation of aquaculture was within the federal government's jurisdiction and, as a result, that the provincial regulatory regime was invalid. Following that decision, it was then left to the federal government to establish a new regulatory regime and take the steps necessary to make decisions on the issuance of federal aquaculture licences. The Province retained some authority in regard to the issuance of land

tenures within provincial jurisdiction for the purposes of aquaculture, to set labour safety requirements and to take certain measures respecting business practices.

[17] Counsel for the Respondent DFO claimed that the impact of the *Morton* decision on DFO's involvement with aquaculture was "monumental", and there is no doubt that the development of a new regulatory regime required an extensive amount of work. Not only did it involve the drafting of new aquaculture regulations and three sets of new general aquaculture licence conditions for the main commercial aquaculture categories (marine finfish, shellfish and freshwater), but it also necessitated the negotiation of a new memorandum of understanding with the Province, the creation of an entire regulatory apparatus to administer the new regulations, and the issuance of approximately 680 aquaculture licences.

[18] Concurrently with the development of the new regulations, in 2009 through early 2010, DFO led an extensive consultation process, gathering input from governments and interested parties, including First Nations and other Aboriginal groups, regarding the future development of sustainable aquaculture. DFO held approximately 30 workshops across the country and consulted with over 500 representatives which led to the November 2010 *Strategic Action Plan Initiative 2011-2015 Overarching Document* and five strategic action plans including the *2011-2015 West Coast Marine Finfish Sector Strategic Action Plan.*

[19] These various tasks clearly put DFO and, more generally, the federal government under enormous pressure. The issue to be decided, however, is whether the Crown fulfilled its duty to consult and, if necessary, the duty to accommodate as a result of the consultation undertaken by DFO with the affected First Nations. The following account of the consultation that took place from

the beginning of 2009 until the issuance of the two impugned licences is based on the affidavits filed by Chief Robert Chamberlin, on behalf of the Applicant, and by Andrew Thomson, Director of the Aquaculture Management Division of the Pacific Region for DFO, on behalf of the Minister of Fisheries and Oceans.

[20] DFO's first step in implementing the *Morton* decision was to draft new regulations under the federal *Fisheries* Act, RSC 1985, c F-14. These eventually became the *Pacific Aquaculture Regulations*, SOR/2010-270 [*Regulations*]. According to the Regulatory Impact Analysis Statement (RIAS) published in July 2010 (Thomson Affidavit, Exhibit "C"), meetings were held with all interested and affected parties in developing the new regulatory regime, including BC provincial and municipal governments, First Nations and other stakeholder groups including industry, environmental groups and the general public.

[21] On March 10, 2009, Chief Chamberlin wrote to Paul Sprout, Regional Director General of DFO, notifying DFO that the KAFN had Aboriginal fishing rights that would be impacted by the licensing of aquaculture sites in the Broughton Archipelago, and requesting consultation on that issue. On April 1, 2009, Mr. Sprout responded to Chief Chamberlin's letter and explained that DFO was considering the implications of the *Morton* decision, that DFO recognized any regulatory transition would require consultation, and that it intended to engage in meaningful consultation with First Nations, industry and stakeholders during the transition. The letter specifically stated that DFO intended to provide the KAFN with the opportunity to discuss the management and regulation of aquaculture with DFO representatives.

[22] In order to facilitate consultation with a large number of First Nations, DFO contracted with both the Aboriginal Aquaculture Association and the First Nations Fisheries Council to host meetings with First Nation groups in BC. These meetings were intended to provide information and to elicit First Nations' views on what elements a new regulatory regime for aquaculture should include. The Aboriginal Aquaculture Association was established in 2003 to assist, support and facilitate the meaningful participation of First Nations in sustainable aquaculture development. The First Nations Fisheries Council was appointed by the BC First Nations Leadership Council to address common fisheries issues, priorities and concerns.

[23] In April 2009, DFO entered into an Aboriginal Aquatic Resource and Oceans Management Program Collaborative Management Contribution Agreement with the Aboriginal Aquaculture Association, to support the carrying out of consultations with First Nations regarding aquaculture. DFO also entered into a similar agreement with the Fisheries Council to facilitate the engagement of Aboriginal groups in dialogue around the use of management of aquatic resources and ocean spaces, by way of capacity building and encouraging inter-community dialogue and collaboration. In total, DFO provided $2,143,830 of capacity funding for Aboriginal fisheries programs, including workshops, meetings and consultation on the *Regulations*.

[24] On May 14, 2009, DFO representatives met with the Fisheries Council to discuss the proposed approach for the initial consultation on the *Regulations* and the tight timelines. The Fisheries Council expressed an interest in contributing to the overall process, reviewing the materials for consultation and providing advice.

[25] On June 16 and 17, 2009, DFO hosted meetings in Vancouver and Campbell River to seek First Nations' views on the *Morton* decision. They were looking to obtain advice pertaining to the development of specific consultation protocols and plans for addressing regulatory management proposals and to focus on the options for structuring the aquaculture management regime. Over 32 First Nations, Tribal Councils and First Nation organizations attended these meetings, including Chief Chamberlin and Sandy Johnson of the KAFN, and Brian Wadhams of the MTTC.

[26] On December 10 and 11, 2009, DFO met with BC First Nations and stakeholder groups in Campbell River, BC to gather their input and recommendations on the development of a new regulatory regime for finfish aquaculture. Chief Chamberlin attended both of these meetings. During the meeting, DFO explained the regulatory development process, the principles behind the *Regulations*, the scope of the *Regulations,* licensing and licence conditions, pollution measures, notification and reporting requirements, enforcement, inspections, audits and fees, and operational policies and guidelines.

[27] Additionally, DFO funded a workshop held on December 14, 2009 in Nanaimo by the Aboriginal Aquaculture Association to discuss, among other things, the development of the *Regulations* and to gather input with respect to sustainable aquaculture development. A second workshop was held at the same location on March 30, 2010 to discuss these issues. These workshops were attended by 25 First Nations and four First Nations organizations, and Chief Chamberlin attended both of these meetings.

[28] In February and March 2010, DFO funded the First Nations Fisheries Council to conduct a series of community meetings/dialogue sessions with First Nations, across British Columbia. The purpose of the meetings was to share information and to seek input and guidance from First Nations on the development of a new regulatory regime for aquaculture, on the basis of a Discussion Paper released in November 2009 by DFO, entitled *Federal BC Aquaculture Regulation & Strategic Action Plan Initiative Discussion Document*. Chief Chamberlin attended six of these meetings.

[29] The First Nations Fisheries Council produced a summary report of the March 2, 2010 meeting in Alert Bay. After stating that the Council is not a consultative body and does not act as a consultation body for DFO, and therefore that "…meetings with DFO did not in any legal way constitute consultation", the Report states, among other things:

> The attendees were unanimous that fish farms in their present form are not acceptable within the traditional territories of the First Nations in attendance, regardless of how they are managed. Closed containment fish farms are the only acceptable forms of finfish aquaculture in the First Nations' territories of the Broughton Archipelago. Furthermore, it is disturbing that foreign companies are permitted to operate in First Nation territorial waters without First Nations consent. These are fundamental issues that need to be addressed before there can be meaningful involvement from First Nations in creating an aquaculture regulation. Yet DFO's presentation was limited to the content of the regulation. Later discussion will be held with First Nations on the National Aquaculture Strategy Action Plan Initiative (NASAPI), but DFO's unwillingness to discuss specific issues or how they will be managed on an ongoing basis creates an artificial separation. First Nations want to be involved in the creation of a new aquaculture regulation, but they are not fully confident that their concerns will be taken into account.
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> Record of the Respondent, Attorney General of Canada and Minister of Fisheries and Oceans, vol 3, Affidavit of Andrew Thomson, Exh. V, p 623

[30] The Report goes on to mention the short time frame set by DFO:

> First Nations are not all fully knowledgeable about the subject or the issues. They need time to speak to others, to learn, to build capacity, etc. The timeline proposed by DFO feel [sic] rushed and will not permit First Nations to engage meaningfully. As First Nations have such a high interest in the outcome of the process, DFO should be held to addressing First Nations concerns adequately. In this regard, First Nations need to work together to assemble a set of expectations.
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> *Ibid*

[31] On May 26, 2010, a joint First Nations Fisheries Council/DFO working group was formed, to work on areas of joint interests regarding aquaculture. Andrew Thomson of DFO and Chief Chamberlin were co-chairs of the Aquaculture Working Group. The Working Group met on five occasions between June and December, 2010, to discuss DFO's plans to develop and implement the new regulatory and licensing regime for aquaculture in BC.

[32] In addition to the foregoing consultations, DFO sent a letter to approximately 70 coastal First Nations on July 13, 2010, advising that the new draft aquaculture regulations had been published in the *Canada Gazette Part I*, and inviting comments during the 60-day public review period. This letter outlined, generally, DFO's intended approach to regulating aquaculture. The letter also noted that for any new federal licences to be issued in December 2010, DFO did not intend to make changes to previous approvals, i.e., increases in production, size of existing facilities or permissible species. Rather, the letter noted, such changes would be individually reviewed in future years.

[33] DFO received direct responses to the July 13, 2010 letters from 12 Aboriginal groups representing 28 First Nations. In addition, DFO received over 900 email, letter and fax submissions

during the 60-day comment period. From August through November 2010, the submissions were reviewed and necessary amendments were made. In his affidavit, Andrew Thomson claims that the comments and recommendations received, assisted in the refinement of a number of provisions of the *Regulations*. However, Chief Chamberlin states in his affidavit that none of the feedback offered by the KAFN was incorporated into the final text of the *Regulations*, as published on December 8, 2010 in Part II of the *Canada Gazette*.

[34] The main management tool under the new regulations is the issuance of licences dictating the conditions to which an operator must adhere. The licence conditions set out specific management requirements such as fish health management plans, escape prevention requirements, measures to minimize impacts on fish and fish habitat, and measures for environmental monitoring record keeping, notification and reporting.

[35] The DFO announcement that all expiring provincial aquaculture licences would be replaced with federal licences was unanimously opposed by the three principal First Nations organizations in British Columbia. On August 10, 2010, the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations wrote a joint letter to the DFO Minister, expressing concern about the Department's plan to roll over existing aquaculture licences. This letter also expressed the view that such a roll over without consultation and accommodation of the infringements caused by these licences "would be unconstitutional" (Applicant's Record, vol II, Affidavit of Robert Chamberlin, p 632).

[36] On August 24, 2010, the KAFN responded to the DFO letter dated July 13, 2010, requesting a meeting to discuss the KAFN's preliminary response to the draft *Regulations* and the accompanying RIAS. The meeting occurred in Nanaimo on September 2, 2010. During the meeting, Mr. Thomson informed Chief Chamberlin that DFO was planning to develop different classes of licences and conditions for aquaculture, and that it would be sharing the draft licences with First Nations as they became available. Chief Chamberlin expressed interest in reviewing the licences and participating in developing conditions, but did not raise any issues pertaining to the two facilities which are the subject of this application for judicial review.

[37] During that same meeting, Chief Chamberlin expressed interest in area-based planning for the Broughton area, and Mr. Thomson agreed to continue to engage the KAFN and MTTC on these issues. DFO also provided an update on its plans to develop Integrated Management of Aquaculture Plans ("IMAP") for aquaculture in BC. This update explained that IMAPs will be the mechanism for setting, consulting on and generally communicating policy development and conditions for future licence issuance and will take a geographic, ecosystem-based approach to aquaculture management. DFO had not determined how it would define the management areas, although it anticipated that each area would likely incorporate the claimed traditional territories of multiple First Nations. Consultation would therefore be required on an aggregate basis and through multiple forums, with bilateral consultations on an as-requested and as-needed basis. At the meeting and in a follow-up letter, the KAFN expressly informed DFO of the potential for the issuance of aquaculture licences to impact its Aboriginal rights, and of the need for direct consultation in respect of any proposed licence replacements in the KAFN fishing grounds.

[38] On September 24, 2010, DFO responded to that letter requesting a further meeting with the KAFN to continue discussing the KAFN's interests and concerns with DFO's proposed regulatory regime for aquaculture. In particular, they were looking to discuss DFO's proposed approach to licensing aquaculture facilities and the use of IMAPs. The letter did not address the KAFN's request for consultation on specific licences in KAFN territory. The letter once again emphasized that the new federal licences would not involve increases in production or changes to the size of existing facilities or permissible species, and advised that DFO was in the process of developing licence conditions that would set out specific management requirements. Finally, the letter stated that examples of draft licences with applicable conditions were expected to be completed by mid-October, and that DFO would be interested in a follow-up meeting to hear the KAFN's views on these conditions.

[39] On October 4, 2010, DFO wrote to BC First Nations to provide additional information on its plans to establish a new federal licensing regime. The letter explained that DFO was in the process of establishing the new *Regulations* and would ensure that any existing aquaculture operations are able to obtain a federal licence to operate lawfully under the *Fisheries Act*. It further explained that DFO's intention with respect to the new licensing regime was to develop four classes of licence for marine finfish operations, freshwater finfish operations, shellfish operations, and enhancement facilities. This would allow for the setting of specific management requirements as conditions to the licence. The letter again reiterated that the new federal licences would not involve increases in production or changes to the size of existing facilities or permissible species.

[40] On October 21, 2010, DFO representatives again met with the KAFN and the KAFN provided an agenda to highlight the focus of this meeting. There was a general discussion on IMAPs, and DFO provided an update on the proposed *Regulations* and its plans for licensing existing facilities, including those in the Broughton Archipelago. With the exception of a request for maps of the licences in their traditional territories, there were no further discussions about licences following the update. The KAFN did not raise any concerns regarding specific farms, such as the Burdwood and Blunden Pass farms.

[41] The requested maps were provided to the KAFN on November 2, 2010. When asked for comments on the maps, counsel for the KAFN responded in an email dated November 9, 2010: "The maps look good, there is the matter of far field effects and to what extent that requires consultation on farms near, but outside the KAFN boundary. But I'll give you a more formal response on that shortly" (Record of the Respondent, Attorney General of Canada and Minister of Fisheries and Oceans, vol 4, Affidavit of Andrew Thomson, p 1000). No further comments or requests were received from the KAFN until November 19, 2010. Moreover, the MTTC cancelled a meeting with DFO that was to be held on October 26, 2010. The meeting was tentatively rescheduled for the latter half of November, 2010. Despite three DFO requests for an agenda for the meeting, one was never provided by the MTTC.

[42] On October 27, 2010, DFO sent a letter to all BC First Nations, including the KAFN, enclosing three draft licence templates for the three main commercial aquaculture categories (marine finfish, shellfish and fresh water). The letter explained that the templates set out the generic contents of the licences that DFO intended to issue and included the full range of conditions that it

foresaw being included in the actual licences. DFO's intent was that the licences would include specific information to the individual operations, but that they would closely follow the template. The letter also asked for comments or questions on the draft licence templates by November 12, 2010. The deadline was subsequently extended to November 19, 2010, at the request of counsel for the Applicant.

[43] On November 19, 2010, counsel for the MTTC/KAFN submitted comments to DFO regarding the draft licences. The letter acknowledged from the outset that "the licence conditions set out in the draft template are nearly identical to the licence conditions under existing provincial regulation". Counsel then stated her clients traditional concerns with salmon farms and aquaculture in general, in the following terms:

> Our traditional territory in the Broughton Archipelago has had the highest concentration of salmon farms in the province for nearly two decades. For this entire period, we have engaged in consultations with the province about the licensing of salmon farms and their impacts on our Aboriginal right to the wild fishery. During this time, we have experienced significant sea lice infestations in our territory, several disease outbreaks, numerous escapes of exotic Atlantic salmon into our wild salmon habitat areas, visible pollution of our shellfish food beaches, and an overall decline of our local wild salmon, herring, eulachon and ground fish stocks. We have very serious concerns about the heavy use and buildup of pesticides, disease antibiotics and antifoulants in our marine ecosystem – the system that has been the primary source of our food since time immemorial. The use of night lights and net pen by-catch are also areas of significant concern for us as a cause of depletion of our wild fishery. To date, these problems and concerns have not been resolved, and we do not see any progress in DFO's adoption of the previous provincial regime.
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> Applicant's Record, vol II, Affidavit of Robert Chamberlin, p 649

[44] Instead of spending time and resources on a detailed technical review of a draft template of generic licence conditions, which raised questions they felt they were not well-positioned to answer,

counsel indicated for the first time that they wished to turn their focus to consultations on concerns with impacts and risks of the specific finfish licences in their traditional territory. In their view, the draft licence template conditions did not address their concerns.

[45] In that same letter, the MTTC/KAFN also stated for the first time, a position that system-wide matters in regard to all the salmon farms in the Broughton Archipelago had to be addressed prior to issuance of federal licences:

> In a letter to you dated September 8, 2010, one of our member nations emphasized its strong interest in engaging in a Broughton Archipelago area based management plan. This is an approach that will allow us to exchange basic and fundamental information such as how many farms are operating in our collective territory and at what volumes and production cycles, whether there will be a fallow strategy to accommodate the outgoing migration of our local wild stocks, and whether there are any adequate processes in place to assess the cumulative effects of a large number of farms in the Broughton Archipelago ecosystem. In our view, these are fundamental concepts that must be addressed prior to DFO's issuance of aquaculture licences in our territory, and prior to detailed discussions on licence conditions.
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> Applicant's Record, vol II, Affidavit of Robert Chamberlin, p 649

[46] On the face of it, this new position taken by the MTTC/KAFN would have required the completion of a multilateral consultation with all interested First Nations in the Broughton Archipelago ecosystem, in regard to an area management plan for the Broughton Archipelago. Finalization of that plan (including any necessary fallowing strategy for the entire region) prior to issuance of licences effective December 19, 2010, would also be required.

[47] In response to a request by the MTTC/KAFN in their letter dated November 19, 2010, a meeting was held on December 10, 2010. What was said at that meeting is not entirely clear, as it

was not explicitly recorded. It appears that the MTTC/KAFN somewhat altered its position. They did not ask that DFO complete consultations and institute an area management plan and a fallowing strategy for the Broughton Archipelago region, over the eight days before expiry of the provincial licences. Instead, the MTTC/KAFN acknowledged it was reasonable in the circumstances that consultations on the salmon farms in the Broughton Archipelago region, and their impacts on the MTTC/KAFN's asserted Aboriginal rights, would have to continue over a transitional period after issuance of the federal licences. During the one year transitional period, consultations on an area-based management approach, as well as on non-regional site-specific matters raised, would be ongoing.

[48] Chief Chamberlin recognized further that a regulatory vacuum for farms stocked with fish was undesirable, and acknowledged that the expiration of provincial licences was imminent. The MTTC/KAFN requested that no licences be issued for the following selection of salmon farms:

a) the farms that were not currently stocked with fish, as there was no immediate need for DFO to authorize dormant fish farms to operate (one of which is the Blunden site);

b) the two farms – Upper Retreat and Blunden Pass – which are in shallow areas and have soft bottoms that in the past have caused a build-up of deleterious substances harmful to fish habitat, and which are near clam beaches and crab areas that have had a significant increase in sediment pollution; and

c) the six key farms in MTTC territory – Burdwood, Sargent's Pass, Humphrey Rock, Glacier Falls, Cliff Bay and Sir Edmund – which are on the primary migratory route of juvenile salmon stocks that are presently in significant distress (alternatively, the KAFN requested that these farms be phased out as soon as practicable).

[49] This was the first time over the course of the consultations that the MTTC/KAFN had communicated to DFO, site-specific concerns and requests for changes relating to specific farms (such as the Burdwood and Blunden Pass farms, which are the subject of this application). In the follow-up letter to that meeting dated December 17, 2010, counsel for the MTTC/KAFN stated that they "hope to see their interim input reflected in those [licensing] decisions, [for the selection of sites identified at the meeting]" and that they "look forward to ongoing dialogue in the new year". They requested that DFO provide written notice of the licensing decisions for those sites at its earliest convenience. Accordingly, one of the DFO officials who attended the December 10, 2010 meeting provided the MTTC/KAFN input to Mr. Thomson on Monday, December 13, 2010.

[50] In making his decision on behalf of the DFO, Mr Thomson stated in his affidavit that he had knowledge of and did consider the following information:

i) the information contained in the provincial licences;

ii) all information provided by First Nations during the course of DFO's consultations, and through correspondence with those First Nations;

iii) information from the licence applicants/proponents as put forward in their applications;

iv) scientific information pertaining to aquaculture environmental impacts, including that prepared by DFO, and various peer-reviewed research articles in scientific journals;

v) knowledge of finfish aquaculture generally, acquired during the course of his education and professional experience;

vi) knowledge that there were no changes to the existing operations (e.g. increases in production, change of species) allowed in the federal licences;

vii) knowledge that the federal licences were of limited duration (in the case of finfish licences – 12 months) which would allow for a careful review of the licences and conditions and provide an opportunity to make any necessary changes to individual licence conditions during this period; and

viii) knowledge of the measures, described in his affidavit, that address fish health and environmental concerns such as those expressed by the KAFN.

Respondent Record of the Attorney General of Canada and Minister of Fisheries and Oceans, Vol 2, Affidavit of Andrew Thomson, para 135

[51] On December 18, 2010, DFO issued approximately 680 aquaculture licences for finfish, shellfish, freshwater and enhancement operations, including the 22 licences in the Broughton Planning Area (17 of which, according to the Applicant, are within KAFN territory). Since the issuance of the *Regulations* and of the licences, there is evidence that DFO has been consulting with First Nations regarding the development of IMAPs. These IMAPs are intended to take a geographic, ecosystem approach to aquaculture management and will be the mechanism for setting, consulting on and generally communicating policy development and conditions for the issuance of future licences.

[52] Prior to the hearing of this application, counsel for the Respondent Attorney General of Canada, brought a motion to strike the affidavit of Michael Price, submitted on behalf of the Applicant, on the grounds that it is inadmissible as expert evidence and not in compliance with Rule 52.2 of the *Federal Courts Rules*, SOR/98-106 and the *Code of Conduct for Expert Witnesses*, as set

out in the schedule to the Rules. Ewos Canada Ltd., doing business as Mainstream Canada, also brought a similar motion, not only to strike the affidavit of Michael Price but also to strike out some paragraphs of the affidavit sworn on behalf of the Applicant by Robert Mountain, Local Fisheries Outreach Coordinator for the MTTC. In a letter dated October 19, 2011, Marine Harvest voiced its support for these motions. They were heard at the beginning of the hearing on November 7, 2011, and I indicated that I would rule on them as part of my decision on the merit.

2. Issues

[53] This application for judicial review raises the following issues:

1) Does the KAFN have the requisite standing to bring this application for judicial review?

2) Did Canada, as represented by DFO, have a duty to consult with the KAFN about the issuance of the aquaculture licences, and more specifically the Burdwood and Blunden licences? If so, what was the extent of the Crown's duty?

3) Were DFO's efforts at consultation reasonable under the circumstances?

[54] Before dealing with these issues, however, I will first address the two motions to strike brought by the Respondents.

3. Analysis

- The Motions to Strike

[55] As previously mentioned, counsel for the Attorney General of Canada filed an objection to the admissibility of the Expert Affidavit of Michael Price and brought a motion to have it struck in its entirety. Counsel submitted that the affidavit is deficient in a number of areas as it failed to set

out: 1) the proposed expert evidence of Mr. Price and merely sets out the conclusions; 2) Mr. Price's qualifications in relation to the issues addressed in his evidence; and 3) the particulars of matters that might affect Mr. Price's duty to the Court.

[56] Counsel for Mainstream Canada filed a similar objection and also brought a motion to strike, on the same grounds as the Attorney General, as well as on the grounds that Mr. Price is not an independent and impartial expert witness as he has been a critic of aquaculture.

[57] The Applicant asserts Aboriginal rights to harvest marine resources within its claimed traditional territory in the Broughton Archipelago. The Applicant claims that the two farms are in its traditional territory and interfere with its Aboriginal rights through pollution of the marine environment and the transmission of parasites and diseases from farmed to wild salmon.

[58] In support of its claim that fish farming is detrimental to the health and environment of the First Nations living in the claimed territory, the Applicant has filed the affidavit of Mr. Michael Price, an MSc candidate in biology at the University of Victoria, whose thesis deals with the early marine ecology of Pacific juvenile salmon. His study areas include British Columbia's central coast and the Discovery Islands region south of the Broughton Archipelago. According to his affidavit, his opening thesis chapter "compares levels of sea lice on juvenile pink and chum salmon migrating through each of the above regions (near and far from salmon farms) to those within the Broughton Archipelago", while the rest of his thesis "focuses on human stressors influencing the early marine ecology of wild juvenile Fraser River sockeye salmon, with a specific focus on marine salmon farms and farm salmon processing facilities" (Applicant's Record, vol I, p 110).

[59] The Attorney General's contention that Mr. Price fails to set out his qualifications that permit him to reach his overall conclusion can be easily disposed of. In his first affidavit, Mr. Price sets out his qualifications in detail, and attaches his *curriculum vitae*. The Attorney General's argument that Mr. Price is not qualified on the particular question that is the subject of this application because his study area does not include the area in dispute, is totally without merit. One does not need to be an expert on the minute subject of the controversy, to offer meaningful help to the Court. As a biologist with an interest in understanding marine host-parasite systems and the potential stressors facing wild juvenile salmon as a consequence of open net pen fish farming, Mr. Price is *prima facie* well suited to form general opinions as to the state of the science and its application to the Burdwood farm.

[60] As the Attorney General relies heavily on Rule 52.2 of the *Federal Courts Rules* and on section 3 of the *Code of Conduct for Expert Witnesses* set out in the schedule to the *Rules*, for ease of reference they have been reproduced:

Federal Courts Rules, SOR/98-106	*Règles des Cours fédérales*, DORS/98-106
Expert's affidavit or statement	Affidavit ou déclaration d'un expert
52.2 (1) An affidavit or statement of an expert witness shall	52.2 (1) L'affidavit ou la déclaration du témoin expert doit :
(a) set out in full the proposed evidence of the expert;	a) reproduire entièrement sa déposition;
(b) set out the expert's qualifications and the areas in	b) indiquer ses titres de compétence et les domaines

respect of which it is proposed that he or she be qualified as an expert;

d'expertise sur lesquels il entend être reconnu comme expert;

(c) be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it; and

c) être accompagné d'un certificat, selon la formule 52.2, signé par lui, reconnaissant qu'il a lu le Code de déontologie régissant les témoins experts établi à l'annexe et qu'il accepte de s'y conformer;

(d) in the case of a statement, be in writing, signed by the expert and accompanied by a solicitor's certificate.

d) s'agissant de la déclaration, être présentée par écrit, signée par l'expert et certifiée par un avocat.

Failure to comply

Inobservation du Code de déontologie

(2) If an expert fails to comply with the Code of Conduct for Expert Witnesses, the Court may exclude some or all of the expert's affidavit or statement.

(2) La Cour peut exclure tout ou partie de l'affidavit ou de la déclaration du témoin expert si ce dernier ne se conforme pas au Code de déontologie.

Federal Courts Rules, SOR/98-106, sched Code of Conduct for Expert Witnesses

Règles des Cours fédérales, DORS/98-106, ann Code de déontologie régissant les témoins experts

Experts' Reports

Les rapports d'expert

3. An expert's report submitted as an affidavit or statement referred to in rule 52.2 of the *Federal Courts Rules* shall include

3. Le rapport d'expert, déposé sous forme d'un affidavit ou d'une déclaration visé à la règle 52.2 des *Règles des Cours fédérales*, comprend :

(a) a statement of the issues addressed in the report;

a) un énoncé des questions traitées;

(b) a description of the qualifications of the expert on

b) une description des compétences de l'expert quant

the issues addressed in the report;	aux questions traitées;
(c) the expert's current *curriculum vitae* attached to the report as a schedule;	c) un *curriculum vitae* récent du témoin expert en annexe;
(d) the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule;	d) les faits et les hypothèses sur lesquels les opinions sont fondées, et à cet égard, une lettre d'instruction peut être annexée;
(e) a summary of the opinions expressed;	e) un résumé des opinions exprimées;
(f) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;	f) dans le cas du rapport qui est produit en réponse au rapport d'un autre expert, une mention des points sur lesquels les deux experts sont en accord et en désaccord;
(g) the reasons for each opinion expressed;	g) les motifs de chacune des opinions exprimées;
(h) any literature or other materials specifically relied on in support of the opinions;	h) les ouvrages ou les documents expressément invoqués à l'appui des opinions;
i) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;	i) un résumé de la méthode utilisée, notamment des examens, des vérifications ou autres enquêtes sur lesquels l'expert se fonde, des détails sur les qualifications de la personne qui les a effectués et une mention quant à savoir si un représentant des autres parties était présent;
(j) any caveats or qualifications necessary to render the report complete and accurate,	j) les mises en garde ou réserves nécessaires pour rendre le rapport complet et précis,

including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise; and	notamment celles qui ont trait à une insuffisance de données ou de recherches et la mention des questions qui ne relèvent pas du domaine de compétence de l'expert;
(k) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.	k) tout élément portant sur la relation de l'expert avec les parties à l'instance ou le domaine de son expertise qui pourrait influencer sur son devoir envers la Cour.

[61] The Attorney General's main complaint with respect to Mr. Price's affidavit, is that it falls short of the requirement found at paragraph 52(2)(1)(a) of the *Federal Courts Rules*, as further clarified in paragraphs 3(d), (g), (i) and (j) of the *Code of Conduct for Expert Witnesses*.

[62] Mr. Price sets out his overall conclusion at paragraph 7 of his affidavit, where he states:

> The scientific evidence for the transmission of parasites and diseases from farm salmon to wild salmon is not conclusive, nor complete. However, there are a number of peer-reviewed scientific studies that indicate there are significant, ongoing, and unaddressed risks to wild juvenile salmon exposed to salmon farms located along migration routes in the Broughton Archipelago.

[63] Mr. Price then elaborates further on this conclusion and explains the reasons for this conclusion. By way of example, he states that the farms at issue use open net pens to grow salmon; thus, there is no physical barrier to restrict the transfer of pathogens from farmed salmon to wild salmon. He further goes on to say that wild salmon are more susceptible to pathogen infection as

juveniles, and the Burdwood farm is located immediately seaward of salmon rivers, from which wild juvenile salmon migrate (para 7 of his affidavit).

[64] Mr. Price then ties these general statements to the particular situation of the Burdwood farm at issue in the within application for judicial review. In this respect, he states the following (para 8 of his affidavit):

> The Burdwood farm is located in Tribune Channel. The Burdwood farm poses a real and significant risk to salmon, for several reasons. First, Burdwood is located immediately seaward of salmon rivers, which poses a very high risk of impact of farm pathogens on the most delicate, juvenile phase of wild pink and chum salmon. There are several studies that show juvenile salmon sampled near Burdwood have consistently hosted elevated levels of sea lice. Second, five depressed pink salmon populations in the Broughton Archipelago likely migrate past Burdwood en route to the open ocean, and their decline is considered to be in response to salmon farm exposure. Third, the close proximity of Burdwood to other farms (i.e., <10 km) may enhance farm-to-farm disease transmission and amplification (and transmission to migrating wild salmon), as has been shown in the past for Burdwood and other farms in the Broughton Archipelago. Disease amplification on salmon farms such as Burdwood, and transmission to wild salmon, is one of the most serious concerns because quarantine of infected populations rearing in farm net-pens is not possible.

[65] The only problem with his affidavit is that his opinion is based entirely on 24 peer-reviewed scientific articles, only one of which he was involved in authoring. This, in itself, may not have been critical if he had provided his own analysis and review of the literature. Instead, he merely attaches the articles as exhibits and purports to summarize them with one or two sentence conclusions which he says arise from the articles. He then adopts these conclusions as his own, in support of his overall opinion.

[66] This method is highly problematic. Of course, as a biologist himself, Mr. Price is qualified to capture the gist of the reviewed articles. The problem, however, is that he does not give much of an explanation as to how he arrives at his own summary of these articles. Nor can he comment on the methodology used or the qualifications of the person who carried these studies. Mr. Price does not explain how the conclusions he draws for the articles, supports his own overall opinion that the Burdwood farm poses a real and significant risk to salmon. This would indeed have been helpful, as none of the studies referenced in his affidavit specifically relate to the Burdwood farm, nor its impact on juvenile wild pink and chum salmon. In fact, only two studies relate to the interaction between wild salmon and farmed salmon.

[67] The problems identified above are compounded by the fact that Mr. Price has publicly spoken out on the serious risks posed by aquaculture and has voiced his opposition to fish farms, on more than one occasion. For example, the evidence shows that the Raincoast Conservation Society, Mr. Price's employer, is to use "informed advocacy" to further its conservation objectives. Mr. Price also acknowledged in his second affidavit of June 17, 2011, that in 2006 he made statements expressing his opposition to aquaculture as it is now practiced, in a presentation to the Special Committee on Sustainable Aquaculture struck by the British Columbia Legislative Assembly. These views were also expressed in multiple letters to the editor of the Times Colonist, as well as in a letter to King Herald V of Norway, dated August 17, 2009. He has recommended that migration routes and rearing areas for juvenile wild salmon be freed of salmon farms immediately, and at bare minimum, farms located on migration routes and/or rearing areas should be emptied during the period when juvenile salmon are entering the sea from their natal rivers. He has also stated that

there must be a transition of the entire industry to closed containment systems within a reasonable time period.

[68] Of course, these views should not disqualify him as an expert. Mr. Price has signed the required certificate certifying that he read the *Code of Conduct for Expert Witnesses*, which explicitly mentions at section 1 that an expert witness, "has an overriding duty to assist the Court impartially", and has agreed to be bound by it. Moreover, Mr. Price has sworn in a third affidavit dated October 18, 2011, that he does not have a personal or professional relationship with the parties to this proceeding. Finally, impartiality does not mean that scientists are not entitled to have their own particular views within the scientific debates of their field. As long as an expert does not become an advocate and does not camouflage an argument under the guise of an expert opinion, his or her testimony will be admissible.

[69] That being said, I find it disturbing that Mr. Price failed to disclose the details of his relationship with the Raincoast Conservation Society. This is contrary to paragraph 3(k) of the *Code of Conduct for Expert Witnesses*, which requires the expert affidavit to set out particulars of any aspect of his relationship with the Applicant in this proceeding, or the subject matter of his proposed evidence, that might affect his duty to the Court. He may also have been well-advised to be more transparent and to disclose to the Court his previous statements in relation to aquaculture on the BC coast.

[70] These deficiencies are not sufficient to render the affidavit of Mr. Price inadmissible. They are, however, important factors that have an effect on the weight to be given to his evidence. His

strong views with respect to fish farming, cannot but cast some lingering doubts on his choice of reviewed articles, as well as on the conclusions that he draws from these articles. From a methodological perspective, an expert opinion based entirely on studies done by other experts is obviously less compelling than an opinion derived from the expertise of the author himself or herself, and is subject to all the pitfalls of a second-hand opinion.

[71] As a result of the above considerations, I am inclined to give little weight to the affidavit of Mr. Price. I accept that there is a body of scientific evidence that shows the potential for impact of the Burdwood farm on wild salmon. Indeed, Mr. Price himself confesses that the scientific evidence is neither conclusive nor complete. The affidavit of Mr. Price is therefore held to be admissible, for this limited purpose only. There is no need to go any further. It is clearly not for this Court, in the context of this application for judicial review, to determine whether or not the health and environmental hazards put forward by the Applicant have been substantiated.

[72] Counsel for Mainstream Canada also brought a motion to strike out paragraphs 8 to 12, 15 to 25, 27 to 31, 34 and 35 and Exhibits D to G of the affidavit sworn March 9, 2011 by Chief Robert Mountain, on the grounds that it contains inadmissible hearsay, opinion and argument.

[73] As set out in paragraphs 4, 5 and 6 in his affidavit, Chief Mountain was born and raised in Broughton Archipelago (where the Burdwood and Blunden sites are located). He was taught to fish in that area by his grandfather from the age of 5, and has been fishing both commercially and for subsistence in the area for the past 48 years. At the time of swearing the affidavit, Chief Mountain had served for twelve years as an Aboriginal Fisheries Guardian in the area, a program funded and

supervised by DFO. Subsequently, he served six years as the Local Fisheries Outreach Coordinator for the local Tribal Council (of which the KAFN is a member), with the primary responsibility of gathering "information related to the wild fishery and aquaculture operations in the Broughton Archipelago" (Applicant's Record, vol II, p 357, para 5). He states that in the course of this work he has spent many days on the water, monitoring the wild and farmed fisheries in the area.

[74] Rule 81 of the *Federal Courts Rules* requires that, except on motions, affidavits be confined to facts within the personal knowledge of the deponent. The rule excluding hearsay is a well-established principle. The Court has stated that "the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions..." (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18, 399 NR 33; see also: *Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 (available on CanLII); *McConnell v Canadian Human Rights Commission*, 2004 FC 817, aff'd 2005 FCA 389).

[75] Hearsay evidence is therefore presumptively inadmissible. Unless the proponent of the hearsay evidence can demonstrate that it meets the twin criteria of necessity and reliability, the general exclusionary rule of hearsay evidence applies (*R v Khelawon*, 2006 SCC 57 at paras 2 and 3, [2006] 2 SCR 787).

[76] I agree with counsel for the Applicant that paragraphs 10, 17, 18, 22, 23 and 28 cannot be regarded as hearsay, as they are within Chief Mountain's knowledge on the basis of his office and experience (see: *Smith Kline & French Laboratories Ltd v Novopharm Ltd*, 25 ACWS (2d) 470, 53

NR 68 (FCA); *Philip Morris Inc v Imperial Tobacco Ltd*, 8 FTR 310, 3 ACWS (3d) 109 (FC)). Chief Mountain's position as Aboriginal Fisheries Guardian and Local Fisheries Outreach Coordinator for many years clearly places him in a position to have personal knowledge of the facts deposed in these paragraphs. It is also of some relevance that Marine Harvest has not challenged the evidence of Chief Mountain with contradictory evidence or by way of cross-examination.

[77] Paragraphs 15 and 16 contain excerpts of an Advisory Report by the Pacific Fisheries Resource Conservation Council to the Minister of Fisheries and Oceans Canada and the Minister of Agriculture, Food and Fisheries of BC (Applicant's Record, vol II, Affidavit of Robert Mountain, exhibit "D", "2002 Advisory: The Protection of Broughton Archipelago Pink Salmon Stocks", p 372). The reliability of this Report poses no serious concerns because Chief Mountain has provided a copy of the Report and a communiqué summarizing it (see Exhibit "E"). As for the excerpts from that document found in the affidavit, they are exact quotations and can easily be verified. It would be unreasonable to view this report as hearsay and to require its first-hand submission by the Pacific Fisheries Resource Conservation Council, in these circumstances. The same reasoning applies to paragraphs 19 to 21 of the affidavit, which refer to the Final Report of the Special Committee on Sustainable Aquaculture to the BC Legislature dated May 2007; to paragraphs 27, 28, 30 and 31, which similarly refer to the Final Report of a survey carried out by Coastal & Ocean Resources Inc. and funded by the Province (*Ibid*, exhibit "G", "Broughton Archipelago Clam Terrace Survey", p 466); and to a similar survey carried out by DFO (*Ibid*, exhibit "H", "An Exploratory Survey for Littleneck Clams (*Protothaca staminea*) in the Broughton Archipelago, British Columbia – 2006", p 505). It is no doubt true that Chief Mountain could not be cross-examined on these various reports, as he is not the author of such reports. However, counsel for the Respondent Mainstream

did not claim to be prejudiced by the introduction of these reports *per se*. It was also open to counsel to introduce countervailing documents in a similar fashion.

[78] That being said, Chief Mountain does cross the line when he quotes selectively from these reports and offers his own interpretation of these reports. This is clearly the realm of expert witnesses. Such an exercise is also fraught with risks and pitfalls. By way of example, Chief Mountain relies on the final paragraph of the last referred Report from DFO (Exhibit "H") to state that "[t]he report concluded that reports from First Nations and commercial harvesters made to DFO managers indicate littleneck clam stocks in the Broughton Archipelago are in decline" (Applicant's Record, vol II, p 533). He fails to signal, however, that the same paragraph goes on to state: "Most of the littleneck clams examined were healthy, so a disease outbreak is not likely the reason why stocks are depressed. More focused research is needed on the impacts of harvesting and other human activities on littleneck clam populations". In my view, this is not sufficient to exclude these paragraphs, but these commentaries on the reports are to be given very limited weight.

[79] Mainstream Canada also argues that paragraphs 8, 9, 11, 12, 24, 25, 31, 34 and 35 should be struck out on the basis that they contain opinion evidence and/or are argumentative. It is of course well-established that ordinary witnesses should confine themselves to those facts that are within their personal knowledge, and should not offer opinion or draw conclusions. Having carefully reviewed the impugned paragraphs of Chief Mountain's affidavit, I am of the view that they are by and large admissible. Summarizing the modern approach to opinion evidence established by the Supreme Court of Canada in *R v Graat*, [1982] 2 SCR 819 (available on CanLII), John Sopinka,

Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in* Canada, 2nd ed, Markham (ON) & Vancouver (BC), Butterworths Canada Ltd, 1999 at p 609:

> Courts now have greater freedom to receive lay witnesses' opinion if: (1) the witness has personal knowledge; (2) the witness is in a better position than the trier of fact to form the opinion; (3) the witness has the necessary experiential capacity to make the conclusion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts he or she is testifying about.

[80] For the most part, the statements found in the above-mentioned paragraphs are largely factual in nature and provide helpful context to this application for judicial review. It is true that some portions of those paragraphs stray from fact to opinion and purport to go much beyond what Chief Mountain could personally observe. Instead of stating events in a matter-of-fact fashion, the affiant is sometimes tendentious and geared at demonstrating a correlation between the presence of aquaculture sites and the onset of diseases, and a decline in salmon stocks in the Broughton Archipelago. To the extent that Chief Mountain offers his own opinion and professes to draw conclusions on the basis of evidence either scientific in nature or of which he has no personal knowledge, his statements should be accorded little weight. I would refrain, however, from trying to excise and strike out those portions of his affidavit that do not appear to be in conformity with Rule 81 of the *Federal Courts* Rules. To some extent, this is because the line between fact and opinion or argument is not always clear, and also because the relatively minor offending portions of Chief Mountain's affidavit are so intertwined with his otherwise admissible statements, that it would make his affidavit incomprehensible. For those reasons, I think it preferable to dismiss the motion of the Respondent Mainstream Canada, and to consider Chief Mountain's affidavit with the appropriate *caveat* as to the weight to be given to those portions of his testimony that do not derive from his personal knowledge.

1) Does the KAFN have the requisite standing to bring this application for judicial review?

[81] Counsel for the Respondent Attorney General of Canada contends that this application could only be brought as a representative proceeding pursuant to Rule 114(1) of the *Federal Courts Rules*, by an individual member on behalf of the Aboriginal collective claiming to hold the Aboriginal right. Since the application has been brought by the KAFN itself, an *Indian Act* band consisting of two distinct but closely associated tribes that were amalgamated for the purposes of the *Indian Act* in 1947, it is argued that the Applicant lacks proper standing.

[82] There is very little jurisprudence interpreting Rule 114. However, a paper prepared by Chief Justice Allan Lutfy and Emily McCarthy, "Rule-Making in a Mixed Jurisdiction: the Federal Court (Canada)" (2010) 49 S.C.L.R. (2d) 313, provides an interesting and helpful summary of the genesis of that Rule.

[83] The predecessor to Rule 114 was repealed in 2002, when the *Federal Courts Rules* were amended to allow for the certification of class actions. It was thought at the time that proceedings that would have formerly been brought as representative actions would now be brought as class actions. However, some time after the repeal of Rule 114, members of the Aboriginal litigation bar requested that the Rules Committee consider its reinstatement. This request was based on the fact that representative proceedings are more appropriate for bringing claims relating to Aboriginal and treaty rights than class proceedings, since there is no need to certify an Indian band, as it is a recognized entity in Canadian law. Aboriginal and treaty rights are *sui generis* rights that are held

by a community and must be asserted communally. Such rights are not held individually and membership in the group is essential for exercising or enforcing the right. The communal nature of the right is particularly problematic for class proceedings because the opt-out provisions, a critical feature of class proceedings, simply do not work in that context (see: *Gill v Canada*, 2005 FC 192 at para 13, 271 FTR 139).

[84] A subcommittee reviewed the reasons for the repeal of Rule 114 and the concerns of the Aboriginal litigation bar. They decided that a representative proceeding rule should be reinstated, and moreover, that it should be more comprehensive than its predecessor. This led to the enactment of Rule 114, which applies to applications in addition to actions, and sets out a number of requirements the representative must meet. The safeguards of Rule 114(1) apply to protect the individual members of a First Nation on an application, just as they do on an action; the Court may therefore require that notice be given, conditions be imposed on any settlement process, and the representative plaintiff be replaced.

[85] Counsel for the Respondent Attorney General of Canada argues that applications claiming in regard to Aboriginal rights, similar to actions so claiming, can only properly be brought as representative proceedings. Yet, no authority is provided in support of that proposition.

[86] Counsel for the Respondent Attorney General of Canada referred to a few cases where a claim of Aboriginal rights has been brought by a representative acting on behalf of the members of the First Nation which holds or asserts these rights (see: *Pasco (Oregon Jack Creek Indian Band) v Canadian National Railway Co* (1989), 56 DLR (4th) 404 (BCCA)(available on CanLII), aff'd

[1989] 2 SCR 1069; *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139, 171 ACWS (3d) 501). Not only are these cases not binding on this Court, but they have been decided in the context of a differently worded rule and they do not explicitly state that a representative proceeding is the only way to bring a claim of Aboriginal right.

[87] In any event, the language of Rule 114 leaves no doubt as to its intent. It is framed as permissive, not as mandatory. The opening words of the Rule clearly state that "…a proceeding (…) may be brought by or against a person acting as a representative on behalf of one or more other persons…" (Emphasis added). Had it been the intention to require all such proceedings be brought pursuant to that Rule, the wording would have been different. Of course, it is always open to the Court to ensure that the Band or the Aboriginal collective do not act in contravention to the will of its members or without lawful authorization. In the case at bar, no such concern has been raised by any of the Respondents.

[88] I recognize that in many cases involving claimed Aboriginal rights and the duty to consult, the applicant is an individual member of the First Nation or its chief on behalf of the First Nation (see, for example, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 , [2004] 3 SCR 511 [*Haida*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763, 315 FTR 178). That does not detract from the fact, however, that Indian Bands are a legal and political entity that can themselves be sued and become the subject of a legal pronouncement (see *Wewayakum Indian Band v Wewayakai Indian Band*, [1991] 3 FC 420 (available on CanLII). While it is true that this case related to a right of occupancy and use of a

reserve and did not involve Aboriginal rights, as submitted by the Respondent Attorney General, it does not detract from the fact that the Band itself was the applicant, as opposed to a representative acting on its behalf. Similarly, a number of Indian Bands brought an application for judicial review of a decision of the Minister of Fisheries and Oceans, on the basis that the Minister had failed to uphold the honour of the Crown and to meet his constitutional duty to consult and accommodate; nowhere did the Court object to the standing of these bands because no representative was involved (*Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212, 379 NR 297).

[89] For all of the above reasons, I am of the view that the application is not fatally flawed because it was not brought by a representative acting on behalf of the members of the KAFN.

[90] There is an additional, related issue that needs to be addressed before turning to the merits of this application. Counsel for Marine Harvest submits that the Applicant is not owed any duty to consult since there is no correlation between this Indian Band and the Aboriginal group that is entitled to claim Aboriginal rights pursuant to section 35 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[91] There is no dispute that the KAFN's claim rests ultimately on an assertion of Aboriginal rights. Section 35 of the *Constitution Act, 1982* does not define the "aboriginal peoples of Canada" to whom such rights are recognized, but subsequent jurisprudence has defined the holders of Aboriginal rights as collectives of peoples with distinctive attributes, which may include a common language, culture and social organization. In addition to the identification of the indigenous Aboriginal collective whose pre-contact practices are said to establish the right (in the present case,

the right to harvest wild salmon in the environs of the Broughton Archipelago), the Applicants must also establish a current connection with the pre-sovereign group. To that extent, band membership may not necessarily establish an ancestral connection with the members of the same indigenous Aboriginal collective for which fishing was an integral aspect of a distinctive culture at contact. An *Indian Act* band is a creature of statute that post-dates contact with European settlers, and it cannot be assumed that the membership of a First Nation holding an Aboriginal right is coincidental with the membership of an *Indian Act* band. Indeed, a First Nation holding or asserting Aboriginal rights may have members who belong to several different *Indian Act* bands.

[92] At paragraph 5 of his affidavit, Chief Chamberlin states as follows:

> The members of the KAFN are the descendants of two distinct but closely associated tribes of the Kwakwaka'wakw people who, at the time of European contact, were known as the Kwicksutaineuk and the Ah-Kwa-Mish. The two tribes were amalgamated for the purposes of the *Indian Act* in 1947 and are now collectively referred to as the KAFN, or the Kwicksutaineuk Ah-Kwa-Mish Indian Band.
>
> Applicant's Record, vol II, p 574

[93] In an affidavit sworn on behalf of the Respondent Marine Harvest, Daisy May Sewid-Smith challenges Chief Chamberlin's assertion that the Kwicksutaineuk/Ah-Kwa-Mish First Nation has Aboriginal fishing rights in the Broughton Archipelago. She deposes that her great-grandfather was a member of one of the three clans of the Qwe'Qwa'Sot'Enox Nation (an alternate spelling of which is Kwicksutaineuk) that lived in the village of Gwayasdums on Guilford Island. She also swears that her great-grandfather moved form Gwayasdums to Village Island, the village site of another First Nation, in 1855, and never returned to Gwayasdums, but never relinquished his ownership of Gwayasdums and the surrounding area. She deposes that the members of the KAFN

presently occupying Gwayasdums are a mixed group of the original three clans and members of neighbouring clans. Through a series of administrative errors by reserve commissioners in the late 1880's, reserves were assigned to the wrong groups; reserves were established within the traditional territory of the Qwe'Qwa'Sot'Enox for the benefit of related tribal groups with no ancestral connection to the land, including the group now comprising the Kwicksutaineuk/Ah-Kwa-Mish First Nation. Thus, she claims that the present membership of the KAFN are not the "true" Kwicksutaineuk people entitled to speak for the ten reserves allocated to the KAFN, or the surrounding lands and waters claimed by the KAFN as their traditional territory.

[94] There is no need for this Court to settle these competing claims, for at least three reasons. First, a nearly identical affidavit was tendered as evidence by the Crown in the case of *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Minister of Agriculture and Lands)*, 2010 BCSC 1699, 15 BCLR (5th) 322 [*KAFN*]. In that case, the plaintiffs alleged that the Province had licensed fish farms, resulting in sea lice infestations in wild salmon stocks, which infringed upon their fishing rights. One of the issues to be decided for the purposes of certifying the proceeding as a class action, was whether the proposed class (the KAFN and the other First Nations which asserted Aboriginal fishing rights in the Broughton Archipelago and rivers that drain into the Archipelago) comprised Aboriginal collectives or members of these collectives who could assert section 35 fishing rights.

[95] In dealing with this issue, Justice Slade not only considered the affidavit of Daisy Sewid-Smith, but also historical and ethnographic writings. He came to the conclusion that the KAFN,

along with eleven other Aboriginal collectives, were members of a language group that is today referred to as Kwakiutl. He went on to state (at paras 89-90):

> Each are present within a geographical area, largely co-extensive with the Broughton Archipelago, used and occupied at contact by the Kwakiutl. At contact, each had territorial interests within the larger geographical area, and enjoyed access to some resources, in common, within the larger territory with which the Kwakiutl, as a linguistic group (i.e. speakers of Kwak'wala), were associated.
>
> Each of the collectives referred to in the above paragraph is a band with antecedents in the tribal divisions among the Kwakiutl. Each, as a band, occupies one or more *Indian Act* reserves. The reserves front on the waters of the Broughton Archipelago. It would be most unusual to suppose that, as fishing peoples, they do not use their reserves for staging their fishing activities.

[96] Of course, this does not dispose of the competing claims that are asserted with respect to the Broughton Archipelago and the right to fish in that area. Such claims, however, are not to be decided in the conduct of a judicial review application. They are better left to the BC Treaty Commission and, eventually to a trial where oral evidence can be given and the ethnographic, historical and traditional evidence can be comprehensively reviewed and considered. I note, moreover, that the Attorney General of Canada does not dispute that they have a duty to consult with the KAFN and therefore acknowledges, at least implicitly, that the KAFN can credibly claim an Aboriginal right to fish in the area where the two aquaculture licences being considered in this application have been issued.

[97] For all of the foregoing reasons, I am of the view that the KAFN does have standing to bring this application for judicial review.

2) Did Canada, as represented by DFO, have a duty to consult with the KAFN about the issuance of the aquaculture licences, and more specifically the Burdwood and Blunden licences? If so, what was the extent of the Crown's duty?

[98] It is well-settled law that the appropriate standard of review with respect to the existence and extent of the duty to consult and accommodate is correctness, as this is a pure question of law. On the other hand, the applicable standard for assessing whether the Crown discharged its duty to consult in making a decision is that of reasonableness (see: Haida, above at paras 61-63; *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 174, 333 DLR (4th) 31).

[99] The Crown's duty to consult First Nations arises when the Crown has knowledge, (either real or constructive), of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it (*Haida*, above at para 35). The Supreme Court has restated that test quite succinctly in its recent decision in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31, [2010] 2 SCR 650 [*Rio Tinto*]:

> The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. (Emphasis in original)

[100] The first two requirements are clearly met in the case at bar. When the KAFN became aware of the decision in *Morton* and of the fact that DFO was assuming jurisdiction over aquaculture, it was proactive in notifying DFO in writing that the KAFN had fishing rights in the

Broughton Archipelago, that it had significant concerns about the impact of salmon aquaculture farms on these rights, and that consultation was required. The letter indicated that the KAFN had previously notified DFO of these concerns. In a letter dated April 1, 2009, DFO acknowledged receipt of the KAFN's letter and acknowledged that "any regulatory transition would require consultation". More specifically, DFO indicated its intention "to engage in meaningful consultation with First Nations", among others, during that period of transition (Respondent Record of the Attorney General of Canada and Minister of Fisheries and Oceans, vol 4, Affidavit of Andrew Thomson, Exhibit "NNN", p 1022). In the course of the following months, DFO also recognized the authority of the KAFN Chief and Council to engage in consultations on behalf of the KAFN. As a result, there is no doubt that the Crown had knowledge of the KAFN's claim to Aboriginal fishing rights.

[101] There can similarly be no question that DFO proposed to, and did in fact, replace aquaculture licences in the KAFN's territory. DFO's decision to issue replacement licences is a "decision" that triggers the Crown's duty to consult. Indeed, the seminal case of *Haida* arose from the Crown's decision to replace and transfer a tree farm licence from one forestry firm to another in Haida Nation territory.

[102] It is the third requirement that is more contentious. This step reflects the purpose of the duty to consult, which is to try to prevent infringements of Aboriginal rights wherever possible. On this topic, it is worth remembering what the Supreme Court stated in *Rio Tinto*, above at paras 45-46:

> The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts

> on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R.(4th) 653, at para. 44, there must [sic] an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

[103] The KAFN submit that the decision to issue aquaculture licences has the potential to impact their fishing rights in two ways. Relying on *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*, 2011 BCSC 266, 20 BCLR (5th) 356 [*Adams Lake*] and *Gitxsan v British Columbia (Minister of Forests)*, 2002 BCSC 1701, 10 BCLR (4th) 126 [*Gitxsan*], they argued that a change in governance necessarily has an impact on their rights**.** In the first of these two cases, the Court found that the creation of a municipality wherein a ski resort was located, did have a significant potential impact on a band which claimed rights and title to these lands, if only because the resort corporation could more easily influence and control the policies of the municipality than it could have done before at the Regional District level. In the second case, the Court agreed with the applicant First Nations that the government had not fulfilled its duty to consult when it consented to the change of control of a forestry company, holding tree farm licences on lands claimed by the First Nations.

[104] I agree with counsel for the Respondent Mainstream Canada that these cases can be distinguished with the case at bar. In *Gitxsan*, above, the change in the decision-maker concerned

not the regulator but the actual corporation. In *Adams Lake*, above, part of the explanation for the Court's decision was the fact that municipalities are not subject to the duty to consult.

[105] There is, however, a common thread in these two decisions that is equally applicable in the present context. A careful reading of these decisions shows that it is the indeterminacy of the principles by which the new governing entity intends to operate, that triggers the Crown's duty to consult. In *Adams Lake*, at para 127, for example, the Court wrote:

> […] Moreover, a change in governance necessarily has an impact on the lands claimed by the Band because it is the Municipality that will now exercise jurisdiction over Sun Peaks in a manner that may or may not adversely affect the aboriginal rights and title claimed by the Band. (Emphasis added)

[106] In the same vein, the Court wrote in *Gitxsan*, at para 82:

> I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly. (Emphasis added)

[107] Admittedly, the Crown was involved in the change of decision-maker in these two cases, whereas the transfer of jurisdiction from the provincial to the federal government in the present case came as a result of a judicial decision interpreting the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3. Strictly speaking, therefore, the Crown did not initiate that change and it cannot be said to derive from Crown conduct. However, this is inconsequential. If the change in control from

one company to another may lead to adverse consequences with respect to claimed Aboriginal rights because of differing philosophies, it is more likely to be the case when the transfer of decision-making involves two levels of government, however that may happen. While this may yet be indiscernible, only time will tell whether the regulation of aquaculture will dramatically be impacted as a result of the *Morton* decision. In recognition of this fundamental shift in the management of the aquaculture industry, I believe the federal government had an obligation to consult the Applicant and all of the other First Nations present in the region.

[108] The second way in which the decision to issue aquaculture licences has the potential to impact the Applicant's fishing rights, is more substantive. The KAFN claim that the licences authorizing aquaculture at the Burdwood and Blunden farm sites pose significant risks to the health and abundance of the wild fisheries, upon which the exercise of their Aboriginal fishing rights depend. This view is grounded in the KAFN's experience of salmon farming in its traditional territory, as found in the evidence of Chief Robert Mountain, and its understanding of the current scientific information about the potential impacts of salmon aquaculture.

[109] Mainstream Canada counters that the transfer of regulatory jurisdiction from BC to Canada that arises from the *Morton* decision does not in and of itself give rise to any adverse impacts on KAFN Aboriginal rights or title. Although the Burdwood licence issued to Mainstream Canada on December 18, 2010 was the first aquaculture licence issued by DFO, it did not allow for any operational changes and it was no different than if the Province had again renewed the annual licence for the Burdwood site in the same form, as had continuously been done since 2003.

[110] It is true that the purpose of consultation is to address concerns regarding new potential adverse impacts. As stated by the Supreme Court in *Rio Tinto*, above at para 49: "Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right". In other words, the scope of the duty to consult does not include past infringements or existing and ongoing impacts of past actions. For the duty to be triggered, there must be a new decision or conduct that may affect Aboriginal rights. The re-issuance of a licence, even if it is similar to the one it is replacing, is certainly sufficient to meet the third requirement underlying the duty to consult (see, for example, *Upper Nicola Indian Band v British Columbia (Minister of Environment)*, 2011 BCSC 388 at paras 103-114, 21 BCLR (5th) 81). It is a fresh action, so much so that in the absence of the renewed licence, the commercial activity authorized by that licence would have to come to a halt. In my view, the duty to consult arises each time a licence is renewed, because each new licence may potentially affect the claim right or title, if only incrementally. Otherwise, the duty to consult would be spent once the initial licence has been granted, for however long a period it is renewed and irrespective of the impacts the renewed licences may have down the road. Such a reasoning would make a mockery of the duty to consult and of the honour of the Crown.

[111] That being said, the extent of the changes brought about by the renewal of a licence will be a crucial factor to be considered when assessing the extent of the duty to consult. The Supreme Court recognized in *Haida* that what is required of the government will vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. When the Aboriginal right is limited and the potential for infringement minor, the duty to consult will be minimal and the

Crown may only have to give notice, disclose information and discuss any issues raised in response to the notice. When, at the other end of the spectrum, there is a strong *prima facie* case for the claim and the right and potential infringement is of high significance to the Aboriginal people, "deep" consultation aimed at finding a satisfactory interim solution may be required. As the Chief Justice stated, on behalf of a unanimous Court in *Rio Tinto*, above at para 36, "[t]he richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right…".

[112] In the case at bar, the Attorney General has acknowledged a duty to consult and made no submissions with respect to the strength of the claim asserted by the Applicant. The Applicant itself was silent on that score. In those circumstances, it would be most inappropriate for the Court to speculate on that first branch of the equation, and I shall therefore refrain from any comment except to note that there seems to be competing claims from many other First Nations on the same territory where the KAFN asserts fishing rights. In his decision, Justice Slade points out that there are several other Aboriginal collectives (many of which are part of the MTTC) that have extensive overlapping territorial claims within the Broughton Archipelago (*KAFN*, above at paras 79-85).

[113] There is more evidence with respect to the second variable of the equation, i.e. the impact of the licences on the Aboriginal fishing right claimed by the Applicant. As previously mentioned, the KAFN relies on the affidavits of Robert Mountain and Michael Price in support of their argument that the authorization of open net salmon aquaculture operations in the Broughton Archipelago has a high potential to adversely impact the KAFN's salmon fishing and shellfish harvesting rights,

particularly in areas identified by the KAFN as sensitive fish habitat such as the Blunden and Burdwood sites.

[114] In response to that assertion, the Attorney General of Canada has submitted an affidavit of Pieter Van Will, employed by DFO as the Program Head of North Island Salmon Stock Assessment, wherein he refers to affidavits that he filed in the BC Supreme Court in a related case opposing the Applicant and the Attorney General. At issue in that claim for damages are the wild salmon populations in the same area defined as the Broughton Archipelago.

[115] While the Van Will affidavits do not come to any definitive conclusion, they provide for a much more nuanced and thorough assessment of the scientific evidence with respect to the status of the salmon stocks within the disputed area. It is obviously not for the Court to come to a definitive finding on these complex scientific issues, especially in the context of an application for judicial review. All that can safely be said, on the basis of the uncontradicted evidence of Mr. Van Will, and bearing in mind the serious deficiencies plaguing the Price and Mountain affidavits, is that there is still a lot to be learned as to the causes of the decline of some salmon stocks in some rivers of the Broughton Archipelago. In light of this evidence, I am of the view that the seriousness of the impact caused by the issuance of the impugned licences on the KAFN's asserted Aboriginal right remains an open question; far from being firmly established, the adverse effect of the licences as issued on December 18, 2010 is, at least for now, speculative. I find myself in much the same situation as Powers J. in *Homalco Indian Band v British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283 at para 34, 39 BCLR (4th) 263, where he could only notice that there are serious gaps and differences in scientific opinion about the effects and risks involved with

salmon aquaculture. While seven years have gone by since he made these comments, there does not seem to be any more certainty as a result of the further studies that have been conducted in the meantime.

[116] In the result, I come to the conclusion that the consultation required is clearly not at the upper end of the spectrum as advocated by the Applicant. I would also be inclined to think that it does not lie at the lower end of the spectrum either, considering the seriousness of the potential impact caused by fish farming on the Aboriginal fishing right claimed by the Applicant. At the end of the day, however, it does not matter where this case falls on the spectrum, as I find that the Government of Canada has done what was required in the circumstances, to maintain the honour of the Crown and to effect reconciliation with respect to the interests at stake.

3) Were DFO's efforts at consultation reasonable under the circumstances?

[117] The KAFN submit that DFO never consulted them in the decision to replace the aquaculture licences. In fact, DFO demonstrated a genuine unwillingness to consult with the KAFN on this matter. The limited consultations DFO undertook with the KAFN, dealt with the general regulatory framework. These do not fulfill the Crown's duty to consult on the licences – which are the operations that cause the negative impacts on KAFN's Aboriginal fishing rights.

[118] Alternatively, the KAFN argues that if DFO is found to have consulted on the decision to issue the licences, this consultation was inadequate and meaningless. First, DFO neither assessed the strength of the KAFN's Aboriginal right nor the potential impacts of the issuance of the licences. Second, there is no evidence that DFO considered the KAFN's concerns regarding the *Regulations*, the issuance of the licences and the licensing conditions. DFO did not respond to the

KAFN's concerns as presented in various correspondences, and did not conduct an environmental assessment or indicate the importance of doing so. Moreover, DFO merely informed the KAFN of the issuance of the licences almost a month after the facts, and did not provide reasons for its decision.

[119] Having carefully reviewed the record and considered the arguments made by the parties, I find that the KAFN's assertions are not borne out by the evidence that is before the Court. First of all, it must be acknowledged that DFO was put in a very difficult position as a result of the *Morton* decision. Since it was obviously not a viable option to let the 680 licences lapse without renewing them, DFO had to simultaneously put in place an entire regulatory and licensing regime for a very complex industry in a very short time frame. The KAFN is correct in stating that the Crown cannot sacrifice its constitutional obligation to consult, in the name of efficiency. The evidence shows, however, that DFO consulted extensively over the course of the 22 months between the release of *Morton* and the deadline set by the Court to allow the federal government time to consider and put in place its own regulatory regime. During that period, DFO (1) provided more than $2 million of capacity funding collectively to the Fisheries Council and the Aboriginal Aquaculture Association over 2009 and 2010 to facilitate consultation with a large number of First Nations; (2) provided information regarding the change in regulatory regime and DFO's approach to its regulation of aquaculture throughout 2009 and 2010; (3) hosted bilateral meetings or participated in bilateral workshops on June 16-17, December 10, 11, and 14, 2009 and on March 30, 2010; (4) provided the draft *Regulations* for review and comment; (5) provided a draft DFO licence for review and comment; (6) met directly, either in person or by phone, with the KAFN and MTTC on September 2, October 21, November 17 and December 10, 2010; and (7) provided information regarding how

DFO intended to address consultation within its new regulatory regime in the future, including the use of IMAPs, to provide for area-based management.

[120] DFO ultimately decided to issue licences for the 22 salmon farms in the Broughton region, effective December 19, 2010, on a transitional basis. While it is true that provincial licences were typically issued annually as well, salmon are raised at the facilities for 16 to 22 months, meaning that one year licences are of limited utility. DFO intends to eventually issue longer term licences, but decided to issue one year licences in order to allow for further review of licence conditions and an opportunity for further consultations prior to decisions on renewal. DFO also maintained existing provincial restrictions on maximum production and permissible species.

[121] In arriving at its decision to issue the licences, DFO considered the information contained in the provincial licences, the information provided by First Nations during the course of DFO's consultations, the information from the licence applicants/proponents as put forward in their applications, and the scientific information pertaining to aquaculture environmental impacts. As part of the context for this decision, heed was also paid to the improvements of the federal regulatory regime over the provincial one, including the new federal requirements and measures to address fish health and environmental concerns relating to the farms (see Thomson Affidavit, paras 87 and 135).

[122] I agree with the Attorney General that the proposal put forward by the MTTC/KAFN in their letter of December 17, 2010, and in particular their request that no licences be issued to six key farms in MTTC territory (including Burdwood) amounts, in essence, to a fallowing strategy for the entire Broughton region. Such a position is unreasonable, as a fallowing strategy for the Broughton

Archipelago region, if necessary, would have to come out of a broad multilateral consultation involving all First Nations potentially impacted by salmon farms in the region, as well as other interested parties.

[123] Moreover, and contrary to the Applicant's assertion, the MTTC/KAFN raised these interim accommodation measures for the first time one day before the expiry of the provincial licences, in that letter of their counsel dated December 17, 2010. In her letter dated September 8, 2010, counsel for the MTTC/KAFN merely stated the need for direct consultation in respect of "any proposed licences, or licence replacements, in their territory". Then, in a November 19, 2010 letter, the MTTC/KAFN asserted for the first time that system-wide matters in regard to all of the salmon farms in the Broughton Archipelago had to be addressed prior to issuance of federal licences. Then again, the MTTC/KAFN altered its position at the meeting held on December 10, 2010, as previously mentioned in paragraphs 47 to 49 of these reasons. It is at that meeting that the KAFN apparently communicated to DFO its concerns with specific sites and requested the closing, or at the very least the phasing out, of six farms in their territory. Not only did this request come only a week before the expiry of the provincial licence, but more importantly, it would have been impractical and unwarranted to take a decision on these farms in isolation, without consultation on an area management plan. DFO's intention to continue the consultation in respect of area management in the Broughton Archipelago ecosystem as well as in regard to non-regional, site specific matters was also a factor taken into account in deciding to issue transitional, one year licences.

[124] When viewed as a whole, DFO's consultation regarding the regulatory framework and the issuance of licences was reasonable and was certainly not meaningless. Inherent in the concept of

the honour of the Crown in consultation cases is the issue of balance and compromise. As the Supreme Court stated in *Haida*, above at para 45:

> …Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[125] In short, I have not been convinced that the consultations were not genuine and were only meant to give Aboriginal groups the opportunity to blow off steam. Quite to the contrary, the evidence demonstrates that the Crown, through DFO, approached the consultations with an open mind. Extensive consultation took place both on the regulatory and on the licensing regime, despite the very short time frame within which the transfer of jurisdiction from the provincial to the federal government had to take place. The consultations were not meaningless, and Mr. Thomson testified in his affidavit that the comments and recommendations received on the draft *Regulations* assisted in the refinement of a number of their provisions. That DFO did not agree with the last minute interim measures proposed by the KAFN is no indication that the consultation was not genuine, for all the reasons already given.

[126] In light of all the above, I am therefore of the view that this application for judicial review ought to be dismissed, with costs to all three Respondents.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with costs to all three Respondents.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-70-11
STYLE OF CAUSE:	KWICKSUTAINEUK AH-KWA-MISH FIRST NATION v ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	November 7, 8, 9 and 10, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	May 3, 2012

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