
Secretariat of the Commission for Environmental Cooperation

Notification to the Submitters and to Council regarding proceedings notified by Canada

Submitters:	Center for Biological Diversity (US) (Represented by Environmental Law Clinic, University of Denver Sturm College of Law) Pacific Coast Wild Salmon Society (Canada) Kwkwasu'tinuxw Haxwa'mis First Nation (Canada) Pacific Coast Federation of Fishermen's Associations (US)
Party:	Canada
Date received:	10 February 2012
Date of the notification:	7 May 2014
Submission no.:	SEM-12-001 (BC Salmon Farms)

I. EXECUTIVE SUMMARY

1. On 10 February 2012, the Submitters listed above (the "Submitters") filed Submission SEM-12-001 (*BC Salmon Farms*) (the "Submission")¹ with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC"), pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or the "Agreement")².
2. Canada responded to the submission on 4 October, 2013 (the "Response"). Canada alleged the existence of two "pending legal proceedings" that, according to Canada, "warrant the termination of the *BC Salmon Farms* submission process, in accordance to [*sic*] NAAEC Article 14(3)(a)."³
3. On 4 November, 2013, the Secretariat requested further information about the proceedings in question. Canada replied to the Secretariat's request on 17 December, 2013 (the "December letter").⁴
4. The Secretariat has assessed Canada's notification of pending judicial or administrative proceedings and determines that in relation to the Submitters' assertions concerning section 35 of the federal *Fisheries Act*,⁵ one of the pending proceedings meets the definition in NAAEC Article 45(3), and the Submission is therefore terminated in respect of that provision. In relation to the Submitters' assertions concerning section 36 of the *Fisheries Act*,

¹ Submission SEM-12-001 (10 February 2012) ["Submission"]. See the SEM Registry for Submission SEM-12-001, online: CEC < <http://goo.gl/hXEEaa> > for developments in relation to the Submission.

² *North American Agreement on Environmental Cooperation*, United States, Canada and Mexico, 14-15 September, 1993, Can TS 1994 No 3, 32 ILM 1480 (entered into force 1 January, 1994) ["NAAEC"], online: CEC < www.cec.org/NAAEC >. Use of the word "Article" in this Notification refers, unless otherwise indicated, to provisions of the NAAEC.

³ SEM-12-001 (*BC Salmon Farms*) Government of Canada Response in accordance with Article 14(3) (4 October 2013) ["Response"] at 2.

⁴ SEM-12-001 (*BC Salmon Farms*) Government of Canada provision of information pursuant to Article 21(1)(b) (17 December 2013) (the "December letter").

⁵ RSC 1985, c F-14.

the Secretariat determines that neither of the pending proceedings meets the definition in Article 45(3). The Secretariat informs the Submitters and the Council that it is proceeding with its consideration whether the assertions in the Submission concerning section 36, in light of the Response, warrants recommending the development of a factual record, in accordance with Article 15(1).

II. SUMMARY OF THE RESPONSE

5. Canada has notified the Secretariat of two proceedings.
6. First, Canada raises *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Agriculture and Lands)* (the “KAFN case”), a case to which the Submission referred.⁶ At paragraphs 59-66 of its Article 14(1) and (2) Determination,⁷ the Secretariat addressed the case in terms of the considerations in Article 14(2)(c).⁸ The Secretariat’s assessment of Canada’s claim of pending proceeding is below.
7. Second, Canada states in the Response that an application for judicial review, *Morton v Minister of Fisheries and Oceans and Marine Harvest Inc.* (the “Morton case”),⁹ was filed in the Federal Court of Canada that “challenges the Minister’s decision to authorize salmon farm operations in British Columbia under the *Pacific Aquaculture Regulations* (as well as the *Fisheries (General) Regulations*).”¹⁰ In the December letter, Canada characterizes the application for judicial review as “concerning the matter of an aquaculture license issued by the Minister of Fisheries and Oceans pursuant to the *Pacific Aquaculture Regulations*.”¹¹
8. Canada makes the claim in its Response that each of these proceedings is a pending legal proceeding in accordance with NAAEC Article 14(3)(a).¹²

⁶ 2010 BCSC 1699 (the “KAFN case”). This case is referred to at page 3 of Exhibit E of the Submission.

⁷ SEM-12-001 (*BC Salmon Farms*), Article 14(1) and (2) Determination (12 September 2013) (the “Determination”).

⁸ Article 14(2)(c) provides that “Where the Secretariat determines that a submission meets the criteria set out in [Article 14(1)], the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether: [...] (c) private remedies available under the Party’s law have been pursued; [...]”

⁹ Federal Court of Canada, Court File T-789-13 (the “Morton case”). In the Determination at paras 59-60 and 66-67), the Secretariat discussed an earlier “Morton case,” *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136 (CanLii), aff’d 2009 BCCA 481 (the “2009 Morton case”).

¹⁰ Response at 1. *Pacific Aquaculture Regulations*, SOR/2010-270. *Fishery (General) Regulations*, SOR/93-53.

¹¹ December letter at 1.

¹² Note: In its Response (at 1), Canada states:

In a letter to the Secretariat dated February 12, 2013, Canada confirmed the ongoing status of a legal proceeding involving one of the submitters in the BC Salmon Farms submission, [namely] the *Kwicksutaineuk/Ah-Kwa-Mish First Nation (Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia)*, an action in which the Government of Canada was enjoined [*sic*] as a defendant. Canada’s records indicate that the representative action of Chief Chamberlin on behalf of the *Kwicksutaineuk/Ah-Kwa-Mish First Nation* has not been discontinued.

While it did receive the 12 February letter from Canada, the Secretariat did not consider the letter at that time, since the NAAEC does not provide for consideration of information other than the Submission and any supporting information attached to the Submission, at the stage of the process when the Secretariat is considering a Submission in light of the factors in Article 14. As the 12 February letter is annexed to Canada’s Response [at 19-31], the Secretariat has considered and referred to its contents in the preparation of this Notification.

III. ANALYSIS

9. NAAEC Article 14(3)(a) provides as follows:

The Party shall advise the Secretariat within 30 days ... of the [Secretariat's] request [of a response from the Party]:

(a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further

10. For purposes of Article 14(3), Article 45(3)(a) defines the term “judicial or administrative proceeding” as

a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order

11. That the Secretariat may assess a notification from a NAAEC Party regarding a pending judicial or administrative proceeding before terminating a submission in accordance with Article 14(3) is supported by the principle that a treaty cannot achieve its object and purpose unless it is effective.¹³ Accordingly, the Secretariat has established certain practices to ensure the effective operation¹⁴ of the NAAEC, even when its powers to do so are not explicit.¹⁵

12. In order to give full effect to the Submissions process and in particular, to promote transparency, public participation and understanding of environmental law enforcement,¹⁶ the

¹³ See, for example: Anne-Marie Slaughter & Annecoos Wiersema, “The Scope of the Secretariat’s Powers Regarding the Submissions Procedure of the North American Agreement on Environmental Cooperation under General Principles of International Law” (2009) 27 North American Environmental Law and Policy 5 < <http://goo.gl/4dRPwU> > at para 6.

¹⁴ On this subject, the International Court of Justice has written: “[T]he necessities of international life may point to the need for international organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as ‘implied’ powers.” *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep 66 at para 25.

¹⁵ “Applied to the CEC Secretariat, the existing law applicable to international law organizations would suggest that the Secretariat has the specific powers assigned to it under the NAAEC, and additionally it has such powers as may reasonably be implied as necessary to carry out the specific functions assigned to it.” Donald M McRae, “Inclusion in a Factual Record of Information Developed by Independent Experts and the Autonomy of the Secretariat of the CEC in the Article 14 and 15 Process” (2008) 26 North American Environmental Law and Policy 1 < <http://goo.gl/Eg7hJX> > at 20-21.

¹⁶ On the subject of the Secretariat’s power to interpret the NAAEC, in SEM-07-005 (*Drilling Waste in Cunduacán*) Article 14(3) Determination (8 April 2009) at para 23 the Secretariat wrote: “That the Secretariat may interpret its constitutive instruments is supported by the doctrine of ‘effectiveness’ in public international law, which has been described in a recent international arbitral award as follows:

[I]nternational organisations have regularly approached the interpretation of their constituent instruments [...] by way of the concept of institutional “effectiveness.” Even though the governing text may not explicitly empower the organization to act in a particular manner, international law authorizes, indeed requires, the organization, should it find it necessary, if it is to discharge all its functions effectively, to interpret its procedures in a constructive manner directed towards achieving the objective the Parties are deemed to have in mind. The same is true of international judicial

Secretariat has always independently assessed notifications by a Party of pending judicial or administrative proceedings.¹⁷ The Secretariat has maintained that the principle of transparency that pervades the NAAEC does not allow the Secretariat to terminate a submission based only on a notification from the Party of the existence of a pending proceeding.¹⁸

13. The Secretariat thus considers whether the “matter” of the Submission is the subject of the proceedings of which Canada has notified the Secretariat, whether the proceedings constitute “pending judicial or administrative proceedings,” and whether they are being “pursued” by Canada.

A. Pending proceeding—*KAFN* case

i) Whether the matter of the submission is the subject of the *KAFN* case

14. In the Response, Canada quotes the Submission noting that the *KAFN* case was brought against the British Columbia government “over the negative impact of commercial salmon feedlots on wild salmon.”¹⁹

15. The Response then describes the subject of the *KAFN* case as follows:

Both this court case and the submission allege government mismanagement, *through authorization* and regulation, of the salmon aquaculture sector in British Columbia resulting in negative impacts on wild salmon stocks and habitat. More specifically, both address issues related to sea lice, infectious diseases, and the application of pest and disease treatments. *The remedies sought* in the [*KAFN*] court action *include an injunction prohibiting the issuance or renewal of salmon aquaculture permits* and an award of damages or compensation for the reduced harvest of wild salmon allegedly resulting from the operation of salmon aquaculture.²⁰

16. The Response also clarifies that Canada, represented by the Attorney General, was added as a defendant to the *KAFN* case by Order of the Supreme Court of British Columbia in

organs [Eritrea-Ethiopia Boundary Commission, Statement of 27 November 2006, UN Security Council Doc. S/2006/992, 15 December 2006, 9-34 at 14]”[citing Territorial Dispute (Libyan Arab Jamahiriya/Chad) Judgment, ICJ Reports 1994, pp 6 and 25].

¹⁷ See, for example: SEM-96-003 (*Oldman River I*); SEM-97-001 (*BC Hydro*); SEM-99-001 (*Methanex*); SEM-00-002 (*Neste Canada*); SEM-98-004 (*BC Mining*); SEM-00-004 (*BC Logging*); SEM-00-006 (*Tarahumara*); SEM-01-001 (*Cytrar II*); SEM-02-003 (*Pulp and Paper*); SEM-03-003 (*Lake Chapala II*); SEM-04-002 (*Environmental Pollution in Hermosillo*); SEM-04-005 (*Coal-fired Power Plants*); SEM-05-002 (*Coronado Islands*); SEM-05-003 (*Environmental Pollution in Hermosillo II*); Consolidated submissions SEM-06-003 and SEM-06-004 (*Ex Hacienda El Hospital II* and *Ex Hacienda El Hospital III*); SEM-06-005 (*Species at Risk*); SEM-06-006 (*Los Remedios National Park*); SEM-07-005 (*Drilling Waste in Cunduacán*); SEM-07-001 (*Minera San Xavier*); SEM-08-001 (*La Ciudadela Project*); SEM-09-003 (*Los Remedios National Park II*); SEM-09-002 (*Wetlands in Manzanillo*); SEM-10-004 (*Bicentennial Bridge*); SEM-11-002 (*Sumidero Canyon II*); and SEM-10-002 (*Alberta Tailings Ponds*).

¹⁸ SEM-01-001 (*Cytrar II*) Article 14(3) Determination (13 June 2001) at 5.

¹⁹ Response at 19 (see also the Determination at para 59).

²⁰ Response at 19 [italics added].

September 2009.²¹ The Response goes on (by way of the “Further Further Amended Statement of Claim”²² in the *KAFN* case, included as pages 23-30 of the Response) to set out the nature of the case.

17. The Further Further Amended Statement of Claim, endorsed in the Vancouver Registry of the Supreme Court of British Columbia on 6 July, 2010, includes the following allegation:

*The Plaintiff says that the manner in which Her Majesty the Queen in Right of the Province of British Columbia (“Province”), primarily through the Minister of Agriculture and Lands (“Minister”), has authorized and regulated salmon aquaculture has caused a serious and material decline in the Wild Salmon stocks within the Broughton Archipelago, which may result in the extinction of some salmon runs. The conduct of the Minister and Province has infringed and continues to infringe the Fishing Rights in violation of s.35 of the Constitution Act, 1982.*²³

18. The location of the salmon farms and wild salmon habitat at issue in the *KAFN* case, namely the Broughton Archipelago, comprises only part of the area with which the Submission is concerned. The Submission alleges that “more than 130 salmon feedlot sites [are] in operation [in] B.C.,”²⁴ while the *KAFN* Statement of Claim mentions 29 salmon aquaculture sites authorized by BC in the Broughton Archipelago, at the date of filing of the original Statement of Claim in 2009.²⁵ In this respect, the “subject” of the *KAFN* proceeding is smaller than the “matter” of the Submission.
19. The Secretariat has reviewed the Chambers decision of Slade J in the *KAFN* case,²⁶ in which the issue was whether to certify the proceeding as a class proceeding pursuant to the British Columbia *Class Proceedings Act*.²⁷ Much of the decision deals with “common issues,” a term defined in the *Class Proceedings Act* for the purpose of establishing membership in the proposed class.²⁸ Although the common issues relate to the issues giving rise to the representative claim that lies at the root of the class proceeding, the identification of the common issues is not a major consideration in identifying the “subject” of the *KAFN* proceeding for the purpose of Article 14(3)(a). Although the class proceeding dimension of the *KAFN* case is now at an end and the surviving representative proceeding at its root is of greater relevance in the pending proceeding analysis, the Chambers decision of Slade J is nevertheless germane to the Secretariat’s assessment.

²¹ Response at 21-22.

²² According to the Response at 23, the original Statement of Claim in the *KAFN* case was filed on 4 February, 2009; an Amended Statement of Claim was filed on 14 May, 2009; a Further Amended Statement of Claim was filed on 9 December, 2009; and the Further Further Amended Statement of Claim was registered as filed on 6 July, 2010.

²³ Response at 24 (*KAFN* case, Further Further Amended Statement of Claim at para 3) [italics added].

²⁴ See Determination at para 4.

²⁵ Response at 25 (*KAFN* case, Further Further Amended Statement of Claim at para 11).

²⁶ *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Minister of Agriculture and Lands)* 2010 BCSC 1699 [the “Chambers decision”].

²⁷ RSBC 1996, c 50.

²⁸ *Ibid*, s 1 (“common issues”).

20. Justice Slade writes, at paragraph 4 of the Chambers decision: “*the plaintiff alleges that the Province’s licensing of fish farms and exercise of regulatory authority over their operation has resulted in sea lice infestations in wild salmon stocks.*”²⁹ According to the Court in the very next paragraph, “[t]he threshold issue sought to be determined, as one of the common issues, is whether wild salmon stocks returning to the Broughton Archipelago are adversely affected by sea lice infestation *attributable to the many open fish farms operating there.*”³⁰
21. Much later in its lengthy Chambers decision, the court notes that “[t]he central question in this matter is whether fish farming has resulted in damage to wild salmon stocks.”³¹
22. Justice Slade’s characterization of the “central question” is consistent with the *KAFN* plaintiff’s allegation (quoted in paragraph 17, above).
23. The Secretariat considers that, based on the preceding review, for the purpose of Article 14(3)(a) the matter of the Submission in relation to section 35 of the *Fisheries Act* is the subject-matter of the *KAFN* proceeding. An essential connection runs from the issuance of salmon aquaculture licences, to the fact of the existence of the aquaculture operations (which would not exist, but for the licenses), to the alleged negative impacts arising from the existence of the operations. Such a connection does not exist between the *KAFN* case and the Submitters’ assertion that Canada is failing to effectively enforce section 36 of the *Fisheries Act*.³²
24. The first link in this connection — namely, the issuance of licences — may relate to the Submitters’ assertion of a general failure to enforce section 35 of the federal *Fisheries Act*.³³ The relationship between section 35 and the federal government’s authorization of salmon aquaculture operations in British Columbia is discussed below,³⁴ as part of the discussion of the *Morton* case.

ii) Whether the *KAFN* case meets the definition in Article 45(3) including whether Canada is “pursuing” it, and whether it is “pending”

25. As noted at paragraph 60 of the Determination and as noted by Canada in its Response at page 20, in May 2012 the British Columbia Court of Appeal overturned the certification of the *KAFN* case as a class proceeding.
26. In its Response, Canada states: “Canada’s records indicate that the representative action of Chief Chamberlin on behalf of the [KAFN] has not been discontinued.”³⁵ In addition, Canada’s December letter states:

²⁹ [italics added]

³⁰ Chambers decision at para 5 [italics added].

³¹ *Ibid*, at para 203.

³² *Infra* at paras 44-46.

³³ See the Determination at paras 3-14, relating the Submitters’ assertion of a failure to effectively enforce ss 35 and 36 of the *Fisheries Act* to sea lice as well as to drugs, chemicals, pesticides, disinfectants, the risk of escape of non-native fish from pens, and disease transfer.

³⁴ *Infra* at paras 33-41.

³⁵ Response at 1.

On November 15, 2012, the Supreme Court of Canada rendered judgment dismissing the Plaintiff's Application for Leave to Appeal. Whilst that concluded the question of broader class action, it did not conclude the initial representative action of Chief Chamberlin on behalf of the KAFN. Unless it is discontinued by the plaintiff or otherwise resolved, the representative action remains open, and the Federal Crown officials are and will continue to be pursuing the case.³⁶

27. In addition to discontinuance, other possible outcomes of the representative action need to be considered, as part of the Secretariat's assessment as to whether a proceeding is "pending" and pursued by the Party. First, under the *BC Supreme Court Rules* a plaintiff in a non-class proceeding (such as the representative action that survives the failed *KAFN* class proceeding) is susceptible to an adverse costs award, giving plaintiffs a disincentive for formally discontinuing the action.³⁷ A plaintiff in a class proceeding benefits from different rules concerning costs.³⁸ An unsuccessful leave to appeal application to the Supreme Court of Canada, as was undertaken by the *KAFN* plaintiff, entails further costs.³⁹ The fact that the *KAFN* plaintiff faces potentially greater exposure to costs awards makes revival of the representative proceeding less likely.

28. Second, as a result of the Order of Justice Slade dated 23 September 2009, not only was the Attorney General of Canada added as a defendant⁴⁰ "and the style of proceedings [ordered] amended accordingly," but the plaintiff (and not the defendants) was then "at liberty to make consequential amendments to the Writ of Summons and Amended Statement of Claim."⁴¹ The "Further Further" amendments to the Statement of Claim endorsed on 6 July, 2010, added the Attorney General of Canada to the style of cause, but the claim that "the manner in which ... the Province of British Columbia ... has authorized and regulated salmon aquaculture"⁴² has not been amended since that date to reflect Canada's changing role (Canada took on the authorization of salmon aquaculture in BC on 18 December 2010⁴³).

³⁶ December letter at 3.

³⁷ Rule 9-8 ("Discontinuance and Withdrawal") of the *Supreme Court Civil Rules*, BC Reg 168/2009 reads in part: "(4) Subject to subrule (2), a person wholly discontinuing an action against a party ... must pay the costs of that party to the date of service of the notice of discontinuance ... and if a plaintiff who is liable for costs under this subrule subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid." (Subrule 9-8(2) deals with a situation not applicable here, namely where notice of trial has been filed, in which case the consent of all parties, or leave of the court, is required before a plaintiff may discontinue all or part of the action.)

³⁸ See *Class Proceedings Act*, RSBC, c 50, s 37 and Canadian Bar Association, British Columbia Branch, "Class Actions in British Columbia," online: < <http://goo.gl/OoNQZz> >:

[In a class action.] Paying the defendant's legal costs is usually not a risk: With class actions, an unsuccessful representative plaintiff in BC doesn't usually have to pay part of the defendant's legal costs (which can happen in individual lawsuits). So starting a class action is not as risky as starting an individual lawsuit. This "no costs" regime in BC is meant to increase people's access to justice.

³⁹ The "no costs" regime established by the *BC Class Proceedings Act*, while applicable in the Supreme Court and Court of Appeal of BC, does not apply in the Supreme Court of Canada. See *Sharbern Holding Inc. v Vancouver Airport Centre Ltd.*, 2011 Carswell BC 1102 (SCC) at para 178, per Rothstein J.

⁴⁰ As noted at para 16, *supra*.

⁴¹ Response at 22 (*KAFN* case, Order of Justice Slade at paras 1 and 2).

⁴² Response at 24 (*KAFN* case, Further Further Amended Statement of Claim at para 3).

⁴³ *Pacific Aquaculture Regulations*, *supra* note 10, s 14: "These regulations come into force on December 18, 2010." This date coincides with the effective date of the British Columbia Supreme Court's declaration of invalidity of

Moreover, the BC Court of Appeal struck out the order certifying the *KAFN* case as a class proceeding in May 2012. Since that date, the plaintiff has not amended the Statement of Claim to indicate that the case is no longer a class proceeding.

29. In summary, the plaintiff has not amended its statement of claim either to reflect the current status of the *KAFN* case as a representative action, or to address Canada's authorization of salmon farms.
30. As part of its Articles 14(3)(a) and 45(3)(a) pending proceeding assessments, the Secretariat considers the timeliness of the pursuit of claimed pending proceedings. In doing so, the Secretariat has noted that it is the pursuit of such proceedings by a Party, and not by other litigants, that is most relevant.⁴⁴ The Secretariat has also noted that a Party's "active" pursuit of proceedings, particularly in a context where a "mere possibility" exists that the proceeding will continue, is relevant in terms of timeliness.⁴⁵ The Secretariat considers that the *KAFN* case is not being pursued in a timely fashion by the plaintiff. Consequently, the case cannot be seen as being pursued by the Party.
31. A NAAEC Party may notify the Secretariat when a case claimed by that Party to be a pending proceeding, has reached a stage when the Party is actively pursuing it.

B. Pending proceeding—*Morton* case

i) Whether the matter of the submission is the subject of the *Morton* case

32. In the *Morton* case, the applicant Alexandra Morton seeks a declaration that Canada, specifically the Minister of Fisheries and Oceans, "lacks the authority or jurisdiction to specify any conditions respecting the transfer of fish having diseases or disease agents in a License issued under the [*Pacific Aquaculture Regulations* or "*PARs*"]".⁴⁶
33. The Secretariat here reproduces section 35 of the *Fisheries Act*,⁴⁷ as it read at the time of the Submission:

35.(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by

the relevant British Columbia regulations that the Court ruled were *ultra vires* the Province in the 2009 *Morton* case: *Morton v British Columbia (Agriculture and Lands)*, 2010 BCSC 100 at para 28.

⁴⁴ See for example SEM—05—002 (*Coronado Islands*) Article 15(1) Notification (18 January 2007) at 12.

⁴⁵ See SEM—11—002 (*Sumidero Canyon II*) Article 15(1) Notification (15 November 2013) at paras 58-59. In the same Notification, the Secretariat also distinguished between proceedings that are pending resolution and not pending resolution, and stated that terminating the submission in relation to a proceeding that was not pending resolution did "not appear justified" (*ibid* at para 51).

⁴⁶ Response at 7 (*Morton* case, Notice of Application at para 1.a.). *Pacific Aquaculture Regulations*, *supra* note 10 (the "*PARs*").

⁴⁷ *Supra* note 5; section 35 is also reproduced in the Determination at para 21.

*the Minister or under regulations made by the Governor in Council under this Act.*⁴⁸

34. The PARs begin: “His Excellency the Governor General in Council, on the recommendation of the Minister of Fisheries and Oceans, pursuant to section 43 of the *Fisheries Act*, hereby makes the annexed *Pacific Aquaculture Regulations*.” The PARs thus meet that particular criterion of subsection 35(2).
35. Section 3 of the PARs allows the federal Minister of Fisheries and Oceans to “issue an aquaculture licence authorizing a person to engage in aquaculture and prescribed activities.” Section 4 of the PARs allows the Minister to “specify conditions in an aquaculture license respecting” various matters, “in addition to the conditions respecting the matters set out in subsection 22(1) of the *Fishery (General) Regulations*.”⁴⁹
36. According to the Response, the applicant in the *Morton* case challenges the decision by the Minister of Fisheries of Oceans “to authorize salmon farm operations in British Columbia under” both the PARs and the FGRs.⁵⁰ The applicant in *Morton* alleges that the Minister lacks the authority or jurisdiction under the PARs to include a particular licence condition “in this or any Aquaculture Licence,” and says that the same licence condition “is contrary to section 56 of the *Fishery (General) Regulations*.”⁵¹ The applicant challenges generally the Minister’s authority to issue a licence or authorization that has the effect of allowing “the transfer of fish having diseases or disease agents” in certain circumstances.⁵² The Notice of Application alleges that the impugned licence condition is contained in an “aquaculture licence” that is purportedly made under the authority of the PARs and FGRs.
37. The aquaculture licences challenged in the *Morton* case are, according to the *Morton* Notice of Application, licences that authorize salmon aquaculture operations. Neither the Party nor the *Morton* Notice of Application makes explicit that aquaculture licences made under the PARs are authorizations for the purposes of subsection 35(2) of the *Fisheries Act*. The Secretariat considers that the subject-matter of the *Morton* case is a challenge of the federal Minister of Fisheries and Oceans’ authority to authorize salmon aquaculture operations in British Columbia coastal waters.⁵³ Although the case deals with just one aspect of the Minister’s authority, namely the inclusion of the impugned licence condition in a single, impugned licence, the applicant makes clear that she is challenging the impugned licence condition “in ... any Aquaculture Licence.”⁵⁴
38. The Secretariat considers that because the impugned licences are issued under authority of the PARs, which in turn *may* fit into a category of authorizations described in subsection 35(2) of the *Fisheries Act* and authorize what might otherwise constitute violations of subsection 35(1) of the *Fisheries Act*, both the matter of the Submission and the subject-matter of the *Morton* case include the enforcement of section 35.

⁴⁸ [italics added]

⁴⁹ *Fishery (General) Regulations*, *supra* note 10 (the “FGRs”).

⁵⁰ Response at 1.

⁵¹ Response at 7 (*Morton* case, Notice of Application).

⁵² Response at 7-15 (*Morton* case, Notice of Application).

⁵³ See section 3 of the PARs for their geographical application.

⁵⁴ *Supra* para 36.

39. The Secretariat considers that it is uncertain, at best, whether section 35 of the *Fisheries Act* applies to salmon aquaculture operations in British Columbia, and that the *Morton* case may settle the question. Continuing the submissions process in relation to the Submitters' section 35 assertions would thus risk interference with the Morton proceeding.

ii) Whether the *Morton* case meets the definition in Article 45(3) including whether Canada is “pursuing” it, and whether it is “pending”

40. Canada states in the December letter in relation to the *Morton* case that “the litigants are currently proceeding with cross examinations on affidavits, which will continue to be considered by the Federal Court through early 2014” and that as a consequence, “the *Morton* case remains pending.” The Secretariat has consulted the Federal Court’s on-line Court Index and Docket, and has confirmed as of the date of the present Notification that the parties to the litigation, including the federal Minister of Fisheries and Oceans as a defendant, are indeed pursuing their respective cases in the matter.

C. Pending proceedings—Summary

41. The Secretariat considers that the matter of the *BC Salmon Farms* Submission is the subject of one of the pending proceedings claimed by Canada, namely the *Morton* case, to the extent that it concerns section 35 of the *Fisheries Act*; that the *Morton* case is “pending,” and that it otherwise meets the definition in Article 45(3)(a).⁵⁵ In contrast to the *KAFN* case, for example, the *Morton* case is being pursued both by the applicant and by the federal Minister of Fisheries and Oceans, who is a defendant in the case.

42. Section 36 of the *Fisheries Act* is another matter. The Submission claims that Canada is failing to effectively enforce section 36, which includes in subsection (3) the general prohibition against the deposit of deleterious substances into water frequented by fish.⁵⁶

43. Only regulations (as distinct from licences or other forms of authorization) made under the authority of subsection 36(5) can authorize deposits of deleterious substances that are otherwise contrary to subsection 36(3). A regulation must make express reference to the legislative authority under which the regulation is made. The Secretariat is not aware of any regulation authorizing section 36 “deposits” in the context of salmon aquaculture.

44. The Secretariat considers that neither of the proceedings of which Canada has notified the Secretariat deals with a regulation made under the authority of subsection 36(5) of the *Fisheries Act*. Both the *KAFN* and *Morton* cases concern salmon aquaculture licences, not regulations in relation to deposits of deleterious substances. Although the *KAFN* case mentions “authorization and regulation,”⁵⁷ it does not pursue the matter of regulations, or the

⁵⁵ *Supra* para 10.

⁵⁶ *Supra* note 33; see also the Determination at paras 3-14. Relevant portions of section 36 are reproduced at para 21 of the Determination.

⁵⁷ *Supra* paras 15, 17 and 20.

absence of regulations, concerning section 36 deposits of deleterious substances. The Submission, by contrast, asserts that Canada is failing to effectively enforce section 36.⁵⁸

45. The Submission is therefore terminated in relation to the assertions concerning section 35 of the *Fisheries Act*, and is not terminated in relation to the assertions concerning section 36 of the *Fisheries Act*.

IV. NOTIFICATION

46. In Summary, the Response informs the Secretariat of a proceeding, the *Morton* case, that the Secretariat has assessed as meeting the definition in Article 45(3)(a) of a “judicial or administrative proceeding,” and that the Secretariat has confirmed as “pending.” The matter of the Submission, insofar as it deals with section 35 of the *Fisheries Act*, is the subject of the *Morton* case. The Submission is therefore terminated in relation to the Submitters' assertions that the Party is failing to effectively enforce section 35.

47. The Secretariat informs the Submitters and the Council that the Secretariat is proceeding with its consideration whether the Submission in light of the Response warrants recommending the development of a factual record in relation to the Submitters' assertions that the Party is failing to effectively enforce section 36 of the *Fisheries Act*, in accordance with Article 15(1).

Respectfully submitted on this 7th day of May, 2014.

Secretariat of the Commission for Environmental Cooperation



Per: Irasema Coronado, Ph.D.
Executive Director

⁵⁸ See the Determination at paras 3-14.